



**THE ATTORNEY GENERAL
OF TEXAS**

February 15, 1990

**JIM MATTOX
ATTORNEY GENERAL**

Ms. Iris J. Jones
Acting City Attorney
City of Austin
P. O. Box 1088
Austin, Texas 78767

Open Records Decision No. 541

Re: Whether a railroad coal transportation agreement between a city, a river authority, and several railroad companies and subject to federal regulations under the "Staggers Act" is public under the Open Records Act (RQ-1656)

Dear Ms. Jones:

The City of Austin received a written request from the City Public Service of San Antonio for a copy of a railroad coal transportation agreement executed by the city and the Lower Colorado River Authority (LCRA) with Western Railroad Properties, Incorporated (WRPI), the Union Pacific Railroad Company (UP), and the Missouri Pacific Railroad Company (MP). The city contends that the terms of the contract are excepted from required public disclosure by sections 3(a)(1), 3(a)(4), and 3(a)(10) of the Open Records Act.

As a preliminary matter, it should be noted that section 6 of the Open Records Act expressly provides that certain categories of information are public information, including

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.

V.T.C.S. art. 6252-17a, § 6(3). Section 6(3) represents a broad public policy of full disclosure concerning a governmental body's debtors and creditors. See Open Records Decision Nos. 385 (1983); 151 (1977). This office has construed this provision to mean that the general terms of a contract may not properly be withheld under the Open Records Act. Open Records Decision No. 514 (1988). It should also be noted that section 6 is prefaced with the phrase

"[w]ithout limiting the meaning of other sections of this Act." The effect of this language is to preserve a governmental body's ability to invoke an exception to disclosure under section 3. The burden of the governmental body to show which exceptions apply and why they apply is heightened, however. Id.

Section 3(a)(1) and the Staggers Rail Act of 1980

Section 3(a)(1) of the Open Records Act excepts from required public disclosure

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

The city argues that the terms of the transportation agreement are made confidential by section 208 of the Staggers Rail Act of 1980, 49 U.S.C. § 10713, and by implementing regulations of the Interstate Commerce Commission. See 49 C.F.R. Part 1313 (1988).

The Staggers Rail Act of 1980 was enacted with the purpose of revitalizing the nation's railroad industry by substantially deregulating the rate-setting process on both the federal and state level. See Burlington N. R.R. v. Public Util. Comm'n of Texas, 812 F.2d 231, 232 (5th Cir. 1987) (hereinafter cited as Burlington); Texas v. United States, 730 F.2d 339, 344 (5th Cir.), cert. denied, 469 U.S. 892 (1984). State regulators may exercise jurisdiction over intrastate transportation provided by a rail carrier only in accordance with the provisions of subtitle IV of Title 49 of the United States Code. 49 U.S.C. § 11501(b)(1). A state regulator may be "certified" by the ICC to exercise jurisdiction if it submits to the ICC standards and procedures that are in accordance with standards and procedures applicable to the ICC. Id. § 11501(b)(3)(A). Following certification, the ICC retains jurisdiction to review decisions of state regulators for compliance with the provisions of subtitle IV. Id. § 11501(c). The Staggers Act has thus been described as being "in nature a preemptive statute." Texas v. United States, 730 F.2d at 347.

Section 208 of the Staggers Act authorizes rail carriers subject to the jurisdiction of the ICC to enter into contracts to provide rail transportation services, a practice that until that time had been prohibited. Burlington, supra, at 233. It requires such contracts to be filed with the ICC along with a summary of the contract that

discloses only information designated nonconfidential by the ICC. 49 U.S.C. § 10713(b)(1). The contract filed under section 208 is considered confidential unless labeled "nonconfidential" and is not available to persons other than the parties to the contract or the persons authorized by federal rule or ICC decision. 49 C.F.R. § 1313.8 (1988). The contract summary is available for inspection. Id. The city contends that these confidentiality requirements compel the conclusion that the contract under consideration here is excepted by section 3(a)(1) of the Open Records Act as information deemed confidential by statute. We disagree.

Section 3(a)(1) was designed in part to account for and incorporate statutes that designate as confidential information that otherwise would be deemed public information under the act. Federal law may make information in the custody of governmental bodies of this state confidential for the purposes of section 3(a)(1). See, e.g., Open Records Decision No. 403 (1983). But for information to be excepted from disclosure under this aspect of section 3(a)(1), confidentiality must be expressly provided in the relevant statute and cannot be assigned by implication. See, e.g., Open Records Decision No. 465 (1987) (statute allowing public access to certain information from driver's license files does not impliedly make all other information in files confidential). With this in mind, it is worth noting that the federal courts have determined that the Staggers Act does not mandate confidentiality of rail contracts in every forum or for every purpose.

