



Office of the Attorney General  
State of Texas

August 1, 1997

DAN MORALES  
ATTORNEY GENERAL

Mr. Gary Keane  
General Counsel  
Dallas/Fort Worth International Airport  
Post Office Drawer 619428  
Dallas, Texas 75261-9428

OR97-1752

Dear Mr. Keane:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 108009.

The Dallas/Fort Worth International Airport Board (the "board") received requests for bids submitted in response to the board's request for proposals for automated teller machine concessions. You explain that you will release those portions of the proposals that you believe to be clearly open records. You claim, however, that other portions of the proposals submitted to the board by third parties may be proprietary in nature and protected from disclosure by section 552.110 of the Government Code. You have submitted those portions of the proposals which the third parties have asserted are confidential to this office for review. See Gov't Code §552.352 (distribution of confidential information is criminal offense).

Since the property and privacy rights of third parties are implicated by the release of the requested information here, this office notified the eight companies that had submitted proposals to the board. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 Open Records Act in certain circumstances).

First, several parties argue that section 552.101 protects the requested information from disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." After reviewing the submitted documents, we do not believe that the information is confidential based on a right of privacy. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex.

1976), *cert. denied*, 430 U.S. 931 (1977) (common-law privacy); Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)) (constitutional privacy). Common-law privacy protects the rights of individuals, not corporations. Open Records Decision No. 620 (1993). Corporations do not have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)); *see* Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings, and does not protect evaluation report on private college). Thus, the companies have no right of privacy in their financial statements. Moreover, we do not find nor does any company point to a statute outside the Open Records Act that would deem the information confidential. We conclude that the information may not be withheld based on section 552.101.

Community Credit Union ("CCU"), Banc One Corporation ("Bank One"), Cash USA, Inc. ("Cash USA"), NationsBank of Texas, N.A. ("NationsBank"), Affiliated Computer Services, Inc. ("ACS"), Independent National Bank, and Bank of America Texas, N.A. ("Bank of America") each raise section 552.110 as an exception to disclosure of their respective proposals. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

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>1</sup>

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. 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. *Id.*

First, we note that FBS Retail Payment Systems ("FBS") asked the board to withhold portions of its proposal. However, FBS has not asserted the protection of section 552.110 nor made any argument against disclosure of the information. Thus, FBS's proposal must be released to the requestors. See Open Records Decision Nos. 639 (1996) at 4 (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), 552 (1990) at 5 (party must establish prima facie case that information is trade secret).

Independent National Bank argues that portions of its proposal are confidential and that disclosure of the information "would enable another bidder an advantage." We do not believe that Independent National Bank has established that the information it seeks to withhold is either a trade secret or confidential commercial or financial information that must be withheld. Therefore, the board must release Independent National Bank's proposal to the requestors.

Cash USA argues that the information within its proposal is considered confidential and must be withheld. We do not believe that Cash USA has established that the information

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<sup>1</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.

it seeks to withhold is either a trade secret or commercial or financial information that must be withheld. Therefore, the board must release Cash USA's proposal to the requestors.

CCU argues that the information within its proposal is considered confidential proprietary and financial information and must be withheld. CCU further argues that its expectation of privacy in its confidential financial information should not be violated. A mere expectation of confidentiality by an individual supplying information does not properly invoke section 552.110. Open Records Decision No. 203 (1978) (construing predecessor to section 552.110); *see also* Open Records Decision No. 479 (1987) (information is not confidential under Open Records Act simply because party submitting it anticipates or requests that it be kept confidential). We do not believe that CCU has established that the information it seeks to withhold is either a trade secret or confidential commercial or financial information that must be withheld under section 552.110.

Next, CCU argues that sections 552.104 and 552.112 except the information within its proposal from public disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the board does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by a governmental body). Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. Therefore, the requested information may not be withheld under section 552.104. Likewise, we do not believe that section 552.112 is applicable in this instance. The board does not seek to withhold the information at issue based on this section. *See* Open Records Decision No. 522 (1989) at 4 (governmental body may decide not to raise permissive exceptions); Open Records Letter No. 97-0301 (1997) at 3-4. The requested information may not be withheld pursuant to section 552.112.

Bank of America originally argued that eight categories of information in its proposal should be withheld. However, in its response letter to this office, Bank of America amends its arguments and asserts that the following portions of its proposal are excepted from disclosure as commercial or financial information:

- 1) Page 2 - Executive Summary,
- 2) Page 17 - Management, Operations, Marketing Plan,
- 3) Page 25 - Minimum Annual Guarantee,
- 4) Appendix B (ATM Lease Terms), and
- 5) Appendix E (Financial Projections).

