



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

April 20, 1990

Mr. William E. Roberts
Chief Appraiser
Tarrant Appraisal District
2315 Gravel Road
Fort Worth, Texas 76118

Open Records Decision No. 550
Re: Whether a survey of income producing properties is excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1955)

Dear Mr. Roberts:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Specifically, the Tarrant Appraisal District has received a request, on behalf of a property owner, for a "complete copy" of a survey of income producing properties in Tarrant County.

You advise that the survey was conducted by M/PF Research, Inc., a market research firm, and that the survey is a copyrighted publication of that firm. You further advise that the appraisal district has, since 1982, paid for subscriptions to certain of the research firm's reports and promised the firm that it will not open the reports for public inspection.

The district summarizes its legal position as follows:
(1) the reports that the district purchased from the research firm are entirely excepted from public disclosure by section 3(a)(10) of the Open Records Act; (2) Property Tax Code section 25.195 gives the property owner a special right of access only to those parts of the survey that the district actually used in appraising the particular properties of the property owner; (3) this right of access is subject to the criminal penalty provisions of Property Tax Code section 22.27(c); (4) the remainder of the survey is excepted from public disclosure by section 3(a)(10) of the Open Records Act; and (5) the district has satisfied the requirements of the Open Records Act by giving the property owner all of the information he is entitled to receive. You have provided for our inspection four exhibits organized by tab number.

Tab (1) consists of four pages that you have provided to the property owner pursuant to Property Tax Code section 25.195. These four pages include a total of seven lines of information. Each line consists of two or three words, presumably identifying a property, followed by a series of numbers and spaces. No explanation is provided with respect to these numbers. At the end of each line one or two words appear such as "full service" or "negotiable." No further explanation of any kind appears on these pages.

Tab (2) consists of the full pages from which the information provided to the property owner was excerpted. These pages include page headings and column headings which serve to explain to some extent the information provided to the property owner.

Tab (3) consists of representative samples of computer printouts that the research firm provides to the district. You advise as follows:

These documents are representative samples of the voluminous computer printouts that M/PF provides to the District. I chose these documents as samples because they correspond to items on the documents at Tab 1 and Tab 2. Comparison of the document at Tab 2 with these documents demonstrates how the District abbreviates and organizes the copyrighted and confidential information that M/PF provides.

M/PF bases its narrative reports on the information in computer printouts like these. The computer printouts, unlike the narrative reports, are not for sale. The District is able to obtain the computer printouts only because of its confidentiality agreement with M/PF.

Property Profiles, Inc., identified in the copyright notation on these documents, is a subsidiary of M/PF Research, Inc.

Tab (4) consists of the complete text of the research firm's 1989 report on office buildings in the Dallas and Fort Worth area. The report consists of narrative, statistics, maps, charts, and graphs. It discusses general trends rather than specific properties.

Section 3(a)(10) of the Open Records Act excepts from public disclosure "trade secrets and commercial or financial

information obtained from a person and privileged or confidential by statute or judicial decision." The two categories of information excepted by 3(a)(10), "trade secrets" and "commercial or financial information," must be considered separately. Open Records Decision No. 496 (1988).

The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757. Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). That definition provides in part:

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. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article.

We have previously determined that certain computer programs, formulas, and other methodologies used by an appraisal firm pursuant to a contract with an appraisal district to determine property values satisfy the Restatement criteria and are protected from public disclosure as trade secrets. Open Records Decision No. 426 (1985); see also Open Records Decision No. 175 (1977). However, you seem to be asserting that the research firm's product itself, rather than the process or method used to create that product, is a trade secret. You state:

[I]t is the compilation and manipulation of data into a usable and marketable form that M/PF seeks to protect. Accordingly, M/PF does not want people to get copies of its reports without paying for them.

We conclude that the information in question does not meet the Restatement definition of "trade secret." As the Restatement of Torts, section 757, defining "trade secret," points out, "[m]atters which are completely disclosed by the

goods which one markets cannot be his secret." Restatement of Torts § 757 comment b (1939).

