



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

September 2, 1977

The Honorable M. L. Brockette
Commissioner
Texas Education Agency
201 East Eleventh Street
Austin, Texas 78701

Open Records Decision No. 173

Re: Whether financial
statements submitted to
the Texas Education Agency
by proprietary schools
are public under the
Open Records Act.

Dear Commissioner Brockette:

Pursuant to section 7 of article 6252-17a, V.T.C.S., the Open Records Act, you request our decision on whether financial statements submitted to the Texas Education Agency by certain proprietary schools are excepted from required public disclosure by the exception in section 3(a)(10) or any other exception in the Act.

The Texas Education Agency collects financial statements from proprietary schools in order to comply with the requirement of the Texas Proprietary School Act that schools applying for a certificate must furnish the TEA administrator such information as he may require to determine that the school meets various statutory criteria, including a showing that "[t]he school is financially sound and capable of fulfilling its commitments for training." Education Code §§ 32.32, 32.33(i).

The Texas Education Agency has promulgated regulations pursuant to its general rule-making authority under the Texas Proprietary School Act, Education Code, section 32.22. Standard XIB of the Guidelines and Minimum Standards for Operation of Texas Proprietary Schools provides in pertinent part:

All financial data submitted to the Director by the owner shall be confidential to the Texas Education Agency.

It is suggested that this provision makes the information confidential by law within the exemption in section 3(a)(1). The Texas Supreme Court rejected this argument in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 677 (Tex. 1976). The court held:

While a rule may have the force and effect of a statute in other contexts, we do not believe that a governmental agency may bring its information within exception 3(a)(1) by the promulgation of a rule. To imply such authority merely from general rule-making powers would be to allow the agency to circumvent the very purpose of the Open Records Act. Absent a more specific grant of authority from the Legislature to make such a rule, the rule must yield to the statute. (Footnotes omitted).

We are unable to find any statute, constitutional principle, or judicial decision which makes this information confidential by law to bring it within exemption 3(a)(1).

Section 3(a)(10) excepts from required public disclosure:

(T)rade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . . (Emphasis added).

With the exception of the emphasized language, this provision is identical to the federal exemption in the Freedom of Information Act on which it was modeled. 5 U.S.C. § 552(b)(4). We have said that because of the emphasized language, "it is unlikely that, as presently written, § 3(a)(10) exempts from disclosure any information not already exempt under § 3(a)(1)." Attorney General Opinion H-258 (1974) at 6.

However, in Open Records Decision No. 107 (1975), we held that this exception was applicable to current grain warehouse inventory information. The facts presented indicated that such inventory information is a key factor in that particular business. We based our decision on the similarity of section 3(a)(10) to the federal exemption, the express statements of intention to include inventory information in the federal legislative history, the federal court decisions applying the federal exemption to the same type of information, and the facts in the particular case.

Even if we look to the federal cases for a judicial decision to satisfy the requirement of section 3(a)(10), as the facts warranted in Open Records Decision No. 107, we do not believe that the financial statements of proprietary schools meet the requirements which have been developed by the federal courts for application of their similar exception.

The leading federal case of National Parks and Conservation Association v. Morton, 499 F.2d 765 (D.C. Cir. 1974) established the following standard for determining the confidentiality of financial information:

[C]ommercial 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. Id. at 770. (Footnotes omitted).

The first of these effects is not likely in the case of proprietary schools, because the Proprietary School Act requires a finding that the school is financially sound before an application may be approved. Education Code § 32.33(i). Since the schools have no choice but to submit the information, disclosure will not affect the State's ability to obtain it, as it might if submission of the information were entirely voluntary. Even in a case of voluntary submission of similar information, we held that no exemption applied. Attorney General Opinion H-258 (1974).

We observe that the second part of this test is very similar to the section 3(a)(4) exception which applies to "information which, if released, would give advantage to competitors or bidders. . . ."

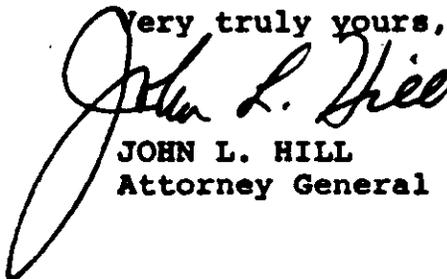
The original request in this case was modified to specify the particular schools whose records are sought. The owners of these schools were notified of the request and given an opportunity to submit any information or arguments as to the applicability of the exceptions claimed by the Agency. One response was received, stating agreement with the Agency's position, but no legal authority or fact was submitted to support an exception. Neither the Agency nor the schools involved have demonstrated that disclosure of this information

is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. See Attorney General Opinion H-436 (1974); Open Records Decision No. 124 (1976); Open Records Decision No. 95 (1975).

The Proprietary School Act requires that a school be financially sound in order to obtain a certificate of approval to operate. Education Code § 32.33(i). It appears that the Legislature intended to eliminate questionable or unknown financial status as a legitimate competitive factor in the proprietary school business, as it has in other situations where the financial soundness of an institution is of substantial public concern. For example, financial statements are routinely required to be disclosed by corporations under federal and state securities laws. See 15 U.S.C. §§ 77, 78; V.T.C.S. art. 581-1, et seq.

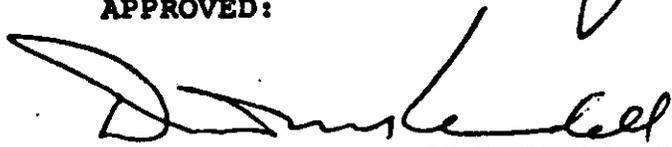
It is our decision that the information is not excepted from disclosure by section 3(a)(10). For the reasons expressed above, neither do we believe the section 3(a)(4) exception to be applicable.

Very truly yours,



JOHN L. HILL
Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee

jst