



## The Attorney General of Texas

February 23, 1984

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Mr. Tony Koriath  
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Open Records Decision No. 406

Re: Whether the Texas Municipal  
League Workers' Compensation  
Joint Insurance Fund is subject  
to the Open Records Act

Dear Mr. Koriath:

You represent the Texas Municipal League Workers' Compensation Joint Insurance Fund [hereinafter the Fund]. You have asked whether the Fund is subject to the Open Records Act, article 6252-17a, V.T.C.S. If it is, you have asked whether it must release certain information.

You have provided the following background information:

[T]he Fund was organized in 1974 by self-insured political subdivision employer members under the Interlocal Cooperation Act, article 4413(32c), R.C.S., and section 4 of article 8309h, R.C.S., to provide workers' compensation benefits to political subdivision employees. The Fund is presently composed of six hundred and thirty-four (634) self-insured political subdivision employer members. The Fund has contracted with Texas Employers Insurance Association [hereinafter TEIA], a mutual company created under article 8308, R.C.S., to provide claims handling, risk control services and certain management services. The Fund has also contracted with Employers Casualty Company (ECC), for certain reinsurance coverage. TEIA and ECC are managed by the same people. Both contracts are scheduled to expire on October 1, 1983.

The Fund has just completed a lengthy competitive bidding process whereby Johnson & Higgins of Texas, Inc. (J & H), a duly licensed insurance broker, was selected by the Fund as the lowest and best bidder to provide the claims

handling, risk control, and management services to the Fund over the next three (3) years, beginning October 1, 1983. The United States Fire Insurance Company, a stock company admitted in Texas, was selected as the lowest and best bidder to provide the reinsurance coverage over the same time period.

Immediately after receiving notification of the results of the bids, TEIA moved to establish a competitive fund (see Exhibit A). At the meeting referred to in Exhibit A, TEIA stated that they would select the initial board of trustees of the new fund. Meanwhile, TEIA has requested certain documents used in the competitive bidding process, under article 6252-17a, R.C.S. (see Exhibit B).

Most political subdivisions have a fiscal year that begins on October 1, and most contracts including a contract that is competitively bid for workers' compensation insurance is being done at this time. If TEIA's new fund were to require a copy of the prices bid by the successful bidder, J & H, they would gain an unfair competitive advantage.

Therefore, we respectfully request that your office issue an opinion answering the following questions:

(1) Is the Fund a governmental body covered under article 6252-17a, R.C.S.?

(2) If the Fund is a governmental body, are the records requested by TEIA privileged under section 3(a)(4) of article 6252-17a, R.C.S.?

(3) I have been informed by J & H that the program management section and the management information system section of their bid is a trade secret and should be exempt under section 3(a)(10) and (11) of article 6252-17a, R.C.S.

(4) Since the actions of TEIA may obviously become the subject of litigation, not only with the Fund and J & H, but possibly with state or federal law enforcement agencies, should this information be treated as coming under section 3(a)(3) of article 6252-17a, R.C.S.?

The threshold question is whether the Fund is a "governmental body" within the meaning of the Open Records Act. Section 2(1)(A) of the act defines a "governmental body" as

any board, commission, department, committee, institution, agency, or office within the executive or legislative branch of the state government, or which is created by either the executive or legislative branch of the state government, and which is under the direction of one or more elected or appointed members . . . .

Section 2(a) of article 8309h, V.T.C.S., provides as follows:

All political subdivisions of this state shall become either self-insurers, provide insurance under workmen's compensation insurance contracts or policies, or enter into interlocal agreements with other political subdivisions providing for self-insurance, extending workmen's compensation benefits to their employees.

Section 4 of this article provides the following:

A joint fund, as herein provided for, may be established by the concurrence of any two or more political subdivisions. The fund may be operated under the rules, regulations, and bylaws as established by the political subdivisions which desire to participate therein. Each political subdivision shall be and is hereby empowered to pay into said fund its proportionate part as due and to contract for the fund, by and through its directors, to make the payments due hereunder to the employees of the contracting political subdivision.

Under sections 2(a) and 4 of article 8309h, the Fund is composed of, and operates "under the rules, regulations, and bylaws as established by" various political subdivisions. Given this fact, we conclude that the Fund qualifies as "any board, commission, department, committee, institution, agency, or office within the executive or legislative branch of the state government" within the meaning of section 2(1)(A) of the Open Records Act, and that it is also "under the direction of one or more elected or appointed members" within the meaning of that section. Accordingly, the Fund is a "governmental body" under the Open Records Act.

We now turn to the four exceptions to the Open Records Act that you claimed. Sections 3(a)(3), 3(a)(4), 3(a)(10), and 3(a)(11) of the act, upon which you rely, except the following materials from required public disclosure:

(3) information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection;

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

. . . . .

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

(11) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency . . . . .

Before dealing with these sections, we note that on November 28, 1983, we sent you a letter informing you that you had not provided us with sufficient information to enable us to then conclude that the exceptions you claimed were applicable. We advised that

[i]f you believe information substantiating your section 3(a)(3) or 3(a)(10) claims exists, please forward it to us within ten days. If you believe section 3(a)(11) applies, please indicate which portions of the requested materials are covered.

More than ten days have elapsed, and we have received no reply. We must therefore proceed on the basis of the information we presently have. See Open Records Decision No. 363 (1983).

Section 3(a)(3) is inapplicable in this instance. This section applies only when litigation concerning a specific matter is either pending or reasonably anticipated. Open Records Decision No. 328

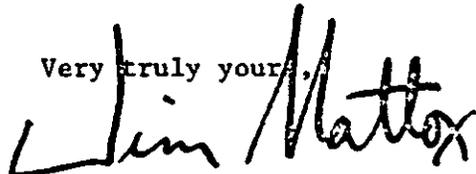
(1982). As we noted, you have provided no facts indicating that either of these conditions has been satisfied.

Section 3(a)(4) is also inapplicable. This section may not be invoked when the bidding on a particular contract has been completed and the contract is in effect. Open Records Decision Nos. 319 (1982); 184 (1978). Your facts indicate that this is the case here.

Section 3(a)(10) excepts from required disclosure both "trade secrets" and "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office has frequently held that a company relying upon the "trade secrets" portion of this exception must demonstrate that it has complied with the trade secrets criteria established by the Restatement of Torts. See, e.g. Open Records Decision Nos. 306 (1982); 255 (1980). No such demonstration has been made in this instance. This office has also held that the "commercial or financial information" portion of this section excepts information from disclosure "if disclosure would likely impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained." Open Records Decision No. 401 (1983); see also Open Records Decision No. 309 (1982). Even assuming that the requested information constitutes "commercial or financial information," however, we have been given no facts indicating that either of these results would likely occur if this information is released. For these reasons, we conclude that section 3(a)(10) is inapplicable in this instance.

Section 3(a)(11) excepts information which could only be obtained by discovery. Open Records Decision No. 251 (1980). You have, however, provided us with no information to support its application. Section 3(a)(11) also excepts advice, opinion and recommendations. See, e.g., Open Records Decision No. 335 (1982). In our opinion, only a very small portion of the handwritten comments on the materials you provided for inspection are within this category. We have marked those portions that may be withheld. The remainder of the requested materials must be released.

Very truly yours,



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