



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 28, 1996

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

OR96-1961

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# 36902.

The Lower Colorado River Authority (the "LCRA") received a request for:

(a) all existing contracts or agreements of Lower Colorado River Authority providing for the purchase of electric power by Lower Colorado River Authority from any party or providing for the sale of electric power by Lower Colorado River Authority to any party, including all such contracts or agreements pursuant to which electric power is presently being purchased or sold by Lower Colorado River Authority and all such contracts or agreements now in existence pursuant to which Lower Colorado River Authority may hereafter be required or entitled to purchase or sell electric power, including both all basic contracts and agreements and all supplements, amendments, modifications, extensions, side agreements, letter agreements and ancillary or related agreements pertaining or related to or affecting any of such contracts or agreements for the sale or purchase of electric power or the sale or purchase of electric power pursuant thereto; and

(b) all written procurement or purchasing policies or guidelines of Lower Colorado River Authority relating to or applicable to the purchase or acquisition of electric power, fuel, or any other goods, supplies, material, equipment or services.

You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.104, 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, this office notified the third party whose interests are implicated by this request to give it the opportunity to raise and explain the applicability of certain exceptions to disclosure of the requested information. Destec Energy, Inc., the parent company of CoGen Lyondell, Inc., and CoGen Lyondell, Inc. (collectively, "Destec"), have responded to the request and contend that sections 552.101 and 552.110 except some of the submitted information from required public disclosure.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. LCRA claims that the submitted information is excepted from disclosure under section 2.051(p) of article 1446c-0, V.T.C.S., which provides:

(p) The [Public Utility Commission of Texas] shall, on request by any affected person and within 90 days after the date a utility files its final integrated resource plan under this section, convene a public hearing on the reasonableness and cost-effectiveness of the proposed final plan. At the hearing, any interested person may intervene, present evidence, and cross-examine witnesses regarding the reasonableness and cost-effectiveness of the proposed final plan. Parties will not be allowed to litigate or conduct discovery on issues that were litigated or could have been litigated in connection with the filing of the utility's preliminary plan. To the extent permitted by federal law, the commission may issue a written order for access to the books, accounts, memoranda, contracts, or records of any exempt wholesale generator or power marketer selling energy at wholesale to a utility, if the examination is required for the effective discharge of the commission's regulatory responsibilities under this Act, except that if the commission issues such an order, the books, accounts, memoranda, contracts, and records obtained by the commission are confidential and are not subject to disclosure under Chapter 552, Government Code.

We do not believe that this provision is applicable to the situation at hand. LCRA has not informed us that any of the submitted information was submitted to the Public Utility Commission in response to a written order in connection with a public hearing on a proposed final integrated resource plan. Therefore, LCRA may not withhold the submitted information under section 552.101.

We understand that LCRA was created in 1934 as a conservation and reclamation district, without tax authority, in order to provide, among other things, wholesale electric power, flood control, and water supply to the public. 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.

In light of this background, we next 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-0, V.T.C.S., gives LCRA authorization to compete in the electric power market. Section 2.057(f) 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 prong of the section 552.104 test, LCRA claims:

If LCRA is unable to protect this information that is generally considered sensitive in the industry, such as pricing information, fuel information, heat rate, electric dispatching, power delivery scheduling, and assignment rights, wholesale marketers and purchasers of electricity will not be willing to do business with LCRA. LCRA and its ratepayers (and possible bond holders) will suffer economic loss and competitive disadvantage if, because of LCRA's inability to maintain limited confidentiality of the competitive contract terms, possible private-sector partners will likely shy away from conducting business with LCRA or might extract higher prices to compensate for the lack of confidentiality. In fuels purchases as well as in electricity purchases, LCRA is frequently offered discount prices if it can protect the confidentiality of the pricing terms.

We believe that based on these arguments, together with the other information supplied by LCRA, that LCRA may withhold from disclosure the information highlighted in Exhibits "B-1," "B-2," "B-3," and "B-6" under section 552.104 of the Government Code.¹

¹As the information which LCRA claims is excepted from disclosure under section 552.110 is "virtually identical" to that we have concluded is excepted under section 552.104, we need not address your claimed exception under section 552.110.

We now address Destec's argument that section 552.110 excepts Exhibits "B-4" and "B-5" from disclosure. Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. Destec argues that these contracts are protected under both prongs of section 552.110. 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).

After reviewing the information submitted by Destec, we believe that they have established that the information in Exhibits "B-4" and "B-5" is confidential commercial or financial information. Therefore, LCRA must withhold these documents under the second prong of section 552.110.²

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/ch

Ref.: ID# 36902

Enclosures: Marked documents

²As we conclude that the information in these exhibits must be withheld under the second prong of section 552.110, we need not address Destec's trade secret claims.

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