



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 7, 1997

Mr. Norbert J. Hart
Assistant City Attorney
City of Corpus Christi
Legal Department
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR97-1035

Dear Mr. Hart:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105391.

The City of Corpus Christi (the "city") received an open records request for the following information:

[A]ny and or all documents working papers, research material, and information in possession of the City of Corpus Christi or any documents thereof that contain information regarding any and all Bids, Requests for Bids, or Bid Qualification, related to expenditures or planned expenditures by the city to construct or acquire new supplies of water. This includes but is not limited to advertised requests for bids or bidding [sic] qualifications by the Port of Corpus Christi as project manager for the City of Corpus Christi on any and all current projects, including but not limited to the Lake Texanna Pipeline Project.

You have submitted for our review the records you contend are responsive to the request and ask whether the information is excepted from required public disclosure under section 552.110 of the Government Code.¹

¹We note that you have enclosed certain copyrighted records among the information which you submitted to our office. A governmental body is not required to furnish copies of copyrighted records; the public may inspect and make copies of such records unassisted by the governmental body, but it assumes the duty and risk of compliance with copyright law. Open Records Decision No. 550 (1990). See Open Records Decision No. 505 (1988) (federal law, not Open Records Act, governs right to reproduce copyrighted records).

You state that the city takes no position on the issue of whether the requested information should be disclosed to the requestor, but ask that we consider the proprietary interests of Pate & Pate Enterprises, Inc. ("Pate Enterprises"). Pursuant to section 552.305, we notified Pate Enterprises whose proprietary interests may be implicated by this request for information, and provided them with an opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). Raising Government Code sections 552.101 and 552.110, the attorneys for Pate Enterprises responded by asserting that their "client provided the Port of Corpus Christi Authority with highly confidential financial information pursuant to an express agreement that it would remain confidential."² We will consider whether the requested information relating to Pate Enterprises is excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes "commercial or financial information," thus excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by mere conclusory assertion of a possibility of commercial harm. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.

²We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert.denied*, 471 U.S. 1137 (1985)). We have considered Pate Enterprises' arguments with regard to the information it seeks to withhold as "commercial and financial information" under section 552.110. Pate Enterprises' attorney argues that "the disclosure of my client's financial statements is likely to cause substantial harm to their competitive position and would give rise to unwarranted invasion of the company's privacy."³ We conclude that Pate Enterprises has not met its burden under section 552.110, and, therefore, we have no basis upon which to pronounce the information protected by section 552.110. Open Records Decision No. 363 (1983). Thus, the submitted information may not be withheld pursuant to section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁴ This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 105391

Enclosures: Submitted documents

cc: Mr. Neal Trolinger
Corpus Christi Taxpayers Association, Inc.
P.O. Box 8852
Corpus Christi, Texas 78412
(w/o enclosures)

³There is no protected common-law privacy interest in financial information about a corporation. Open Records Decision No. 192 (1978) at 4 (right of privacy protects feelings of human beings, not property, business, or other monetary interests).

⁴As for your claimed exception under section 552.101, after reviewing the submitted information, we do not find any information that was protected by privacy or any provision of law in conjunction with section 552.101. Accordingly, we conclude that section 552.101 is inapplicable to the submitted information.

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