



The Attorney General of Texas

December 19, 1983

JIM MATTOX
Attorney General

Supreme Court Building
P. O. Box 12548
Austin, TX. 78711-2548
512/475-2501
Telex 910/874-1367
Telecopier 512/475-0266

Mr. Jerry S. McGuire
Panhandle Regional Planning
Commission
P. O. Box 9257
Amarillo, Texas 79105

Open Records Decision No. 402

Re: Whether audit proposals
are subject to disclosure
under the Open Records Act

714 Jackson, Suite 700
Dallas, TX. 75202-4506
214/742-8944

4824 Alberta Ave., Suite 160
El Paso, TX. 79905-2793
915/533-3484

1001 Texas, Suite 700
Houston, TX. 77002-3111
713/223-5886

806 Broadway, Suite 312
Lubbock, TX. 79401-3479
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501-1685
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205-2797
512/225-4191

An Equal Opportunity/
Affirmative Action Employer

Dear Mr. McGuire:

An accounting firm has asked the Panhandle Regional Planning Commission to furnish it with copies of proposals submitted by two other accounting firms which competed for a contract from the commission to perform audits for comprehensive employment retraining act programs. We have been informed that the commission awarded the contract in question on June 23, 1983. You have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires the commission to comply with this request. You claim that sections 3(a)(4) and 3(a)(10) except the requested information from required disclosure. These sections except, respectively:

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

. . . .

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

Section 3(a)(4) is inapplicable. This section may not be invoked when the bidding on a particular contract has been completed and the contract is in effect. See, e.g., Open Records Decision Nos. 319 (1982); 184 (1978); 75 (1975). That is the case in this instance.

With regard to your section 3(a)(10) claim, this office in Open Records Decision No. 184 concluded that a plan of operation filed with the Department of Human Resources by a transportation company was public information. The decision noted that the company

failed to demonstrate that it has undertaken
specific and concrete measures to protect the
confidentiality of its plan of operation. The
company's brief states merely that 'the
information is treated internally as confidential

and simply has not been made available to those outside the business.'

Similarly, in Open Records Decision No. 198 (1978), this office required the Texas Education Agency to disclose a technical proposal submitted by a company with which the agency contracted. The decision noted that the company had been invited

to summarize its objections to disclosure, with particular reference to 'the six criteria developed by the Restatement of Torts for determining whether particular information constitutes a trade secret.'

The company, however, chose

to rely upon the statement of its subcontractor, which asserts, without elaboration, that portions of its technical proposal 'are the result of years of independent effort and expense.' The subcontractor contends that 'substantial competitive harm' would result from disclosure and that 'no perceptible public interest' would be served thereby, but it does not refer to the extent to which the information is known, either to employees or to others, the ease or difficulty with which it might be acquired or duplicated, or to any prior efforts to preserve its confidentiality. Neither does the subcontractor furnish more than conclusory observations about the value of the information or the amount of effort or money expended in its development.

The factors to which this decision refers are among those used in determining whether information fits in the "trade secret" category. Essentially, both of these decisions emphasize the obvious fact that when agencies or companies fail to provide us with relevant information regarding these factors, we have no basis upon which to conclude that the "trade secret" exception applies. And with respect to the remainder of section 3(a)(10), which excepts from required disclosure "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision," we point to the following statement in Open Records Decision No. 319 (1982):

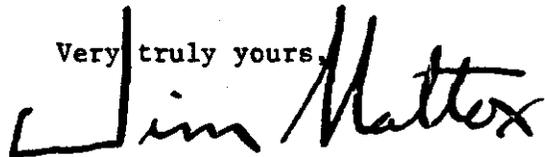
This office has in the past required a company claiming the 3(a)(10) exception for 'commercial and financial information' to demonstrate compliance with the criteria established by the Restatement of Torts in determining whether and in

what manner particular information constitutes a
'trade secret.'

We sent you a letter informing you that "no showing of efforts to keep this information confidential has been made to this office" and that you should inform the firms in question that "if they desire their audit proposals to be withheld from disclosure, they should make such a showing to this office immediately." (Emphasis in original). We received no reply. Subsequently, we sent a copy of the earlier letter and advised that "if we receive no response within ten days, [we will assume] that the companies in question do not intend to demonstrate to us" that they have attempted to keep the requested information confidential. Again, we received no reply.

Since we have been furnished no information which would enable us to conclude that the trade secrets exception is applicable in this instance, we can only conclude that the exception is not applicable. Compare Open Records Decision No. 217 (1978). Furthermore, we have been directed to no statute or judicial decision which would require us to conclude that this is "commercial or financial information [which is] confidential by statute or judicial decision." V.T.C.S. art. 6252-17a, §3(a)(10). We therefore conclude that the requested information must be made available in its entirety.

Very truly yours,



JIM MATTOX
Attorney General of Texas

TOM GREEN
First Assistant Attorney General

DAVID R. RICHARDS
Executive Assistant Attorney General

Prepared by Jon Bible
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Rick Gilpin, Chairman
Jon Bible
Colin Carl
Susan Garrison
Jim Moellinger
Nancy Sutton
Bruce Youngblood