

Opinion No. 2012-035

June 18, 2012

The Honorable Ken Casady
Prosecuting Attorney
Twenty-Second Judicial District
102 South Main Street
Benton, Arkansas 72015

Dear Mr. Casady:

You have asked for my opinion regarding whether the “competitive-advantage exception” to the Arkansas Freedom of Information Act (FOIA) applies to certain records held by the City of Benton’s Advertising and Promotion Commission (“A&P Commission”). As background for your question, you explain:

As part of its duty in collecting the A&P tax, the Commission remits forms indicating the amount of sales the restaurant generated for a tax reporting month. Based upon the advice of the city attorney, the custodian of these records, as defined by the [FOIA], has in times past declined to release the sales tax forms (or documents generated by the city detailing this information), which are submitted to the city. The city bases its decision upon the exception provided at A.C.A. § 25-19-105(b)(9)(A), stating [that] the release would give an advantage to a competing restaurant or business, including those considering whether...to enter the local marketplace. The businesses consider the information proprietary.

You then ask whether “the city’s position [is] a correct interpretation of A.C.A. § 25-19-105(b)(9)(A).

RESPONSE

This office has addressed this precise question several times. In each case, my predecessors have been unable to definitively say whether the tax records of individual businesses are, as an absolute rule, subject to the competitive-advantage exception. For such a question is highly factual and must be decided on a case-by-case basis and this office is not authorized or equipped to make those kinds of factual determinations when issuing opinions.

Instead, when my predecessors have been asked this precise question, they have simply explained the legal standards that custodians must apply when determining whether subsection 25-19-105(b)(9)(A) applies. For example, in 1995, my predecessor was asked whether under the FOIA Bentonville A&P Commission was “required to make available to the public the taxes of individual establishments?” In response, my predecessor relied on opinions from 1991 and 1987 to explain the applicable rules that the custodian must apply:

As stated in Opinion 91-390, the burden of proving eligibility for this so-called “competitive advantage” exemption is upon the entity seeking nondisclosure. A determination that all such tax records are exempt, in the absence of a specific showing of competitive injury, would be contrary to the FOIA’s general policy of disclosure. *See generally Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977). Whether the disclosure of particular records would give advantage to competitors will depend upon the likelihood of substantial harm to the competitive position of the one seeking the exemption. *Id.* at 3. *See also* Ops. Att’y Gen. 95-108 and 94-015. Conclusory or generalized assertions in this regard will not suffice. Op. Att’y Gen. 87-473. Rather, specific factual or evidentiary material must be presented showing actual competition and the likelihood of substantial competitive injury from disclosure of the records.^[1] *Id.* This necessarily involves a case-by-case determination. Although the responsibility of review falls on the custodian of the records, the custodian must in turn rely upon information supplied by the one claiming the exemption. Op. Att’y Gen. 87-194.

¹ In addition, the mere fact that the business entity labels the information “proprietary” or “confidential” does not make it so. *See* Op. Att’y Gen. 95-106. The business must offer objective evidence to support its claim that the information is confidential.

In conclusion, therefore, there may be scenarios where the competitive advantage exemption might properly be claimed by individual businesses in response to FOIA requests for this tax information. The necessary factual review, however, prevents any across-the-board determination. While I thus cannot provide a conclusive opinion in response to your question, the foregoing sets out the legal framework for the factual analysis.²

I agree with this analysis. The custodian should apply the law described above, which is analyzed more fully in the above-cited opinions.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh

² Op. Att'y Gen. 95-414.