With respect to the second category of information excepted under section 3(a)(10) you state:

In addition to 'trade secrets,' § 3(a)(10) also excepts commercial or financial information if disclosure of the information (1) is likely 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. As discussed previously, if the Appraisal District were required to disclose these surveys pursuant to the Open Records Act, it would be impossible to obtain future reports from any market research consulting firm. M/PF, Inc. does extensive analysis and research to comprise their report and if the Appraisal District gives the reports away, freely to the public, M/PF will no longer sell them to the Appraisal District. In addition, if these reports were made available to the public, it could substantially affect M/PF's business in that competing research firms would have their information readily available; plus anyone interested in the real estate market could use these reports to their own advantage. Therefore, it is imperative that these reports be deemed exempt under the Open Records Act to enable [the district] to continue the best possible valuations of property within their taxing district.

Section 3(a)(10) is patterned after a similar exception in the Freedom of Information Act. 5 U.S.C. section 552(b)(4). In interpreting section 3(a)(10) we have taken guidance from federal authorities interpreting section 552(b)(4). See, e.g., Open Records Decision No. 494 (1988). The federal test for the applicability of section 552(b)(4) with respect to information that is not a trade secret requires the information to be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). In raising the exemption for commercial or financial information, you correctly state the test for

confidentiality with regard to such information. Id. at 770. However, before the test for confidentiality is applied, it is first necessary to determine if the information in question is "commercial or financial information obtained from a person" within the meaning of the statute. Continental Oil Co. v. Federal Power Comm'n, 519 F.2d 31 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976).

A review of cases construing section 552(b)(4) reveals that the type of information to which the courts apply the protection of this provision is information that relates to the commercial or financial condition of the person, i.e. the informant supplying the information. For example, in a recent Fifth Circuit case concerning the disclosure of appraisal reports, the court affirmed a district court holding that the requested information was protected by section 552(b)(4). The court's reasoning was based, in part, on the district court's finding that the release of the information "would likely cause substantial competitive harm to the appraisers' informants." Calhoun v. Lyng, 864 F.2d 34, 36 (5th Cir. 1988). Similarly, in Sharyland Water Supply Corp. v. Block, 755 F.2d 397 (5th Cir.), cert. denied, 471 U.S. 1137 (1985), the court found that though a water supply company's audit reports filed with the FHA were commercial or financial information obtained from a person, they were not confidential.

The information in question here is not information that relates to the financial or commercial condition of the research firm from which the information was obtained. Rather, it is the product which is the stock in trade of the research firm. We therefore conclude that this information is not the type of commercial or financial information excepted by section 3(a)(10).

Section 22.27 of the Property Tax Code provides:

(a) Rendition statements and real and personal property reports filed with an appraisal office and information voluntarily disclosed to an appraisal office or the State Property Tax Board about real or personal property sales prices after a promise it will be held confidential are confidential and not open to public inspection. The statements and reports and the information they contain about specific real or personal property or a specific real or personal property owner and information voluntarily disclosed to an

appraisal office about real or personal property sales prices after a promise it will be held confidential may not be disclosed to anyone other than an employee of the appraisal office who appraises property except as authorized by Subsection (b) of this section.

(b) Information made confidential by this section may be disclosed:

(1) in a judicial or administrative proceeding pursuant to a lawful subpoena;

(2) to the person who filed the statement or report or the owner of property subject to the statement, report, or information or to a representative of either authorized in writing to receive the information;

(3) to the director of the State Property Tax Board and his employees authorized by him in writing to receive the information or to an assessor or a chief appraiser if requested in writing;

(4) in a judicial or administrative proceeding relating to property taxation to which the person who filed the statement or report or the owner of the property that is a subject of the statement, report, or information is a party;

(5) for statistical purposes if in a form that does not identify specific property or a specific property owner; or

(6) if and to the extent the information is required to be included in a public document or record that the appraisal office is required to prepare or maintain.

