



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 9, 1997

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-2254

Dear Ms. Keller:

On behalf of Variform, Inc. ("Variform"), you ask us to reconsider Open Records Letter No. 97-1681 (1997). Your request for reconsideration was assigned ID# 109612.

The Texas Department of Insurance (the "department") received a request for the test results of three companies that received product approval from the department. You claimed that the request implicates the proprietary interests of the applicant companies. Thus, pursuant to section 552.305 of the Government Code, we notified the applicant companies of the request for information and of their opportunity to submit written comments explaining why the requested information should be excepted from disclosure. Variform responded by claiming that its information is excepted from disclosure under section 552.110. However, after reviewing Variform's argument, we ruled that Variform did not demonstrate that its test reports are protected by section 552.110. Open Records Letter No. 97-1681 (1997). Variform has submitted additional arguments to this office and you now ask us to reconsider whether section 552.110 excepts Variform's test reports from disclosure.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n 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. A business

enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision 639 (1996) at 4. 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. *Id.*

Variform has now demonstrated that its test reports are commercial information the release of which would cause it to suffer substantial competitive harm. Thus, we conclude that the department must withhold Variform's test reports from disclosure under section 552.110.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/alg

Ref: ID# 109612

Enclosures: Submitted documents

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