



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 29, 1998

Ms. Bonnie P. Elder
Chief Counsel
Via Metropolitan Transit
Legal Services Department
P.O. Box 12489
San Antonio, Texas 78212

OR98-2546

Dear Ms. Elder:

You ask this office to reconsider our decision in Open Records Letter No. 98-1667 (1998). Your request for reconsideration was assigned ID# 118970.

Open Records Letter No. 98-1667 involved requests to the Via Metropolitan Transit System of San Antonio, Texas ("VIA") for copies of proposals submitted in response to a request for proposals for an integrated Fleet-wide Automated Vehicle Location/Communications Control and Data Interchange System. You ask that we reconsider a portion of the letter ruling that determined that VIA may not withhold from the requestors the proposals of two companies, Orbital Science Corporation ("Orbital") and Raytheon Transportation Management Solutions ("Raytheon"). You state that VIA maintains a neutral position with regard to the company's assertions.

You now inform this office that Raytheon has filed a lawsuit against VIA over the release of the documents in question. *Raytheon Transportation Management Solutions v. Via Metropolitan Transit System*, No. 98CI-10845 (37th Dist. Ct., Bexar County, Tex., filed July 24, 1998). It is the policy of this office not to address issues that are being considered in pending litigation. Accordingly, we will allow the trial court to resolve the issue of whether the Raytheon records must be released to the requestor.

Orbital asserts that portions of its proposal are excepted from disclosure as trade secrets and confidential commercial information. Section 552.110 of the Government Code 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* 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).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2.¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

We have considered Orbital’s arguments and reviewed the information at issue. We conclude that, based on section 552.110 of the Government Code, VIA must withhold the information Orbital asserts is excepted from disclosure with the exception of section 10 of chapter 3, the marked information in chapter 5 and the “DBE Forms.” We are unable to reach a conclusion with regard to “Paragraph E.3, OSC’s Team, Paragraph E.4, OSC’s System Solution and Key Features, and Paragraph E.5, OSC’s Strength as a Supplier” as we are unable to locate this information among the submitted documents.

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

¹The six factors include: 1) the extent to which the information is known outside of [the company’s] business; 2) the extent to which it is known by employees and others involved in [the company’s] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS, § 757 (1939)

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Deputy Chief
Open Records Division

KHH/ch

Ref.: ID# 118970

Enclosures: Submitted documents

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