



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 3, 1997

Mr. Gary E. Keane
General Counsel
Dallas/Fort Worth International Airport
P.O. Drawer 619428
DFW Airport, Texas 75261-9428

OR97-0702

Dear Mr. Keane:

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# 104880.

The Dallas/Fort Worth International Airport (the "airport") received an open records request for "the bid of CarroSell, Inc. as it pertains to the request for bids for baggage carousel advertising services at [the airport]." You state that the airport will make available to the requestor those portions of the requested proposal "which [the airport] believes to be clearly open record." Additionally, you have submitted to this office the comments of representatives of CarroSell, who have argued that the following portions of their proposal are excepted from required public disclosure pursuant to section 552.110 of the Government Code:

1. CarroSell's Operational Plans for installing, maintaining, operating, and managing the baggage carousel advertising panels;
2. CarroSell's Marketing Strategies;
3. CarroSell's Marketing Qualifications;
4. CarroSell's Implementation plans contained in the "Additional Comments" section of the Bid;
5. CarroSell's Marketing Research conducted by A.C. Nielsen Company;

6. CarroSell's Advertising Impact Study; and
7. CarroSell's carousel study.

Section 552.110 of the Government Code excepts from required public disclosure two categories of information: 1) trade secrets and 2) commercial or financial information. This material is clearly commercial information. To fall within the second branch of section 552.110, however, the information must be "privileged or confidential by statute or judicial decision."

Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 *et. seq.* Open Records Decision Nos. 639 (1996), 309 (1982); 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 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. (Emphasis added.)

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). A factor to be considered in these tests is whether the information is of a type that is customarily released to the public. *See, e.g., AT&T Information Systems, Inc. v. General Services Administration*, 627 F. Supp. 1396, 1403 (D.D.C. 1986), *rev'd on other grounds*, 810 F.2d 1233 (D.C. Cir. 1987).

The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. You have expressed no opinion on this subject. We therefore must determine whether the second test is satisfied. The courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. *Actual competition and the likelihood of substantial competitive injury* is [sic] all that need be shown. (Emphasis added.)

Gulf & Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); *see also National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. *See National Park*, 547 F.2d, at 680.

In this instance CarroSell has met its burden in demonstrating actual competition in the marketplace and the likelihood of substantial competitive injury from the release of the

information at issue. We therefore conclude that the airport must withhold the information at issue pursuant to section 552.110 of the Government Code.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/ch

Ref: ID# 104880

Enclosures: Submitted documents

cc: Mr. W.M. Huffington
Ad Claim
1717 Walnut Hill Lane
Irving, Texas 75038
(w/o enclosures)

Mr. Kenneth C. Johnston
Kane, Russell, Coleman and Logan
3700 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-7207
(w/o enclosures)