The court in Burlington rejected the claim that the Staggers Act preempted the exercise of any state authority that results in the public disclosure of rail contracts executed pursuant to section 208. It held that state authority to regulate railroads is indeed preempted by the Staggers Act, but the act does not reach other regulatory actions that indirectly affect railroads, in that case regulation of electric utilities by the Public Utility Commission. 812 F.2d at 234-236. The court detected no Congressional intent to remove all barriers to competition that may exist because of imperfections in the marketplace or by virtue of the regulation of entities with which railroads do business, and it recognized the potential public interest in disclosing the terms of rail contracts outside the context of rail regulation. Thus, parties to rail contracts cannot rely on the Staggers Act to prevent public disclosure of such contracts in circumstances other than direct regulation of railroads; they must look elsewhere for

protection. Id. at 236 n. 2 (public disclosure may be prevented by trade secrets or competitive practices laws).

The public interest in knowing the details of contracts executed by a governmental body of this state involving the receipt or expenditure of public funds is indisputable, finding clear expression in section 6(3) of the Open Records Act. Parties doing business with a governmental body are presumed to know the legal restraints that affect the ability of the governmental body to conduct business with complete freedom, including those imposed by the Open Records Act. Thus, the public policy expressed in the Open Records Act cannot be bargained away, and the obligations of a governmental body under the act cannot be compromised simply by its decision to enter into a contract. See Attorney General Opinion JM-672 (1987); Open Records Decision No. 514 (1988). Accordingly, because the Staggers Act does not bar public disclosure of rail contracts outside the context of rail regulation, we conclude that the city's coal transportation agreement is not excepted from disclosure by section 3(a)(1) of the Open Records Act. Accord Freedom Newspapers v. Denver & Rio Grande W. R.R., 731 P.2d 740 (Colo. App. 1986) (Staggers Act does not prohibit disclosure of City of Colorado Springs' coal transportation contract under Colorado Open Records Act); Letter from Robert S. Burk, General Counsel, Interstate Commerce Commission, to Rick Gilpin, Chairman, Opinion Committee, Texas Attorney General's Office (March 16, 1989) (stating that Staggers Act does not preempt state open records laws).

Section 3(a)(4) and the protection of competitive interests

The city also invokes section 3(a)(4) of the Open Records Act as an exception to public disclosure of the agreement. Section 3(a)(4) protects "information which, if released, would give advantage to competitors or bidders." The principal purpose of this exception is to protect a governmental body's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. It requires a showing of some actual or specific competitive harm in a particular competitive situation. A general allegation or remote possibility that an unknown competitor will gain an unfair advantage will not suffice. Open Records Decision No. 514 (1988).

Section 3(a)(4) is generally invoked to protect the integrity of the competitive bidding process and to preserve

the advantages it offers a governmental body. Once the competitive bidding process has ceased and a contract has been awarded, section 3(a)(4) will not except from disclosure either information submitted with a bid or the contract itself. See Open Records Decision Nos. 514 (1988); 319, 306 (1982). Section 3(a)(10) of the act, discussed below, may protect such information, however. Id.

The city has in this instance failed to demonstrate how disclosure of the terms of the coal transportation agreement will harm the city's purchasing interests. Because the agreement apparently was executed without disclosure of any of its essential terms, there appears to be no basis for invoking the protection of section 3(a)(4). It has been argued, however, that the competitive interests of the railroads warrant application of section 3(a)(4) to the entire contract.

In separate briefs, the railroads that are parties to the coal transportation agreement with the city and their chief competitor for this particular contract (Burlington Northern Railroad Company) agree that disclosure of the contract will severely damage the competitive position of UP, WRPI, and MP vis-a-vis Burlington Northern on similar contracts. Section 3(a)(4) may protect information submitted by a successful bidder if public disclosure will allow competitors to accurately estimate and thereby undercut future bids. Open Records Decision No. 309 (1982) (quoting Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)). An examination of Open Records Decision No. 309, however, suggests that this principle will apply when the governmental body solicits bids for the same or similar goods or services on a recurring basis. There, the bidding was for a construction contract awarded by the Department of Highways and Public Transportation. The focus of section 3(a)(4) was redirected to the interests of the successful bidder, but the context was unchanged -- i.e., a private entity conducting a particular business transaction with a single governmental body. There was no suggestion that section 3(a)(4) was designed to protect the competitive interests of the successful bidder in the broader marketplace. Here, on the other hand, the duration of the contract and the unique services provided under the contract make it highly unlikely that the city will have occasion to solicit coal transportation services again in the near future. These facts may not reduce the risks to the broader competitive interests of the affected railroads, but these are interests that section 3(a)(4) does not address. See

Open Records Decision No. 463 (1987) (section 3(a)(4) applies primarily to competition for government contracts).

