



The Attorney General of Texas

December 14, 1979

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Honorable Jerome Chapman
Texas Department of Human Resources
John H. Reagan Building
Austin, Texas 78701

Open Records Decision No. 231

Re: Whether a feasibility study prepared by the Department of Human Resources is public under the Open Records Act.

Dear Mr. Chapman:

You request our decision pursuant to section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act, on whether a feasibility study and materials used in preparing that study are excepted from required public disclosure under exceptions 3(a)(4) or 3(a)(11) of the Act. You also request our decision on whether a publication by a private company is excepted by section 3(a)(10) of the Act.

The feasibility study at issue here was undertaken by the Department to determine whether it would be more economical for the Department to produce certain information on microfilm itself than to utilize the services of a corporation which has a contract to provide the same services to state agencies. The activity involved is the production of computer-output-microfilm. The study concluded that in-house production would be more economical. The corporation with the contract to provide these services to state agencies desires to see the study and the information on which it is based. The Department has not yet decided to accept the recommendation made in the study and there is no actual bidding process going on at this time.

The Department contends that public disclosure of the study would provide a potential bidder a competitive advantage "not available to others," and is therefore excepted under section 3(a)(4) which excepts:

(4) information which, if released, would give advantage to competitors or bidders.

Disclosure of the study to this potential bidder would not give any unfair competitive advantage to him. The information would in fact be available to all persons who might have an interest in the matter. The only possible competitive advantage which might arise would be that obtained by

the initiative and enterprise of one potential bidder in obtaining and making use of information available to all. Competition of this sort should be encouraged rather than restrained and could be enhanced by making it generally known that the information is available, rather than restricting it. This argument provides no basis for withholding the information under section 3(a)(4).

The Department further contends that section 3(a)(4) permits this information to be withheld because of the potential competitive situation which may exist as between private companies and the Department in providing the production services discussed in the study.

The fundamental policy of openness established by enactment of the Open Records Act does not permit a governmental body to use secrecy to gain competitive advantage over private entities. Governmental bodies may not be regarded as being in competition with private enterprise so as to permit them to withhold information under section 3(a)(4). Open Records Decision No. 99 (1975); see Open Records Decision Nos. 217 (1978); 124 (1976). It is our decision that section 3(a)(4) does not apply to permit this feasibility study to be withheld.

The Department also contends that the feasibility study may be withheld from public disclosure as an intra-agency memorandum under section 3(a)(11). This exception is designed to protect from disclosure advice and opinion on policy matters and to encourage open and frank discussion between subordinate and chief with regard to administrative action. Attorney General Opinion H-436 (1976); Open Records Decision Nos. 222 (1979); 213, 211, 209, 197, 196, 192 (1978); 179, 168, 163 (1977); 149, 137, 128 (1976); 86, 81 (1975); 29, 20 (1974). The exception does not extend to severable factual information. Id. We have previously held that objective evaluations of the type found in this feasibility study are not excepted from required public disclosure under section 3(a)(11). Open Records Decision Nos. 222 (1979); 213 (1978); 171, 160 (1977). The 3(a)(11) exception applies to recommendations which are a part of the decisional process, but does not except factual evaluations such as are contained in this study. This study provides the factual basis upon which decisions may be made, and should be available to the public.

One item of information involved here is a publication entitled "Miniform Concepts and Facilities 8300Q11" published by Datagraphix, Inc. The first page bears the following statement:

This document contains proprietary information for Datagraphix, Inc. It is loaned to the recipient in confidence solely to facilitate operation of the Datagraphix equipment described therein. No other use, direct or indirect, of this document or of any information derived therefrom is authorized. No copies of any part of this document shall be made without written approval by Datagraphix. The document shall be returned upon request to Datagraphix.

The Department first contends that this publication is not a Department record subject to the Open Records Act. The Act applies to "[a]ll information collected, assembled, or maintained by governmental bodies . . . in connection with the transaction of official business. . . ." Sec. 3(a). This information was obtained by the Department and used in the course of the study. The Department has in fact "collected" it and has "maintained" it in their offices, and we believe that it is subject to the Act. In Open Records Decision No. 142 (1976), this office said: "The fact that the records were generated by another entity is irrelevant to the determination of whether they are public records when they are in the possession of [a governmental body]"

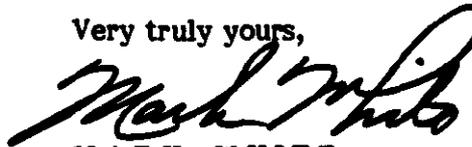
The Department contends that if the publication is subject to the Act, that it is excepted from required disclosure under section 3(a)(10) which excepts:

(10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The company who published this information, Datagraphix, Inc., was notified of this request, but we have received no information which would permit us to determine that this information is a trade secret, nor have we been referred to any statute or judicial decision which would apply to permit this information to be withheld. Absent some showing of this nature, we are obliged to conclude that the information is not excepted under section 3(a)(10). See Open Records Decision Nos. 217, 198, 184 (1978); 175 (1977); 89 (1975).

It is our decision that the feasibility study and the materials used in the preparation of the study are not excepted from disclosure under sections 3(a)(4), 3(a)(10) or 3(a)(11), but are public information and must be disclosed.

Very truly yours,



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