



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 25, 1997

Ms. Mary D. Marquez
Assistant to Chief Counsel
Capital Metropolitan Transportation
Authority
2910 East Fifth Street
Austin, Texas 78702

OR97-2171

Dear Ms. Marquez:

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# 109103.

The Capital Metropolitan Transportation Authority ("Capital Metro") received a request for "all documentation issued by Longhorn Railway (to date) in response to Capital Metro's Demand Letter dated May 30, 1997, that relates to the 15% Escrow Account and/or any response in compliance with Section XXX, Subsection A of the Rail Freight Contract." You contend that section 552.110 of the Government Code exempts portions of the escrow report from public disclosure. You also received a request for

1. Two (2) and five (5) year Rail Freight Service Marketing Plan and any updates or amendments as shown in quarterly and annual reports. (Contract Section XII)[.]
2. Hazardous Waste Material Emergency Response Plan and safety policies for transporting hazardous materials. (Contract Section XXXII no. 6) [and]
3. Feasibility Assessment and Proposal addressing safety in residential areas. (Contract Section XXXII no. 8)[.]

You raise section 552.305 of the Government Code for this request. We have considered the arguments raised and reviewed the information submitted to this office.

Pursuant to section 552.305 of the Government Code, we notified The Longhorn Railway Company ("Longhorn") of its opportunity to claim that the information at issue is excepted from disclosure. Longhorn contends that the requested information is confidential under section 11904 of title 49 of the United States Code. Longhorn further argues that the federal law preempts the Texas Open Records Act.

Section 11904 provides:

(a) A--

(1) rail carrier providing transportation subject to the jurisdiction of the Board under this part, or an officer, agent, or employee of that rail carrier, or another person authorized to receive information from that rail carrier, that knowingly discloses to another person, except the shipper or consignee; or

(2) a person who solicits or knowingly receives,

information described in subsection (b) without the consent of the shipper or consignee shall be fined not more than \$1,000.

(b) The information referred to in subsection (a) is information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation provided under this part, or information about the contents of a contract authorized under section 10709 of this title, that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.

49 U.S.C. § 11904. The requested information is not the type of information defined by subsection (b) as it is not information "about the nature, kind, quantity, destination, consignee, or routing of property" or information that may be used to the detriment of a shipper or consignee. Thus, section 11904 is not applicable here.

In addition, the question whether the Staggers Railway Act of 1980, 49 U.S.C. §§ 10101 *et seq.*, which is at issue here, preempts state law such as the Texas Open Records Act was addressed in Open Records Decision No. 541 (1990). Federal law may make information in the custody of governmental bodies of this state confidential for the purposes of section 552.101. *See, e.g.*, Open Records Decision No. 403 (1983). However, for information to be excepted from disclosure under this aspect of section 552.101, confidentiality must be expressly provided in the relevant statute and cannot be assigned by implication. Open Records Decision No. 541 (1990).

In Open Records Decision No. 541 (1990), we noted that the federal courts have determined that the Staggers Act does not mandate confidentiality of rail contracts in every forum or for every purpose. In *Burlington N. R.R.*, the court rejected the claim that the Staggers Act preempted the exercise of any state authority that results in the public disclosure of rail contracts executed pursuant to provisions of the statute. *Burlington N. R.R. v. Public Util. Comm'n of Tex.*, 812 F.2d 231 (5th Cir. 1987). The court held that although state authority to regulate railroads is preempted by the Staggers Act, the act does not reach other regulatory actions that indirectly affect railroads. *Id.* at 234-36. The *Burlington* court recognized the potential public interest in disclosing the terms of rail contracts outside the context of rail regulation. Thus, parties to rail contracts cannot rely on the Staggers Act to prevent public disclosure of such contracts in circumstances other than direct regulation of railroads. *Id.* at 236.

There is a public interest in knowing the details of contracts executed by a governmental body of this state involving the receipt or expenditure of public funds. Open Records Decision No. 541 (1990) at 4. "Thus, the public policy expressed in the Open Records Act cannot be bargained away, and the obligations of a governmental body under the act cannot be compromised simply by its decision to enter into a contract." *Id.*; see also Open Records Decision No. 514 (1988). Accordingly, we concluded in a previous decision that, because the Staggers Act does not bar public disclosure of rail contracts outside the context of rail regulation, the requested railroad coal transportation agreement between the City of San Antonio and certain railroad companies is not excepted from disclosure by section 3(a)(1) of the Open Records Act.¹ Open Records Decision No. 541 (1990) at 4 (citing to Letter from Robert S. Burk, General Counsel, Interstate Commerce Commission, to Rick Gilpin, Chairman, Opinion Committee, Texas Attorney General's Office (March 16, 1989) (stating that Staggers Act does not preempt state open records laws)). Likewise, the information at issue here is not excepted from disclosure by section 552.101. See *Freedom Newspapers v. Denver & Rio Grande W. R.R.*, 731 P.2d 740 (Colo. App. 1986) (Staggers Act does not prohibit disclosure of city of Colorado Springs' coal transportation contract under Colorado Open Records Act).

