



July 22, 1999

Mr. Mark Walker
Associate General Counsel
The Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR99-2065

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# 125962.

The Lower Colorado River Authority (the "LCRA") received two requests for information concerning Southwestern Bell Telephone's ("SWBT") proposal in response to the LCRA's request for proposal on its telephone system upgrade. Specifically, the requested information includes itemized prices, pricing revisions, and the formal evaluation of the submitted proposals. You state that you have released a substantial amount of the requested information. You contend that section 552.110 of the Government Code exempts the remaining requested information from public disclosure because SWBT has indicated that it constitutes a trade secret or proprietary information.

Since the property rights of a third party may be implicated by the release of the requested information, this office notified SWBT of the request for information. *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 Public Information Act in certain circumstances).

SWBT argues that its pricing information is excepted by section 552.110. Section 552.110 protects the property interests of third parties 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. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.--Austin May 20, 1999, no pet. h.). Because SWBT has not cited to a statute or judicial decision that makes the commercial or financial information privileged or confidential, you may not withhold the requested information under the commercial or financial information prong of section 552.110.

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 at 5 (1990). Six factors determine whether information will be accorded trade secret status: "(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. 541 at 6 (1990), 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

SWBT argues:

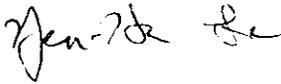
SWBT provided its unit price for each piece of equipment plus the discount SWBT was willing to give LCRA in order to obtain the sale. The unit price consists of SWBT's cost in obtaining the equipment from Nortel plus contribution, i.e., mark-up or profit. Since Nortel sells its equipment to many telecommunications providers, including Williams [the requestor and a competitor], Williams could make a fairly accurate estimation of SWBT's cost of obtaining equipment from Nortel from the unit prices noted in SWBT's response. With that information, Williams could extrapolate the approximate amount of contribution SWBT normally obtains on Nortel equipment. With the discount information in SWBT's response, Williams could determine quite easily the percentage by which SWBT is willing to reduce the contribution it would normally receive for sales to similar customers under similar circumstances.

SWBT has not provided arguments under the six criteria as set out by the Restatement. Most importantly, SWBT has not demonstrated the specific measures taken to protect the secrecy of the information or the extent to which the information is not known outside of the company's business. The requestor contends that the requested pricing information had been provided in the recent past. After reviewing all of SWBT's arguments, we conclude that SWBT has not made a *prima facie* showing that section 552.110 excepts the requested information from public disclosure as a trade secret.

Lastly, SWBT asserts that section 552.104 excepts the requested information from public disclosure. Section 552.104, which excepts from public disclosure "information which, if released, would give advantage to competitors or bidders," protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Because the LCRA does not raise section 552.104, this section is not applicable to the requested information. *Id.* (section 552.104 may be waived by governmental body). The LCRA must release the requested information.

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.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref: ID# 125962

Encl.: Submitted documents

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