However, Bank of America acknowledges that its list of ATM locations is already a public record. Thus, the portions of Appendix B that list the ATM locations must be released; we have marked these sections. After reviewing Bank of America's arguments, we conclude that it has demonstrated that the information it seeks to withhold constitutes confidential commercial and financial information protected by section 552.110. We note that Bank of America seeks to withhold only the minimum annual guarantee information on page 2;

therefore, all other information on page 2 must be released. Likewise, Bank of America seeks to withhold only the surcharge rate information found on page 17 under the heading, "Marketing," and subheading, "Surcharge." Thus, all other information on page 17 must be released. The board must withhold the remaining portions of Bank of America's proposal for which it has asserted a section 552.110 exception under the commercial and financial prong. We have marked the information that must be released.

NationsBank argues that the following portions of its proposal constitute a trade secret or commercial or financial information that should be excepted from disclosure: 1) the "List of Machines" paragraph in the "Experience" section of its proposal and the accompanying list of machines and revenue information, and 2) section VIII titled "Minimum Annual Guarantee" and the accompanying schedule. After reviewing NationsBank's arguments, we conclude that it has established that this information is confidential commercial and financial information protected by section 552.110. Therefore, the board must withhold this information.<sup>2</sup>

Bank One argues that the information it has marked in its proposal constitutes a trade secret or commercial or financial information that should be excepted from disclosure under section 552.110. After reviewing Bank One's arguments, we agree that the information it has marked is confidential commercial and financial information under section 552.110. Therefore, the board must withhold the information that Bank One has marked on pages 3, 12, 17, 19-21, 47-62, and 64.

Finally, ACS argues that certain portions of its proposal are protected under section 552.110. ACS amended its original claim that its entire proposal should be excepted to argue that only certain portions should be excepted. After reviewing ACS's arguments, we conclude that ACS has met its burden under section 552.110 as to most of the information it seeks to withhold. The board must withhold the following categories of information under the trade secret prong of section 552.110: 1) Tab 2, Future Products and Services; 2) Tab 2, multi-color sheet describing the ATM pictured; and 3) Tab 6, E. References. The board must withhold the following categories of information under the confidential commercial and financial information prong of section 552.110: 1) Tab 2, G) Rent; 2) Tab 2, ATM Surcharge Survey; 3) Tab 6, V. Experience; 4) Tab 6, C. ATM Locations; 5) Tab 8; 6) Tab 10; 7) Tab 11; and 8) Tab 12. We note that Tab 7, which consists of ACS's organizational charts, is not excepted from disclosure by section 552.110. *See* Open Records Decision No. 319 (1982) (information relating to organization and personnel, professional references, and qualifications and experience are not excepted from disclosure under predecessor statute); *see also* Open Records Decision Nos. 306 (1982), 175 (1977). We have marked the information that the board must withhold; the remainder of the proposal must be released.<sup>3</sup>

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<sup>2</sup>As we have determined that NationsBank's information is confidential under section 552.110, we need not address its other claimed exception under section 552.104.

<sup>3</sup>We note that ACS has marked certain information on a page titled, "ATM Surcharge Survey (Texas)," as confidential. This page was not included in the proposal that you submitted to this office. The board must withhold the information ACS marked on this page and release the remaining information on this page.

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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/ch

Ref: ID# 108009

Enclosures: Submitted documents

cc: Mr. Donald R. Postell  
Attorney for Bank of America Texas, N.A.  
Arter & Hadden  
1717 Main Street, Suite 4100  
Dallas, Texas 75201-7366  
(w/o enclosures)

Mr. Alan L. Burtin  
First National Bank of Grapevine  
P.O. Box 1000  
Grapevine, Texas 76009-1000  
(w/o enclosures)

Mr. John L. Busselmaier  
President  
FBS Retail Payment Systems  
950 17th Street, Suite 850  
Denver, Colorado 80202  
(w/o enclosures)

Mr. S. Cass Weiland  
Attorney for Community Credit Union  
Jackson & Walker, L.L.P.  
901 Main Street, Suite 6000  
Dallas, Texas 75202-3797  
(w/o enclosures)

Ms. Rikki L. O'Neal  
Banc One Corporation  
Legal Department  
1717 Main Street  
Dallas, Texas 75201  
(w/documents you submitted)

Mr. Mike Pearce  
President/CEO  
Independent National Bank  
3636 West Northgate Drive  
Irving, Texas 75062  
(w/o enclosures)

Ms. Kay Gregory  
President  
Cash USA, Inc.  
1708 Peek  
Plano, Texas 75075  
(w/o enclosures)

Mr. Robert G. McCain  
Assistant General Counsel  
NationsBank of Texas, N.A.  
Legal Department  
901 Main Street, 68th Floor  
Dallas, Texas 75202-3714  
(w/o enclosures)

Mr. A. Jeffrey Smith  
Senior Associate General Counsel  
Affiliated Computer Services, Inc.  
P.O. Box 219002  
Dallas, Texas 75221-9002  
(w/documents you submitted)

