



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 27, 1998

Mr. David Anderson
Chief Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR98-1048

Dear Mr. Anderson:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 114606.

The Texas Education Agency (the "agency") received a request for "the course guide for DriveSafe Take Home Video Course." You submitted to this office for review as responsive to the request a copy of the course guide for the DriveSafe Defensive Driving ("DriveSafe") video driving safety course. As provided by section 552.305 of the Government Code, you ask this office to determine if the course guide is confidential. This office provided DriveSafe the opportunity to submit reasons as to why the course guide should be withheld from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). In correspondence to this office, DriveSafe contends that its course guide is excepted from disclosure pursuant to sections 552.104 and 552.110 of the Government Code.

Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in a competitive bidding situation. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. As the agency has not raised section 552.104 nor indicated that it is applicable in this situation, the information at issue is not excepted from disclosure pursuant to section 552.104.

DriveSafe asserts that the course guide is commercial information protected from disclosure under section 552.110 of the Government Code. Section 552.110 of the

Government Code excepts from required public 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 applying the commercial or financial information aspect of section 552.110, this office 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)).

DriveSafe's attorney explains that the company created and obtained agency approval of a videotaped version of its driving safety course. Various security measures employed by DriveSafe ensure that the student actually views the tape over a six hour period and completes the course pursuant to agency guidelines. The attorney for DriveSafe explains that the course guide "contains a verbatim transcript of the entire six-hour driving safety course" and that the course guide also includes "a complete description, with questions, answers and passwords, of all the security measures for each version of the video course." DriveSafe has provided information to this office showing that it actually faces competition in offering driving safety programs and that substantial competitive injury would likely result from disclosure of the course guide. Thus, the course guide must be withheld from disclosure pursuant to 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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

Ref: ID# 114606

Enclosures: Submitted documents

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