



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 3, 1997

Mr. Robert A. Parmelee  
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Fort Worth, Texas 76102-4118

OR97-1274

Dear Mr. Parmelee:

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# 106096.

The Ft. Worth Transportation Authority (the "T"), which you represent, received a request for information relating to Commuter Service Operating Contract - RFP 96-T007, to include "any pricing or cost estimates prepared at any time for the purpose of evaluating the bidders' proposals, and any Herzog document indicating the operating and manpower assumptions behind its pricing proposal." By letter dated May 8, 1997, this office was informed that the requestor no longer seeks the financial statements of Herzog. We therefore do not address the applicability of the exceptions you raise to this information. You assert that the information is excepted from disclosure pursuant to sections 552.104 and 552.110 of the Government Code. We have considered your arguments and have reviewed the information submitted.<sup>1</sup>

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<sup>1</sup>You also claim that section 552.101 of the Government Code (information confidential by law excepted from required public disclosure) and section 252.049 of the Local Government Code (trade secrets and confidential information in proposals not open for public inspection) except the information at issue from disclosure. Section 252.049 provides that "[a]ll proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection." Local Gov't Code § 252.049(b). This section makes specifically public all information in these types of proposals except for information that is a trade secret or is otherwise confidential by law. Thus, section 252.049 is essentially coextensive with section 552.110 of the Government Code and does not provide any exception to disclosure over and above that provided by section 552.110 of the Government Code.

Since the property and privacy rights of a third party may be implicated by the release of the requested information here, this office notified that party of this request. 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). We notified Herzog Transit Services, Inc., the entity awarded the contract for which the T issued its request for a proposal, of its opportunity to submit arguments for withholding the requested information from disclosure. Herzog responded by arguing that audited financial statements as well as cost and pricing data is exempted from disclosure pursuant to section 552.110.

Section 552.110 of the Government Code exempts from required public disclosure two types of information, a "trade secret" and "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Herzog asserts that its cost and pricing information is within the commercial or financial information branch of section 552.110. In applying this branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (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. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by mere conclusory assertion of a possibility of commercial harm. "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. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985)).

Herzog asserts that the release of certain pricing information will cause substantial harm to its competitive position by allowing competitors to estimate and undercut Herzog's future bids. It argues that disclosure of the cost data will effectively strip it of its ability to utilize aggressive pricing such as this against competitors, to the detriment of other public agencies and Herzog.

We note that federal cases applying the analogous FOIA exemption to prices in awarded government contracts have denied protection for such prices, reasoning that disclosure of prices charged the government is a cost of doing business with the government. See *generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152. Moreover, we believe the public has a strong interest in the release of prices in government contract awards. See Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Accordingly, we conclude that the T may not withhold the Herzog cost and pricing information from public disclosure

based on section 552.110 of the Government Code. *See* Open Records Decision No. 319 (1982) (pricing proposals may only be withheld under the predecessor to section 552.110 during the bid submission process).

Finally, we address your arguments concerning a resume and qualifications of an individual that were submitted as part of Herzog's proposal to the T. In Open Records Decision No. 175 (1977), this office ruled that "resumes listing the education and experience of . . . employees . . . cannot . . . reasonably be said to fall within the 'trade secret' or any other exception to the Open Records Act." *See also* Open Records Decision Nos. 306 (1982) (resumes listing education and experience of employees of a private company are not excepted by predecessor to section 552.110), 319 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted by the predecessor to section 552.110). We therefore conclude that the information you seek to withhold relating to a specific individual may not be withheld pursuant to section 552.110. Nor do we believe it is protected by 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) (under common-law privacy, 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).<sup>2</sup>

The T also raises section 552.104 of the Government Code. Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is 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 usually 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. Further, section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982); 184 (1978). Thus, the requested information may not be withheld under section 552.104.

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

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<sup>2</sup>We note you argue that the individual whose resume and qualification are at issue in this matter provided such information upon the express condition that it would be kept strictly confidential, and that it would not be revealed to his employer. This office has ruled, however, that information is not confidential under the Open Records Act simply because the party submitting it anticipates or requests that it be kept confidential, Open Records Decision No. 479 (1987), or merely because it is furnished with the expectation that access to it will be restricted. Open Records Decision No. 180 (1977).

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/ch

Ref.: ID# 106096

Enclosures: Marked documents/submitted documents

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