



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

April 30, 1996

Mr. Mark A. Walker
Attorney
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR96-0631

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38136.

The Lower Colorado River Authority (LCRA) has received a request for documents related to LCRA's implementation of a two-way radio system. You have provided most of the responsive documents to the requestor. You claim, however, that sections 552.101, 552.104, 552.107, 552.110, and 552.111 of the Government Code except from disclosure certain records which you have submitted to this office for review.

Pursuant to section 552.305 of the Government Code, this office notified third parties whose interests are implicated by this request to give them the opportunity to raise and explain the applicability of certain exceptions to disclosure of the requested information. Ericsson Inc., (Ericsson), one of the third parties, has responded to the request and contends that section 552.110 excepts some of the information from required public disclosure.

We understand that "LCRA was created in 1934 as a conservation and reclamation district and has been authorized, and in some cases mandated, to control, store, preserve, use, distribute, and sell the waters of the Colorado River for useful purposes; provide flood control and water management services; [and] provide water and wastewater services in a 33 county service area." In addition, LCRA is authorized by law to generate and distribute hydroelectric and thermal electric power in central Texas. Water Code Aux. Law Art. 8280-107 (Vernon 1996) (Acts 1975, 63rd Leg., ch. 74, § 2, at 180). Thus LCRA is authorized by law to provide a variety of services to counties in central Texas.

Further, LCRA explains that it must "have a reliable communications system capable of effectively managing daily operations and emergency situations" in order to provide the level of public services LCRA is authorized and legislatively mandated to provide. To do so, LCRA has secured licenses for use of "public safety" frequencies in the 900 MHz band and is making these frequencies available to governmental and non-profit entities on a non-profit cost shared basis. Ericsson is the successful contractor with LCRA to construct and deliver the trunked radio system for the LCRA service area.

We first address LCRA's arguments under section 552.104, which excepts from disclosure information "that, if released, would give advantage to a competitor or bidder." Two criteria must be met in order for a governmental body to be deemed a competitor for purposes of section 552.104. First, competition must be specifically authorized by law. Open Records Decision No. 593 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2.

Regarding the first part of the test, we believe that section 2.057(f) of article 1446c, V.T.C.S. gives LCRA authorization to compete in the electric power market. Section 2.057 provides in relevant part:

Affiliates of public utilities, exempt wholesale generators, qualifying facilities, and all other providers of generation may compete for the business of selling power.

Thus, section 2.057 specifically authorizes LCRA to compete for purposes of section 552.104 of the Government Code.

With respect to the second part of the test, however, we do not believe that LCRA has sufficiently demonstrated that release of the requested information would harm its interest in competing in the electric power market. LCRA explains that

[b]y sharing the cost of the system with other public entities, LCRA is able to meet its communications needs at reduced costs to its ratepayers, and provide a public safety benefit to the region. . . . In order to establish and support the two-way radio system required for LCRA's needs, it will be necessary to obtain support by and participation in the system from other public entities eligible to use the public safety frequencies held by LCRA for the system. Without wide participation, the cost-effectiveness of the system cannot be fully realized, impairing LCRA's competitive position as an electric wholesale provider, and an important regional communication system could not be completed.

Thus, LCRA generally claims that if information relating to its purchase and implementation of the two-way radio system were released, it would negatively impact its ability to provide electric power at a competitive price. We disagree. In essence, this two-way radio system is being developed with the cooperation of and funding by other public entities to help LCRA and those entities establish a reliable communication system to meet all of their diverse statutory duties. We do not believe that release of this information would substantially harm LCRA's ability to compete in the electric power marketplace. That argument is too speculative for purposes of section 552.104. Therefore, you may not withhold any of the information under section 552.104 of the Government Code.

We next address LCRA's arguments under section 552.111. You inform us that several of the exhibits submitted for our review are "drafts of documents, not in final form, that reflect the deliberative process related to policy matters." Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office concluded that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 also excepts from required public disclosure a preliminary draft of a letter or document related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). We have reviewed the draft documents at issue and conclude that they relate to LCRA's policymaking process. Therefore, the draft documents may be withheld from disclosure under section 552.111.

We note, however, that several of the documents in Exhibits B-9 and B-10 for which you claim protection under section 552.111 have been provided to Ericsson, do not appear to be drafts, or are not "interagency or intraagency" memoranda. We have marked those documents in Exhibits B-9 and B-10 that you may not withhold under section 552.111. In addition, you state that some of the documents in Exhibit B-13 are drafts. However, you did not mark those documents or otherwise explain which of the documents were drafts. We have marked the documents containing handwritten notations which appear to be drafts that you may withhold under section 552.111. The remaining information in Exhibit B-13 may not be withheld under section 552.111.

Next, we address LCRA's assertion that section 552.107 of the Government Code excepts some of the requested information from required public disclosure. Information may be withheld under section 552.107(1) only to the extent that it documents confidences of a governmental representative to its attorney or reveals the attorney's legal advice and opinions. Open Records Decision Nos. 589 (1991), 574 (1990). We have examined the documents LCRA wishes to withhold under section 552.107(1) and

Lastly, we address Ericsson's contention that section 552.110 exempts some of the requested information from required public disclosure, specifically Exhibits B-14, B-16, B-17 and B-18. Section 552.110 exempts 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." Ericsson contends that several of the documents submitted for our review are exempted from disclosure as "commercial or financial information" under 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). 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).

To establish that the public release of information is likely to cause substantial competitive harm, a business 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. See Open Records Decision No. 639 (1996) at 4 (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397 (5th Cir.), cert. denied, 471 U.S. 1137 (1985)). We have reviewed Ericsson's arguments under section 552.110 as well as the submitted documents. We believe that Ericsson has established that it actually faces competition and that substantial harm to its competitive position could result from the release of the information in Exhibits B-16.1 through B-16.8, B-16.10, B-16.17, and B-18.18. Consequently, we conclude that LCRA may withhold the information under section 552.110 of the Government Code.

Although Ericsson claimed protection for Exhibit B-14 in its original brief to this office, Ericsson did not explain why the information in Exhibit B-14 is exempted from disclosure under section 552.110. Similarly, although LCRA raised section 552.110 for Exhibit B-12, Ericsson did not explain why section 552.110 exempts from disclosure the information in Exhibit B-12.¹ Therefore, you may not withhold Exhibits B-12 and B-14 under section 552.110.²

¹LCRA generally claims that release of any of Ericsson's proprietary information "would impair LCRA's ability to obtain necessary information of this kind" in the future. In light of the requirement in LCRA's Request for Information to provide this information to LCRA in order to compete for the contract, we do not believe that this statement sufficiently establishes impairment for purposes of section 552.110.

²Because we conclude that LCRA must withhold the Ericsson information as "commercial or financial information," we do not address Ericsson's arguments under the trade secret prong of section 552.110.

In summary, we have marked the documents that you may withhold under sections 552.107, 552.110 and 552.111 of the Government Code. The remaining information, consisting of Exhibits B-3, B-12, part of B-13, B-14, B-15, and marked documents in Exhibits B-9 and B-10, must be released. 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,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 38136

Enclosures: Marked documents

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