



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

September 11, 1997

Ms. Joyce C. Arnold  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR97-2024

Dear Ms. Arnold:

You ask that we reconsider our decision in Open Records Letter No. 97-1237 (1997), which concerns the public disclosure of cold germination test results for certain varieties of cotton seed for two particular seed companies. Your request for reconsideration was assigned ID# 108421.

In Open Records Letter No. 97-1237 (1997), this office was unable to conclude that the Texas Department of Agriculture (the "department") could withhold the requested information from disclosure because we lacked copies of the requested information. See Gov't Code §§ 552.301(b), 552.303(a) (requiring governmental body to submit to attorney general specific information requested). The department now asks this office to consider the request for reconsideration of one of the seed companies whose information is at issue, Stoneville Pedigreed Seed Company ("Pedigreed"). In order to respond to the department's request for reconsideration, we notified the department that, in accordance with Government Code section 552.303, it must supply this office with copies of the specific information requested. That notification further stated that failure to do so will result in the legal presumption that the requested information is public. *Id.* § 552.303(e). The department has failed to submit the requested copies; the requested information is presumed to be public.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ) (concerning ten-day deadline for requesting open records decision). When an exception to disclosure that is designed to protect the interests of a third party is applicable, the presumption of openness may be overcome. See Open Records Decision No. 552 (1990).

Pedigreed asserts that the requested information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 excepts 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.”

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)).

We have reviewed Pedigreed’s arguments and conclude that it has established that the requested information is confidential commercial information, excepted from disclosure under section 552.110. The applicability of section 552.110 to the requested information overcomes the presumption of openness and compels us to conclude that the department must not release the requested information to the public. See Open Records Decision No. 552 (1990).

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 Hastings  
Assistant Attorney General  
Open Records Division

Ref: ID# 108421

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