Section 3(a)(10) protection of private commercial interests

Section 3(a)(10) may offer broader protection of the general business interests of an entity doing business with a governmental body. It excepts from public 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. 5 U.S.C. § 552(b)(4). It comprises two separate categories of information -- (1) trade secrets and (2) commercial and financial information -- requiring the application of different criteria. Section 3(a)(10) was designed to preserve third party interests protected by statute or judicial decision.

Trade secrets

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which provides that a trade secret is

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 will be accorded trade secret status:

- 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.

See Restatement of Torts, § 757, comment b (1939). To secure trade secret protection under section 3(a)(10), the governmental body must submit information that explains why the requested information is a trade secret.

The city has failed to provide such information. The railroads that are parties to the coal transportation agreement have, however, submitted information explaining their reasons for claiming trade secret protection for the entire agreement, a document that comprises 27 sections and three exhibits covering 80 pages. Affidavits of two officials of UP and Chicago and North Western Transportation Company (parent corporation of WRPI) have been offered in support of these claims. Because this office cannot ultimately resolve questions of fact such as this in the course of rendering an open records decision, it has been the practice of this office to rely upon the representations of a governmental body, or those of the business entity that are endorsed by the governmental body, concerning compliance with the six trade secret criteria. See, e.g., Open Records Decision No. 426 (1985).

We should first note that this office has in the past been reluctant to find that an entire contract constitutes a trade secret for purposes of section 3(a)(10). Open Records Decision No. 184 (1978) concluded that a portion of a contract awarded by a state agency following competitive bidding was not excepted by section 3(a)(10) as a trade secret. The information sought by the requestor included a description of services and implementing procedures, a listing of program goals, objectives, and performance indicators, and a delineation of cost estimates, reporting, and evaluation. The attorney general stated that neither the governmental body nor the successful bidder had demonstrated the specific measures taken to protect the secrecy of the information and noted that he was "not aware of any court decision which has held this kind of information to be included within the meaning of 'trade secret.'" Id. at 2.

In Open Records Decision No. 514, we observed that it was not clear "whether the general terms of a contract with a state agency could ever constitute a trade secret." In that decision the requestors of a copy of a contract executed by the secretary of state with a publishing company supplied information disclosing that the contract in question bore striking similarities to other publishing contracts that had routinely been released to the public. Open Records Decision No. 514 also noted the impact of section 6(3) of the Open Records Act on the burden to establish the applicability of an exception to disclosure. In light of this decision, we are reluctant to conclude that every term of a contract executed with a governmental body is to be considered a trade secret unless it is specifically shown that all provisions of the contract are entitled to be treated as such.

The affidavits submitted by the railroads provide detailed explanations of the measures taken to protect the secrecy of their contracts:

[Union Pacific Railroad Company] carefully guards the confidentiality of its rail transportation contracts, especially its coal contracts. UP typically includes in both its bid offerings and its final contract documents confidentiality clauses which either forbid disclosure or permit it only in narrowly defined circumstances. UP often attempts to obtain advance notice from a shipper in the event the contract is required to be produced in the course of litigation so that we can take steps to prevent disclosure or to obtain a protective order. Contract files are kept secure and access to UP's contracts is limited to those marketing, legal, operating and accounting personnel who need to see select sections of the agreement in the course of their work. Further, contract counterparts filed with the Interstate Commerce Commission are kept confidential.

Affidavit of Norman R. Linse, General Director - Energy Development, Union Pacific Railroad Co., para. 13 (1989) (on file with the Attorney General's Office) (hereinafter Linse affidavit). The affidavits also set forth the amounts of revenue attributable to the railroad's coal transportation business in 1988. Linse affidavit, para. 7 (\$678 million); Affidavit of David G. Weishaar, Vice President, Sales &

Marketing - Energy, Chicago and North Western Railroad Company (CNW), para. 14 (1988) (on file with the Attorney General's Office) (hereinafter Weishaar affidavit) (\$200 million). The affidavits also explain that the particular terms of coal transportation contracts reflect many years of research, experience, and expense. Linse affidavit, para. 9; Weishaar affidavit, para. 11. These statements, in our opinion, adequately show compliance with five of the six trade secret criteria; however, we do not believe the affidavits sufficiently reflect the fourth criterion -- the value of the information to the company and its competitors -- with respect to every term of the contract. At best, we think these affidavits show that only four categories of information contained in the contract clearly warrant protection from public disclosure as a trade secret.

