



The Attorney General of Texas

January 18, 1982

MARK WHITE
Attorney General

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Mr. Raymon L. Bynum
Commissioner of Education
Texas Education Agency
201 East 11th Street
Austin, Texas 78701

Open Records Decision No. 305

Re: Availability under the
Open Records Act of bid
proposal filed with Texas
Education Agency

1607 Main St., Suite 1400
Dallas, TX. 75201
214/742-8944

Dear Mr. Bynum:

In June 1981, the Texas Education Agency advertised for proposals to furnish support services for the conduct of the 1982 and 1983 Texas Assessment of Basic Skills program. This assessment will measure the skills of public school students in certain grades. Of the proposals submitted, the one filed by Westinghouse Data Score Systems was judged the best, and that company received the contract.

4824 Alberta Ave., Suite 160
El Paso, TX. 79905
915/533-3484

You have received a request from CTB/McGraw-Hill for a copy of the Westinghouse proposal. This proposal contains six sections and an appendix. We understand that Westinghouse is willing to release everything in the proposal except for one portion of the appendix, namely, a test booklet stamped "proprietary." You ask whether you may withhold this booklet under sections 3(a)(4) and/or 3(a)(10) of the Open Records Act, article 6252-17a, V.T.C.S., which except from required disclosure:

1220 Dallas Ave., Suite 202
Houston, TX. 77002
713/650-0666

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

806 Broadway, Suite 312
Lubbock, TX. 79401
806/747-5238

...

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

4309 N. Tenth, Suite B
McAllen, TX. 78501
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205
512/225-4191

An Equal Opportunity/
Affirmative Action Employer

In a letter which you forwarded to us, Westinghouse advances the following argument:

Our booklets qualify as 'trade secrets' under both definitions accepted in Texas. [see below] Under the Restatement definition, they are patterns or devices used in our Test and Measurement business which have given and will continue to give an

advantage over our competitors. The test booklets are manufactured to secure physical integrity from the time the booklets leave the printing press until they are machine-trimmed prior to scoring, yet the contents are readily accessible to elementary school children taking the test. The secure, yet accessible design of the booklets, wholly new to the testing industry, was developed to meet the demands of the 1981-1983 TABS, yet will be used in many of our test and measurement activities.

Although firms in the industry have been trying to solve the simultaneous demands of security and accessibility, Westinghouse is the first to succeed. Westinghouse is now in the process of getting the design patented. Information on our unique process would be extremely valuable to the numerous firms in the Test and Measurement Industry, because security of test contents is basic to the testing process. Westinghouse has thus far expended over \$15,000 on development and is close to completion of necessary field testing of the design....

The focus and definition of 'trade secrets' in the Texas Penal Code is on efforts of the owner to keep secret the trade secret. Our Iowa City facility maintains extensive security measures because of the sensitivity of our business -- automatic data processing. We have professional security guard service twenty-four hours each day, seven days a week; television monitoring of all facility access; employee badge requirements; escort and badge requirements for all visitors; restricted access to sensitive areas; vault storage for critical information; remote controlled electrical door locks; and security bonds for employees in critical areas. Our Trafford facility has similar protective measures.

Westinghouse responded to the Texas Education Agency request for proposal by providing a sample of the test booklet with each copy of the proposal submitted.... The samples were prominently stamped PROPRIETARY. There are no other test booklets available outside Westinghouse. Following distribution of test booklets to hundreds of thousands of Texas school children in early 1982, the booklets may become available to outsiders in spite of Westinghouse security

efforts. However, the unique process used in making them should remain secret.

In your letter to this office, you state that:

...the process for manufacturing the sample booklet is a 'trade secret' and would be revealed if their competitors could inspect the sample blank booklet. The manner in which this booklet is assembled provides a unique and innovative solution to securing test questions, or other information, prior to use in documents which are to be processed by optical scanning equipment.

The test booklets that will be administered on a state-wide basis are secure materials. They are not available for consumption or review by anyone other than designated school district personnel responsible for administration. The booklets will be sent by Westinghouse directly to the designated persons in the districts who will return them directly for scoring. This procedure ensures the confidentiality of the test questions. As a result, the process for manufacturing the test booklets would remain secure.

Texas has adopted the definition of "trade secret" contained in the Restatement of Torts, section 757, comment (b) 1939. Hyde Corporation v. Huffines, 314 S.W.2d 763, 766 (Tex. 1958). See Open Records Decision Nos. 238 (1980); 184 (1978); 175 (1977). That definition provides:

A trade secret may consist of 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....

The Texas Penal Code, in making theft of a "trade secret" a third degree felony, defines it as:

...the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes.

Penal Code §31.05(a)(4).

The Restatement lists six factors to be considered in determining whether particular information is a trade secret:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

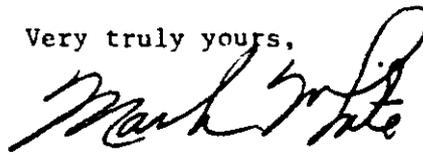
Restatement of Torts, comment b (1939).

It is unquestionably true that intangibles as well as tangibles may qualify as a "trade secret." In Brown v. Fowler, 316 S.W.2d 111, 114 (Tex. Civ. App. - Fort Worth 1958, writ ref'd n.r.e.), for example, the court stated that:

A trade secret may be a discovery rather than an invention, and may result from industry or application, or may be merely fortuitous. It may be any secret of a party important to his interest. The means by which the discovery is made may be obvious, and the experimentation leading from known factors to presently unknown results may be simple and lying in the public domain. But these facts do not destroy the value of the discovery and will not advantage a competitor who by unfair means obtains the knowledge without paying the price expended by the discoverer....

In this instance, Westinghouse is essentially seeking to protect the process it has developed to manufacture the test booklet in question. Based on the facts and arguments presented by you and by Westinghouse, we conclude that this process qualifies as a "trade secret" under the standards discussed above. Inasmuch as the release of this booklet would effect the release of this trade secret, you may withhold it from disclosure under section 3(a)(10).

Very truly yours,



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Assistant Attorney General

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