



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 7, 1997

Mr. Paul M. Gonzalez
Matthews and Branscomb, P.C.
106 South St. Mary's Street
San Antonio, Texas 78205

OR97-1044

Dear Mr. Gonzalez:

On behalf of the City Public Service Board of San Antonio ("CPS"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106412.

CPS received a request for "a copy of the Contract with Next Wave [Wireless, Inc.] regarding antenna sites on CPDS substations." You inform us that CPS has provided the requestor a copy of the "Communications Facilities License Agreement" (the "Agreement") without its attachments. You raise no exception to the required public disclosure of the requested information, but ask whether CPS must disclose to the requestor the Agreement's attachments. Gov't Code § 552.305. Next Wave Wireless, Inc. ("Next Wave") asserts that Attachment A and Exhibits A through D to the Agreement are excepted from required public disclosure based on Government Code section 552.110.

Section 552.110 of the Government Code excepts from required public disclosure two kinds of information, trade secrets and "commercial and financial information obtained from a person and privileged or confidential by statute or judicial decision." 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.

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)).

Next Wave maintains that the public release of Attachment A and Exhibits A through D to the Agreement will cause it substantial competitive harm.¹ We have considered Next Wave's arguments and believe that Next Wave has shown that it actually faces competition and that substantial competitive injury would likely result from disclosure of the information. Accordingly, we conclude that CPS must withhold from public disclosure Attachment A as well as Exhibits A through D to the Agreement based on section 552.110 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may 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,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 106412

Enclosures: Submitted documents

cc: Mr. Cole H. Newman
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¹Next Wave also makes two other arguments under section 552.110. Next Wave asserts that the release of the information will impair the ability of other agencies to obtain similar information in the future. Next Wave also asserts that the information constitutes its trade secrets. In light of our conclusion, we need not address these other arguments.

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