As a final note on the preemption issue, Longhorn cites to *Kansas City Southern Ry. Co. v. Daniel*, 180 F.2d 910 (5th Cir. 1950), as the basis for its assertion that "the federal constitution, its interstate commerce and supremacy clauses, as well as, the federal Interstate Commerce Act preempts totally all state laws, not merely selective statutes." However, the court actually stated that "[t]he Constitution and laws of the United States are the supreme law of the land and *state statutes that unreasonably burden or interfere with interstate commerce have been stricken down.*" *Kansas City S. Ry.*, 180 F.2d at 916 (emphasis added). Thus, the court recognized that there are situations to which the Texas statutes may lawfully be applied. See *id.* at 914.

¹Section 3(a)(1) is the predecessor to section 552.101 which 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.

Next, you suggest that portions of the escrow report constitute confidential commercial or financial information that is excepted from disclosure by section 552.110. First, you assert that Capital Metro is contractually bound by confidentiality provisions to protect the requested information. However, governmental bodies may not enter into contracts to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 444 (1986), 437 (1986), 425 (1985). A contract cannot overrule the Open Records Act, but it may be evidence of a private party's attempt to keep information confidential, as, for example, would be useful for a showing under section 552.110 of the Government Code. Attorney General Opinion JM-672 (1987).

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. 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). In *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, the same court limited the holding in *National Parks* to that information that is required to be submitted to the government. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). For information that is voluntarily submitted to the government, the court announced a new test: the information must be of a kind that the provider would not customarily make available to the public. *Id.*

Courts have concluded that information is produced to the government voluntarily when it was not produced pursuant to subpoena or to obtain a contract or other benefit from a governmental body. *McDonnell Douglas Corp. v. United States Equal Employment Opportunity Comm'n*, 922 F. Supp. 235, 241-42 (E.D. Mo. 1996) (documents produced pursuant to agreement and not to subpoena were produced voluntarily); *Cortez III Serv. Corp. v. National Aeronautics and Space Admin.*, 921 F. Supp. 8, 12-13 (D.D.C. 1996) (general and administrative expense rate ceilings not required to be submitted as part of proposal were submitted voluntarily); *McDonnell Douglas Corp. v. National Aeronautics and Space Admin.*, 895 F. Supp. 316, 318 (D.D.C. 1995) (price elements necessary to win government contract are not voluntary); *Chemical Waste Management, Inc. v. O'Leary*, Civ. A. No. 94-2230 (NHJ), 1995 WL 115894 (D.D.C. Feb. 28, 1995); (price information submitted in response to requirement in request for proposals not voluntarily submitted); *Lykes Bros. Steamship Co. v. Pena*, Civ. A. No. 92-2780-TFH, 1993 WL 786964 (D.D.C. Sept. 2, 1993) (documents provided as requirement to obtain government approval of application not voluntarily produced).

You state that "Capital Metro is only contractually entitled to portions of the information in the Escrow Report." You further assert that the information you have marked concerning Longhorn's private expenses and financial concerns was voluntarily submitted by Longhorn. We disagree. Section XIX.B of the contract provides:

... the RAIL OPERATOR shall maintain and make available to OWNERS for inspection, records that will provide accurate, current, separate, and complete disclosure of the status of the revenue generated and expenses incurred under Contract in accordance with Generally Accepted Accounting Principles. The RAIL OPERATOR'S record system shall contain sufficient documentation to provide in detail full support and verification of each expenditure.

Thus, the marked information was not voluntarily submitted as it is contractually required to be submitted. Hence, the *Critical Mass* test is inapplicable.

We must therefore decide whether the test announced in *National Parks* is applicable to the requested information: Will the disclosure of the requested information 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*, 498 F.2d at 770. 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.*

You contend that your inability to receive, in the future, information that you claimed was voluntarily submitted "would hinder and be detrimental to Capital Metro's oversight and understanding of Longhorn's overall operations." As stated above, Longhorn is contractually obligated to provide the information; therefore, Capital Metro's ability to obtain the information in the future will not be impaired. Moreover, you have not demonstrated that Longhorn actually faces competition and that substantial competitive injury would likely result from disclosure. Accordingly, you may not withhold the marked portions of the escrow report under section 552.110. The requested information must be released to the requestors.

We are resolving this matter with this 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 may 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/rho

Ref.: ID# 109103

Enclosures: Submitted documents

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