



June 29, 2001

Ms. Anne M. Constantine  
Legal Counsel  
Dallas/Fort Worth International Airport  
P.O. Drawer 619428  
DFW Airport, Texas 75261-9428

OR2001-2800

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148931.

The Dallas-Fort Worth International Airport Board (the "board") received a request for information pertaining to a specific request for a proposal. Although you explain that most of the responsive information has been made available to the requestor, you state that one of the bidders, York International Company ("York"), has objected to the release of its "Life Cycle Energy Study." You state that you have notified York of the request for information. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 Public Information Act in certain circumstances). You raise no exception to disclosure on behalf of the board and make no arguments regarding the proprietary nature of York's information.

We note that the board did not seek an open records decision from this office within the statutory ten-day period. *See Gov't Code § 552.301*. The board received the request for information on April 11, 2001. However, you did not request a decision from this office until April 26, 2001, more than ten business days after the date that you received the request. The board's delay in this matter results in the presumption that the requested information is public. *See Gov't Code § 552.302; see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379

(Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or a demonstration that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). York responded to your notice by asserting that the "Life Cycle Energy Study" is proprietary information that is protected from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Thus, we will address York's arguments against disclosure.

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party 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).

York argues that disclosure of the submitted study would allow The Trane Company ("Trane"), a competitor, to "reverse engineer" the York equipment which was the subject of the study and "obtain detailed performance and cost data necessary to provide Trane with a competitive advantage in future procurements involving the same type of equipment." Further, York argues that this would "allow Trane to predict more accurately York's bids on a type of equipment Trane does not manufacture, but against which Trane must compete, in numerous future procurements worldwide." Finally, York argues that the "consequence of this disclosure then would be substantial competitive harm to York through future lost sales where Trane carefully underbids York's bids based on their enhanced knowledge of the life cycle performance of York's equipment." After reviewing the documents and the arguments presented, we conclude that York has demonstrated based on specific factual evidence that the release of the submitted study would cause it substantial competitive harm. Consequently, the submitted study is excepted from disclosure pursuant to section 552.110(b) of the Government Code and, thus, must be withheld from the requestor. Because we are able to make a determination under section 552.110(b), we need not address York's additional arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

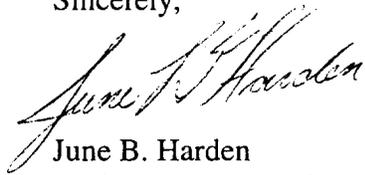
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/RJB/seg

Ref: ID# 148931

Enc. Submitted documents

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