



February 3, 1999

Mr. John B. Dahill
Advisory Chief
Dallas County District Attorney -- Civil Section
Administration Building
411 Elm Street
Dallas, Texas 75202

OR99-0319

Dear Mr. Dahill:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 121595.

The Dallas County Commissioners Court (the "county"), which your office represents, received a request for six categories of information concerning Request for Proposal ("RFP") number 96-098. Specifically, the first category of the request asks for "any and all proposals, bids, and other documents submitted by Enershop, Johnson Controls, and TD in response to RFP No. 96-098 and the Request for Clarification issued in 1997." In response to the request, you submit to this office for review a representative sample of the records at issue.¹ You state that the county is making available to the requestor all of the information responsive to the remaining categories of the request, as well as records which were previously made public. You contend, however, that the information responsive to the first category of the request may be excepted from required public disclosure by section 552.110 of the Government Code. We have considered the exception you claim and reviewed the submitted information.²

As a preface to our discussion, we note that this office has previously addressed whether records responsive to a similar request for information were subject to an exception to required disclosure. In Open Records Letter No. 98-2562 (1998), our office concluded that the county could withhold information concerning RFP number 96-098 pursuant to section 552.104 of the Government Code. However, since a contract has been awarded, and the requestor has submitted a new request for the information at issue, you ask this office whether a portion of the requested information must be withheld under section 552.110. See Open Records Decision No. 541 (1990).

¹We 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.

²You have submitted to this office information, such as the requestor's RFP responsive records, that apparently were sent for informational purposes only. In this ruling, we do not address that information.

You explain that “all bidders were asked to identify proprietary data or information contained in their respective proposals.”³ Pursuant to section 552.305, we notified Enershop, Inc. (“Enershop”), Johnson Controls, Inc. (“Johnson”), and TD Industries (“TDI”), whose proprietary interests may be implicated by this request for information, and provided them with an opportunity to claim that the information at issue is excepted from disclosure. *See* Gov’t Code § 552.305; Open Records Decision No. 542 (1990). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. However, only Enershop and Johnson responded to our notification. Since TDI did not respond to our notification, we assume that their company has no property or privacy interest in the information. Therefore, we have no basis to conclude the information about TDI is excepted from required public disclosure, and conclude it must be released. Consequently, we will only consider whether the requested information relating to Enershop and Johnson is excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting 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.” This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as well as the Restatement’s list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).⁴ 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

³We 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).

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. 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). 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 at 4 (1996). "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." *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).

In its brief to this office, among other arguments, Enershop argues that "Enershop faces keen competition in the markets in which its energy conservation services are offered," and that the requested information "sets forth in great detail the technical and engineering information that is at the heart of Enershop's competitive enterprise." Based on a review of the submitted records and Enershop's brief, we conclude that Enershop has provided specific factual or evidentiary material for this office to determine that release of the submitted information will cause substantial harm to their competitive position. Thus, we conclude that Enershop has met its burden under section 552.110 in order to withhold portions of the requested records. We have tagged Enershop's submissions that the county must withhold pursuant to section 552.110.

Next we consider, Johnson's brief to this office, in which they "object[] to the release of any and all of the information contained in its proposal to RFP 96-098 as such information is exempt from release under . . . Sections 552.101, 552.104 and 552.110."⁵ Specifically, Johnson argues that if the information is released to the requestor, it would provide a

⁵Section 552.104 is not applicable to protect the proprietary interests of a third party. *See* Open Records Decision No. 592 (1991).

competitor an advantage because the competitor “would be privy to confidential business strategies and processes, and privy to Johnson Controls’ past performance with other customers.” Johnson further states that release of the requested information would give its competitor “access to financial information demonstrating how Johnson Controls [sic] price projects and what type of financial savings Johnson Controls offers to customer.” After examining the submitted arguments and documents, we conclude that Johnson has demonstrated that release of a portion of the requested information is likely to cause substantial harm to its competitive position. The requested information concerning Johnson must be withheld as confidential commercial information under section 552.110.

We note, however, some of the information contained in the Johnson proposal appears to have been widely distributed, such as brochures and annual reports. For information to be protected under section 552.110, it must be information that is not publicly available or readily ascertainable by independent investigation. *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 435 (Tex. App.--Forth Worth 1987, no writ). Accordingly, such information may not be withheld under the section 552.110 of the Government Code.

Finally, we consider whether section 552.101 excepts any of the submitted information. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. We have examined the submitted information and we are not aware of any law that makes the requested information confidential, nor do you raise any such statute. Accordingly, we conclude the county may not withhold any portion of the submitted information based on section 552.101 of the Government Code.

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/ch

Ref.: ID# 121595

Enclosures: Submitted documents

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