(c) A person who legally has access to a statement or report or to other information made confidential by this section or who legally obtains the confidential information

commits a Class B misdemeanor if he knowingly:

(1) permits inspection of the statement or report by a person not authorized to inspect it by Subsection (b) of this section; or

(2) discloses the confidential information to a person not authorized to receive the information by Subsection (b) of this section.

(d) No person who directly or indirectly provides information to the State Property Tax Board or appraisal office about real or personal property sales prices, either as set forth in Subsection (a) of this section under a promise of confidentiality, or otherwise, shall be liable to any other person as the result of providing such information.

Information compiled by a private market research firm and provided to an appraisal district as part of a commercial transaction cannot be said to come within the kinds of information made confidential by section 22.27. The concept of voluntary disclosure would ordinarily mean that such disclosure was given without legal obligation or valuable consideration. Webster's Ninth New Collegiate Dictionary 1132 (1983) ("voluntary" definition #7). Rendition statements are, of course, statements made by or on behalf of the property owner rendering the property for taxation.

Thus, the confidentiality provisions of section 22.27, including the criminal penalties found therein, appear not to apply to the information in question. ¹

Since we have determined that the information in question is neither excepted from public disclosure by

1. Whether section 22.27 of the Property Tax Code could ever apply to information purchased from a consulting firm is a question we need not answer here. Nothing in the facts presented to this office in regard to any of the information in question here indicates that section 22.27 is applicable.

section 3(a)(10) of the Open Records Act nor confidential under section 22.27 of the Property Tax Code, we need not reach the question of whether you provided the property owner with all the information to which he was entitled under section 25.195 of the Property Tax Code.²

However, it is worth noting that we construe section 25.195 to confer on a property owner a right of access to all appraisal records relating to the property of the property owner, together with the supporting data and schedules used in making the appraisals. Open Records Decision No. 500 (1988), at 6. As noted in Open Records Decision No. 500, the section by section bill analysis for Senate Bill 515 of the 69th Legislature (1985), which enacted the current language of section 25.195, provides:

Amends Section 25.195, Tax Code, to provide that a property owner may inspect the appraisal records and supporting data and schedules used appraising property. Deletes the reference to the definition of 'supporting data' as it is defined in Section 25.01(c), making it clear that all records used in the appraisal of property are public records and open for inspection by a property owner. (Emphasis added.)

Id.

Finally, we note that the research firm that has provided information to the district is protected by its copyright. While copyrighted information may be subject to public disclosure under the Open Records Act, the custodian of public records must comply with copyright law and is not

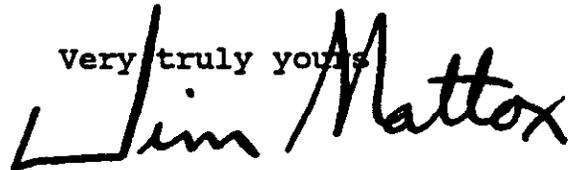
2. Section 25.195 of the Property Tax Code confers on property owners and their agents a special right of access to information that falls within the confidentiality provisions of section 22.27 or any of the exceptions to public disclosure found in the Open Records Act. A consulting firm need not provide any proprietary information to an appraisal district. However, if such information is provided to the district, and if the information comes within the scope of section 25.195, the statute provides a property owner with access to the information. Open Records Decision No. 500 (1988).

required to furnish copies of copyrighted records. Members of the public may inspect copyrighted materials held as public records, and make copies of such records unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. Attorney General Opinion MW-307 (1981); Open Records Decision No. 180 (1977).

S U M M A R Y

Information compiled by a private research firm and provided to an appraisal district as part of a commercial transaction is neither excepted from public disclosure by section 3(a)(10) of the Open Records Act nor confidential under section 22.27 of the Property Tax Code. The research firm is protected by its copyright.

Very truly yours



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