The affidavits assert that the primary advantage to be gained by competitors from public disclosure of the terms of the agreement with the City of Austin is the ability to match or undercut UP/CNW bids in the future. Linse affidavit, para. 12; Weishaar affidavit, para. 12. Although the railroads contend the entire contract is a trade secret, one affidavit describes what the affiant regards as the most competitively sensitive terms of the contract:

(1) TERM

This section contains the duration of the agreement and the parties' options for extension. Although the term of the agreement (10 years) is publicly known, no other information regarding the term has been released.

(2) BASE RATES

This section states the base rates which LCRA/Austin pays UP/CNW for transportation services during the life of the contract.

(3) ADJUSTMENTS TO RATES AND CHARGES

This section sets forth the formula for escalation of the base rates and includes exhibits.

(4) REVIEW OF RATES

This section provides a methodology for revising the rates if, over time, they become overstated or understated.

(5) VOLUME COMMITMENT

This section states LCRA/Austin's volume requirements and the liquidated damages to be paid if the requirements are not met.

(6) RAILROADS' TRANSPORTATION OBLIGATIONS

This section states the service standards the railroads must meet as well as the consequences if such standards are not met.

(7) EQUIPMENT COMMITMENTS

This section outlines conditions for the supply of equipment, including equipment charges.

(8) TRAIN SIZE

Involves maximum and minimum train sizes.

(9) LOADING AND UNLOADING OF TRAINS;
WEIGHING OF TRAINS; ADDITIONAL SERVICE

Outlines terms for train loading, unloading and weighing and special handling of cars, trains and crews.

(10) BILLING PROCEDURES

Outlines billing and terms.

(11) FORCE MAJEURE

Outlines the terms under which the parties' obligations may be excused due to forces beyond their control.

(12) MISCELLANEOUS

Contains a mix of miscellaneous provisions relating to the agreement.

Linse affidavit, para. 8.

The affidavit thus demonstrates that not every term of the agreement can be expected to have special business value to a competitor. This notion is reinforced in subsequent paragraphs that supply concrete explanations of the commercial value of only certain kinds of information contained in the aforementioned sections:

9. UP's rates and rate adjustment provisions, like all other contract provisions, are not something that were put together quickly or can easily be duplicated. The adjustment provisions are a product of many years of experience, hard work and refinement by UP's marketing, sales, finance and cost personnel. The adjustment provisions are an integral part of our rate proposals and an important basis upon which UP competes. Providing a competitor access to the rate adjustment provisions would be akin to providing it with the sum total of years of UP's experience and research on rate adjustments.

10. Other provisions of coal transportation agreements provide additional value to the total package and are also highly confidential. The volume requirement is the coal tonnage which the customer guarantees it will ship in return for the rate given by the railroad. If a utility can commit to a higher minimum volume (in effect, ship coal in larger quantities over time) the railroad is normally better able to provide a lower rate than a shipper who can guarantee only smaller volumes.

11. Another important factor in many agreements are the service features. Since some of our customers use their own rail cars, they seek contractual assurances that cycle times from the mine to the plant and

back to the mine will be as efficient and timely as possible.

12. Once a competitor obtains information as to rates, adjustment provisions, minimum volume provisions and service standards or other confidential provisions of the contract (such as those listed [above]), it may use this insight to determine quite closely the methodology and structure of the railroads' contract pricing and gain an advantage in bidding for subsequent coal transportation contracts. Such a situation would seriously and irreparably undermine the railroads' ability to compete for future coal transportation.

Id. paras. 9-12. Thus, while the affidavits make a persuasive case for application of section 3(a)(10) trade secret protection, their profound deficiency is that they supply the crucial link -- that is, precise explanations of the relative commercial value of particular pieces of information -- for only four categories of information contained in the agreement. Accordingly, we conclude that only those sections of the agreement prescribing base rates, rate adjustment provisions, minimum volume requirements, and service features¹ are excepted from disclosure. These sections appear in the contract as sections 4, 5, 6, 7, 8, 9, 10, 11 and Exhibits A, B, and C. No other sections of the agreement may, on the basis of the affidavits and arguments presented to this office, be classified as trade secrets for the purposes of section 3(a)(10) of the Open Records Act.

Our attention has been directed to the recent case Burlington N. R.R. v. Omaha Public Power Dist., 703 F.Supp.

