



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 6, 1996

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

OR96-1394

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40079.

The Lower Colorado River Authority (the "LCRA") received a request for "copies of all the submissions to LCRA for Contract Programming Services IAW with the Dec 1995 request for proposals due to Diane Chase on Jan 2, 1996." You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Pursuant to section 552.305 of the Government Code, we notified the parties whose information had been requested of the request and of their obligation to present arguments as to why any claimed exceptions apply to the requested information. Three of the companies responded. EDP Contract Services, Cutler/Williams, BDM Technologies, Inc., and Cooper Consulting Company did not respond to our request. We therefore consider only the arguments presented by the three responding companies, Ajilon, Inc. ("Ajilon"), RFD & Associates ("RFD"), and Analysts International Corporation ("AIC"), and LCRA.

Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential

specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 (1990) at 4, 520 (1989) at 4.

Here, the LCRA has not established how the disclosure of the requested information would harm the LCRA in any particular competitive situation. Although both Ajilon and AIC claim that section 552.104 excepts portions of their requested information from disclosure, the exception is intended to protect a governmental body's interest and not the interests of third parties. Open Records Decision No. 592 (1991). Therefore, the LCRA may not withhold the requested information under section 552.104 of the Government Code.

RFD has not claimed any exception to disclosure, other than to say that it believes portions of its information to be confidential and that the information is clearly marked "confidential." Information is not confidential merely because one submitting it marks it as confidential. Open Records Decision No. 575 (1990). Therefore, we conclude that RFD has not met its burden in establishing the applicability of any exception to the requested information. Accordingly, the LCRA may not withhold the information submitted by RFD from required public disclosure.

Ajilon claims that portions of its information submitted to the LCRA are excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." However, this provision applies only to personnel files of government employees, not private sector employees. Therefore, section 552.102 does not except any of Ajilon's information from required public disclosure.<sup>1</sup>

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<sup>1</sup>Additionally, we conclude that section 552.102 does not apply to the requested information, assuming that it does fit within the parameters of this exception. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have reviewed the information submitted to this office for review and find nothing that must be protected from disclosure under common-law privacy.

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. The LCRA claims that the second prong of section 552.110 excepts portions of the requested information from required public disclosure. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "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).

The LCRA claims that the information requested was submitted "voluntarily," and that its release would cause substantial harm to the vendors. We believe that the information was not submitted "voluntarily," as that term is understood in this context. *See, e.g., Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible" in order to secure better usage charges for its lands); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

Ajilon and AIC also claim that some of the requested information is excepted from disclosure under the second prong of section 552.110 because release of the information would harm their competitive interests. We have reviewed AIC's arguments and submitted materials and conclude that AIC has established that the second prong of section 552.110 applies to a portion of the submitted materials. We conclude that the LCRA must withhold the rates on Schedule 1 under the second prong of section 552.110. The remainder of AIC's materials may not be withheld under section 552.110.

We have reviewed Ajilon's information and conclude that part of it is protected from disclosure under the second prong of section 552.110. Therefore, the LCRA must withhold the following information under the second prong of section 552.110: sections 5.4.1 - 5.4.4.3, 6.6.8 - 6.6.9, 7.12, 8.1 - 8.3, the rates on Schedule 1, and Schedule 4. We conclude that the remainder of the information for which Ajilon claimed an exception, specifically, the remainder of Schedule 1 and Schedule 2, may not be withheld under the second prong of section 552.110.

As Ajilon and AIC have also claimed that parts of information not protected by the second prong of section 552.110 are trade secrets, we address the first prong of section 552.110. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>2</sup>

Having reviewed Ajilon's and AIC's arguments, we conclude that the remainder of the information for which they have claimed an exception is not protected under the first prong of section 552.110. Therefore, the LCRA may not withhold any of the other information submitted by Ajilon or AIC from required public disclosure. Similarly, the LCRA may not withhold the information submitted by RFD, EDP Contract Services, Cutler/Williams, BDM Technologies, Inc., and Cooper Consulting Company from required public disclosure.

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<sup>2</sup>The 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 other 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/rho

Ref.: ID# 40079

Enclosures: Submitted documents

cc: Mr. Randy L. Miller  
Eurosoft, Inc.  
1705 Capital of Texas Highway  
Austin, Texas 78746  
(w/o enclosures)

Mr. Michael Kelly, Branch Manager  
EDP Contract Services  
8240 MoPac, Suite 210  
Austin, Texas 78759  
(w/o enclosures)

Mr. Leonard H. Pazulski  
Charles E. Chlan & Associates, L.L.C.  
8835-D Columbia 100 Parkway  
Columbia, Maryland 21045  
(w/o enclosures)

Ms. Andrea L. Berkebile  
Sales Account Manager  
Analysts International Corporation  
La Costa Green  
1033 La Posada, Suite 300  
Austin, Texas 78752  
(w/o enclosures)

Ms. Julie Mowdy, Austin Branch Manager  
Cutler/Williams  
One Park North  
8200 N. MoPac, Suite 250  
Austin, Texas 78759  
(w/o enclosures)

Mr. Rob Welborn  
BDM Technologies, Inc.  
600 Congress Avenue, Suite 3131  
Austin, Texas 78701  
(w/o enclosures)

Ms. Trina Rose  
Cooper Consulting Company  
Two Cielo Center  
1250 Capital of Texas Highway, Suite 300  
Austin, Texas 78746  
(w/o enclosures)

Ms. Anne Davidson  
President  
RFD & Associates  
1210 West 5th Street  
Austin, Texas 78703  
(w/o enclosures)