



**THE ATTORNEY GENERAL  
OF TEXAS**

December 2, 1988

**JIM MATTOX  
ATTORNEY GENERAL**

The Honorable Jack M. Rains    Open Records Decision No. 514  
Secretary of State  
P.O. Box 12697  
Austin, Texas 78711

Re: Whether a copy of the state's contract with West Publishing Company regarding the Texas Administrative Code is protected from disclosure under sections 3(a)(4) or 3(a)(10) of the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1445)

Dear Secretary Rains:

Article 6252-13b, V.T.C.S., requires that the Secretary of State publish the Texas Administrative Code. To carry out this responsibility, the Secretary of State entered into a contract authorizing West Publishing Company to publish the official Texas Administrative Code. The Secretary of State received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for a copy of this contract with West Publishing Company.

The contract itself, in section 9.1, purports to make confidential "any information or matter that . . . constitutes or concerns the terms and conditions of this Agreement." The same section also provides, however, that disclosure is not prohibited when "public authority (including the Texas Open Records Act, Article 6252-17a, V.A.C.S.)" requires disclosure. We note that a governmental body cannot close information simply by entering into a contract provision that prohibits disclosure. Attorney General Opinion JM-672 (1987); Open Records Decision No. 232 (1979); see Industrial Foundation of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977); cf. Open Records Decision No. 292 (1981) (existence of confidentiality agreement may affect applicability of section 3(a)(10)). A governmental body cannot create new exceptions. The Open Records Act requires the release of all information held by governmental bodies unless one of

the act's specific exceptions protects the information from required disclosure. Attorney General Opinion JM-672 (1987). You claim that sections 3(a)(4) and 3(a)(10) protect the contract at issue from disclosure.

Section 3(a)(4) excepts from required disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) protects the government's purchasing interests by preventing competitors or bidders from gaining unfair advantage over other competitors or bidders. This exception applies only upon a showing of some specific actual or potential harm in a particular competitive situation. Open Records Decision Nos. 463 (1987); 331, 309 (1982). A general allegation that a competitor might gain an unspecified advantage from disclosure does not trigger section 3(a)(4). See Open Records Decision Nos. 463 (1987); 75 (1975). For this reason, section 3(a)(4) ordinarily does not protect bids from disclosure once bidding is over and the contract has been awarded. See, e.g., Open Records Decision Nos. 402 (1983); 319 (1982); 255 (1980); 184 (1978). In Open Records Decision No. 232 (1979), the attorney general considered the applicability of section 3(a)(4) to a proposal for a construction contract awarded by the Texas Municipal Power Agency. Even if the agency solicited new bids on a similar project at a later date, because of the nature of the project, both the passage of time and changed circumstances would negate the commercial value of the specific cost proposals at issue. Open Records Decision No. 232. Similar considerations apply to the contract at issue here.

Additionally, the contract at issue here does not contain a detailed list of pricing proposals; the references to pricing are limited to discounts or free services available to the Secretary of State. Section 3(a)(4) does not protect the Secretary of State's contract with West Publishing Company. It is conceivable, however, that a state contract which section 3(a)(4) does not protect may contain information that is confidential under section 3(a)(10). See Open Records Decision Nos. 319, 309 (1982).

Section 3(a)(10) protects from required disclosure:

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

Section 3(a)(10) parallels exemption 4 of the Federal Freedom of Information Act (FOIA), 5 U.S.C., section

552(b)(4), and protects third party interests protected by statute or by judicial decision. Open Records Decision Nos. 309 (1982); 107 (1975). Section 3(a)(10) consists of two parts: 1) trade secrets and 2) commercial or financial information. Different tests apply under each part.

Court decisions protect "trade secrets" as defined in the restatement of Torts:

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.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958).

Six factors determine whether particular information generally constitutes a trade secret:

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

Restatement of Torts, § 757, Comment b (1939).

You do not show how the Secretary of State's contract with West Publishing Company constitutes a trade secret. Nor is it clear whether the general terms of a contract with a state agency could ever constitute a trade secret. Additionally, letters from the entities requesting copies of the contract show that it is strikingly similar to previous

contracts entered into with other publishing companies. These contracts have been released routinely to the public. Consequently, much of the information is known in the industry.

Section 3(a)(10) also protects certain commercial or financial information that need not constitute a trade secret. The commercial/financial information test is as follows:

[a] commercial 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. (Emphasis added.)

Open Records Decision No. 494 (1988) (quoting National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974)).

You suggest that releasing a copy of the contract will impair the Secretary of State's ability to find someone willing to publish the code. This is not the equivalent of impairing the Secretary of State's ability to obtain the information at issue, the contract. In Open Records Decision No. 292 (1981), the attorney general upheld a claim by the Lower Colorado River Authority that release of a copy of a contract would impair the Authority's ability to obtain the copy of the contract and that section 3(a)(10) therefore protected the contract. That contract, however, was between an electric cooperative and an oil company. The Authority was not a party to the contract; the Authority simply contemplated joining the project. The case at hand involves a contract created in part by the government and necessarily held by the government; it is not subject to the same protection. See Open Records Decision Nos. 306 (1982); 184 (1978).

The second part of the commercial/financial test under section 3(a)(10) is whether release of the information is likely to cause substantial competitive harm to the person from whom the information was obtained. Your letter states that the contract:

contains a description of procedures that the company has expended considerable resources

to develop in order to produce the code, as well as information relating to marketing the code and [to the] pricing policy used by the company for various customers.

The contract, however, does not contain specific procedures for producing the code, nor does it detail the company's marketing strategy. Although the contract provides that certain services will be provided free or at a discount rate to the Secretary of State and others, it does not detail West's pricing policy. The contract is simply a general description of West's agreement with the Secretary of State. You do not show how release of this information could cause substantial competitive harm to West Publishing Company.

You note that the "confidentiality of the data base described in this contract is specifically exempted from disclosure under section 5A of article 6252-13b, V.T.C.S." The contract does not, however, reveal any part of the data base, nor has the data base been requested. The availability of the data base is not at issue here.

Finally, section 6(3) of the Open Records Act expressly describes as public information:

information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law.

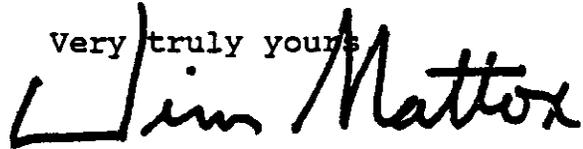
The list of information expressly deemed public in section 6 does not override the act's exceptions to disclosure. Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 185 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision Nos. 280 (1981); 233 (1980). On the other hand, the legislature did not intend the section 6 enumeration to be totally meaningless. In this case, it indicates that the general terms of a contract may not properly be withheld under the Open Records Act. See Open Records Decision No. 75 (1975). At the least, it heightens a governmental body's burden under the act of showing which exceptions apply and why. See id; see also Open Records Decision Nos. 395 (1983); 208 (1978).

#### S U M M A R Y

The Secretary of State's contract with West Publishing Company to publish the

official Texas Administrative Code is not protected from required public disclosure by section 3(a)(4) or section 3(a)(10) of the Texas Open Records Act, article 6252-17a, V.T.C.S.

Very truly yours



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