



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

January 17, 1990

Mr. S. David Freeman
General Manager
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767

Dear Mr. Freeman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 7853; this decision is OR90-028.

The Lower Colorado River Authority (LCRA) received an open records request for copies of documents and responses to LCRA's request for proposals to provide banking services. Each bank submitting a response was asked to identify material which it considered confidential. Some banks listed their annual reports as proprietary or confidential. The LCRA seeks to withhold these reports from required public disclosure under section 3(a)(10) of the Open Records Act.

Section 3(a)(10) of the Open Records Act excepts from required public disclosure:

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Section 3(a)(10) is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. 552 et seq. Open Records Decision Nos. 309 (1982); 107 (1974). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (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. (Emphasis added.)

National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The courts have held that

[i]n order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown. (Emphasis added.)

Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); citing National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976)). "Conclusory and generalized allegations" of competitive harm are insufficient to satisfy the requirements for non-disclosure. See Kleppe, supra, at 680.

You have not shown specifically that release of the annual reports of the banks that submitted proposals for banking services would impair the ability of your agency to obtain such information in the future, nor how release of these annual reports would cause any competitive injury to the banks that submitted them. The reports are not excepted from disclosure under section 3(a)(10); they must be released. We note, however, that some of the material submitted is copyrighted. The custodian of records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Members of the public have the right to examine copyrighted materials held as public records and to make copies of such records unassisted by the state. One so doing assumes the risk of copyright infringement. Attorney General Opinion MW-307 (1981).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a

published open records decision. If you have questions about this ruling, please refer to OR90-028.

Yours very truly,

Open Government Section
of the Opinion Committee
Open Government Section
of the Opinion Committee
Prepared by David A. Newton
Assistant Attorney General



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Ref.: ID# 7853

Enclosure: Documents Sent

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