



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 30, 1997

Mr. Habib H. Erkan, Jr.  
Assistant City Attorney  
City of San Antonio  
P. O. Box 839966  
San Antonio, Texas 78283-3966

OR97-2198

Dear Mr. Erkan:

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# 109123.

The City of San Antonio (the "city") received a request for the "bid specifications submitted in response to [the city's] RFP #96-156." You state that "[i]n this instance, both Motorola and I.B.M. have indicated that the contents of each of their proposals are confidential."<sup>1</sup> You have submitted for our review a representative sample of the requested records at issue and ask whether the information is excepted from required public disclosure under section 552.110 of the Government Code.<sup>2</sup> We have considered the exception you claim and have reviewed the submitted records.

Pursuant to section 552.305, we notified Motorola, Inc. ("Motorola") and IBM Consulting and Systems Integration ("IBM"), whose proprietary interests may be implicated by this request for information, and provided them with an opportunity to claim that the

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<sup>1</sup>We 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).

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information at issue is excepted from disclosure. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). However, only IBM responded to our notification. IBM's attorney responded by arguing that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code, as "trade secret" and "commercial financial information" that is privileged. As Motorola did not respond to our notification, the requested information regarding their proposal is presumed public and must be released.<sup>3</sup> Therefore, we will only consider whether the requested information relating to IBM is excepted from disclosure under section 552.110.

Section 552.110 of the Government Code excepts from disclosure:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

Commercial or financial information may be excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 of the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. Consequently, if a governmental body or other entity can meet the test established in *National Parks*, the information may be withheld from disclosure.

To be held confidential under *National Parks*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks*, 498 F.2d at 766. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. Moreover, "[t]o 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." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). See Open Records Decision No. 639 (1996) at 4.

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<sup>3</sup>We further note that the information which you have submitted to our office as representative of Motorola's records is copyrighted. 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).

IBM's attorney has submitted a brief to object to "the release of portions of its response to the RFP submitted to [the city] on October 18, 1996." Specifically, IBM objects to the release of the following:

- (1) the customer information contained on pages 10-12 of the response to the RFP;
- (2) the software application information contained in pages 13, 14, and 55-59 of the response;
- (3) the pricing information contained in Appendix A to the response; and,
- (4) the Statement of Work contained in Appendix B.

We conclude that IBM has provided specific factual or evidentiary material for this office to determine that release of portions of the requested information will cause substantial harm to their competitive position. Thus, we conclude that IBM has met its burden under the second prong of section 552.110 in order to withhold portions of the requested records. We have marked those portions of the submissions that the city must withhold pursuant to section 552.110. The city must therefore withhold from disclosure the specified portions of the requested information regarding the IBM proposal, and release the remaining portions of these documents.

We are resolving this matter with an 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 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# 109123

Enclosures: Marked documents

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