



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 4, 1989

James R. Lindley
General Counsel
American Educational Complex System
P.O. Box 1432
Bell-Coryell Counties
Killeen, Texas 76540

Dear Mr. Lindley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 4880; this decision is OR89-004.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The American Educational Complex System (the System) received proposals in response to the System's Request For Proposals concerning an airline travel service provider. You advise that the bidding process is over and that a contract for the travel services has been awarded. The System has received a request from one bidder who submitted a proposal and who now seeks:

1. Copy of the solicitation for bid,
2. Copies of all bids received pursuant to said solicitation,
3. Copies of any and all minutes of the Board

of Trustees pertaining to the discussion of the awarding of the bid,

4. Copies of all correspondence to and from any of the prospective bidders with regard to the aforementioned bid,
5. Copies of any and all of the records which may pertain to the awarding of this bid either from the American Education Complex, the Board of Trustees or the Committee convened to study the bids and make recommendations.

You indicate that your office does not possess requested item #3. This office does not require governmental bodies to prepare new information nor to obtain requested information that is not in its possession. Open Records Decision No. 342 (1982).¹ Any requests for this information should be directed to the proper custodian of such records. This decision only addresses the availability of items 1, 2, 4 and 5 under the act.

The information in the proposals you submitted consists of a description of proposed services, customer information, professional references, personnel resumes and various financial statements. You suggest that this information is exempt from required public disclosure by sections 3(a)(4) and 3(a)(10) of the act.

Section 3(a)(4) protects "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) protects the government's purchasing interests by preventing a competitor or bidder on a government contract from gaining unfair advantage over other competitors or bidders. Bids may be withheld as long as negotiations are in progress regarding the interpretation of the bids and as long as any bidder is free to furnish additional

1. Please note, however, that section 3B of the Texas Open Meetings Act, article 6252-17a, V.T.C.S., requires that governmental bodies prepare and retain minutes or a tape of open meetings. Further, although some matters may be discussed in closed session, all final actions, decisions, or votes must be made in open session. The minutes of open meetings are public.

information. Open Records Decision No. 170 (1977). Section 3(a)(4) does not exempt bids from disclosure when bidding is over and the contract has been awarded. Open Records Decision No. 406 (1984). Because you have advised us that the System's bidding process is over and that the contract has been awarded, section 3(a)(4) does not apply.

Section 3(a)(10) of the act excepts from disclosure:

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

This section protects third-party interests that have been protected by courts. Section 3(a)(10) protects information that qualifies as a "trade secret" or commercial/financial information.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts § 757:

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).
See Open Records Decision Nos. 255 (1980); 232 (1979).

There are six criteria for determining whether information qualifies as 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 its 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 this information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

The information requested must satisfy all six criteria cited in Hyde Corp. v. Huffines, supra, to qualify as a "trade secret." Technical material that relates to the substance of a proposal is, as a general rule, excepted from disclosure under section 3(a)(10). See Open Records Decision No. 319 (1982). However, information relating to organization and personnel, program goals and objectives, professional references, and qualifications and experience is not ordinarily exempt. See Open Records Decision No. 319; see also Open Records Decision No. 184 (1978). Much of the information in the proposals you submitted is neither technical information nor does it satisfy the Hyde test. This information consists of program objectives and descriptions of services that will be provided to the governmental body by the successful bidder on the contract. Consequently, information containing a general description of proposed services, resume information, credits or professional references, or experience in the travel industry is not exempt under the trade secret aspect of section 3(a)(10).

The proposals also contain customer information. Customer information is not protected as a trade secret unless it meets the six criteria discussed in Hyde, supra. Open Records Decision No. 494 (1988). Compliance with the six criteria is required to secure protection under section 3(a)(10). Customer lists, absent a detailed purchasing history or information demonstrating the specific and concrete measure taken by the entity to protect the confidentiality of the lists, do not qualify as a trade secret. Id.; see also Open Records Decision Nos. 306 (1982); Rimes v. Club Corp. of America, 542 S.W.2d 909 (Tex. Civ. App. - Dallas 1976, writ ref'd n.r.e.). We have marked the customer information that falls within the purview of this aspect of section 3(a)(10).

Section 3(a)(10) also protects certain commercial/financial information that may not constitute a trade secret. Open records decisions rely on federal cases' rulings on exemption 4 of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), in applying section 3(a)(10) to commercial information. Open Records Decision No. 309 (1982). The federal test is as follows:

commercial/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.)

National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

These two tests for commercial/financial information are alternates. To meet the first test, the governmental body must verify and explain to this office that its ability to obtain the information in the future will be impaired by disclosure. To meet the second test, the entity affected, or the governmental body on its behalf, must show that actual competition exists and that substantial and specific competitive injury will result from release of the information. See Open Records Decision Nos. 309; 271 (1981). The burden of proof is on the agency or the company wishing to withhold information. See Open Records Decision No. 504 (1988). General allegations of unspecified competitive harm will not suffice. See id.

Some of the information contained in the proposals is detailed financial information, e.g., company balance sheets, sales volumes, financial incentives or rate offerings, and other financial statements. Some of this financial information is protected by section 3(a)(10). Balance sheets, sales volumes, proposed rates, and any other financial information that reveals a private entity's specific profit/loss history or potential may be withheld. Additionally, the attorney general has determined that inventory information is protected under section 3(a)(10). Open Records Decision No. 255 (1980). We have marked the financial information that falls within the purview of section 3(a)(10).

Finally, in your letter of November 16, 1988, to this office, you raise additional grounds for withholding requested information. You claim that section 3(a)(11) applies to supplemental records you have provided. Please be advised that governmental bodies bear the burden of showing which exceptions apply to specific information and why. Attorney General Opinion H-436 (1974); Open Records Decision No. 252 (1980). Section 7(a) of the act requires a governmental body to release information or to request a

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decision from the attorney general within 10 days of receiving a request for information the governmental body wishes to withhold. All applicable exceptions must be raised within the 10 day deadline.

When a governmental body fails to request a decision within 10 days, the information at issue is presumed public. City of Houston v. Houston Chronicle Pub. Co., 673 S.W.2d 316, 323 (Tex. App. - Houston [1st. Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling reason to overcome this presumption. Id. You raised an additional argument concerning supplemental records and information on November 16, 1988, long after the section 7(a) deadline had lapsed. You have not shown compelling reasons why the supplemental information should not be deemed public or why this office should consider additional exceptions. Consequently, this decision does not address your arguments regarding the arguments submitted after the 10 day deadline. You must apply the guidance in this decision and the enclosed marked documents to all of the information requested and submitted for review.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-004.

Yours very truly,

Open Government Section
of the Opinion Committee
Prepared by Jennifer S. Riggs
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Ref. Id #4880
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Enclosures