1. The affidavits do not identify which sections of the agreement describing the railroads' service obligations to the City of Austin are of special commercial value to competitors. We think it is fair to assume that these provisions not only reflect the needs of the city and the capabilities of the railroads, but also the negotiation and compromise between the parties. Thus, we think most, if not all, of these provisions would be of significant commercial value to competitors for similar contracts.

826 (D. Neb. 1988), aff'd 888 F.2d 1228 (8th Cir. 1989), in which the court held that a coal transportation contract executed by a public utility was a trade secret under the Nebraska Public Records Act. The district court employed the Restatement test adopted by the Texas Supreme Court in concluding that the contract was a trade secret. The case provides useful insight into the broader commercial significance of coal transportation contracts, but we are also mindful of the fact that the decision was based on specific evidence supplied to the court demonstrating the contract under scrutiny was a trade secret. Our decision likewise must be based on the arguments and representations made to this office with respect to the particular contract in question. That this question must ultimately be answered in light of the facts of each case is demonstrated by a case from another jurisdiction in which the court rejected a claim that a coal transportation contract was covered by an exception to the state's public records law for trade secrets and commercial and financial information. See Freedom Newspapers, supra.

Because the city and railroads claim that the entire agreement is excepted from disclosure, we will now consider whether any of the remaining sections of the agreement fall within the second category of information excepted by section 3(a)(10), commercial and financial information.

Commercial and financial information

Section 3(a)(10) excepts commercial and financial information if disclosure is likely to either (1) impair the governmental body's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. Open Records Decision No. 496 (1988). The city has not explained how either of these tests is satisfied in this instance. The railroads, meanwhile, argue that the first test is met because the ability of other governmental bodies to obtain competitive bids for coal transportation services will be impaired. The disclosure of the terms of this agreement, it is argued, will have a chilling effect on the inducements the railroads will offer other public utilities in the future. See Linse affidavit, para. 14; Weishaar affidavit, para. 13. A similar argument was rejected in Open Records Decision No. 514. There we determined that section 3(a)(10) simply did not address a governmental body's interest in letting a particular contract at some unspecified time in the future. Similarly, section 3(a)(10) was not designed to protect a governmental body's

interest in obtaining favorable contract terms, but its ability to obtain information from private entities that may have no legal obligation to provide such information. See generally Open Records Decision Nos. 504, 494 (1988).

The second test for commercial and financial information is whether disclosure will cause substantial competitive harm to the person from whom the information was obtained. Our discussion of the city's trade secret claim noted those sections of the contract that the railroads claimed were the most competitively sensitive and those sections that we believe were demonstrated to be in compliance with the trade secret criteria. Clearly, the sections of the agreement excepted as trade secrets are also protected by the second test for commercial and financial information. But because neither the city nor the railroads have explained how disclosure of specific provisions of the agreement will cause substantial competitive harm to the railroads, we conclude that these provisions are not protected from disclosure by section 3(a)(10).

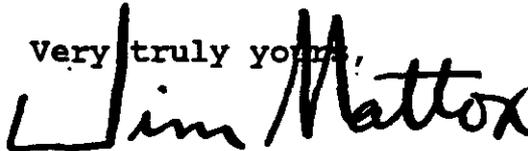
To summarize, we conclude that the Staggers Rail Act of 1980, 49 U.S.C. § 10713, does not prohibit public disclosure of rail contracts outside the context of rail regulation. The coal transportation agreement between the City of Austin, the LCRA, and the railroads therefore is not excepted by section 3(a)(1) of the Open Records Act. The terms of the agreement are not excepted from disclosure by section 3(a)(4) or by section 3(a)(10) as commercial or financial information. Portions of the agreement prescribing base rates and adjustments to rates, minimum volume requirements, and service features may be withheld pursuant to section 3(a)(10) as trade secrets.

S U M M A R Y

The Staggers Rail Act of 1980, 49 U.S.C. § 10713, does not make information confidential for purposes of section 3(a)(1) of the Open Records Act, V.T.C.S. article 6252-17a. A coal transportation agreement executed by the City of Austin and the Lower Colorado River Authority with several railroad companies is not excepted from public disclosure by sections 3(a)(1), 3(a)(4), or 3(a)(10) as commercial or financial information. Portions of the agreement prescribing base rates, adjustments to rates, minimum volume requirements, and service features may

be withheld pursuant to section 3(a)(10) as
trade secrets.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, prominent "J" and "M".

J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RENEA HICKS
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

Prepared by Steve Aragon
Assistant Attorney General