



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

February 15, 1989

Honorable Bob Bullock
Office of the Comptroller
L.B.J. State Office Building
Austin, Texas 78774

Dear Mr. Bullock:

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# 5328; this decision is OR89-56.

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.

You received a request for the winning proposal for a computer software project, documentation relating to the Comptroller's evaluation of bids, and the recommendation packet developed by the evaluation committee. You assert that this information is exempt under sections 3(a)(4), 3(a)(10), and 3(a)(11) of the act.

In your letter you stated that only portions of the bid proposal are considered proprietary and exempt under sections 3(a)(4) and 3(a)(10) by agreement with the bidder. The provisions of the Open Records Act cannot be waived by private agreement. See Attorney General Opinion No. JM-672. This office will consider only the sections you referred to in your letter without regard to the contract.

Section 3(a)(4) does not except bids from disclosure when the bidding is over and the contract has been awarded. Open Records Decision Nos. 306 (1982); 184 (1978). However, we have also held that successful bid proposals may contain information that may be withheld pursuant to section 3(a)(10). See Open Records Decision No. 309 (1982).

Section 3(a)(10) excepts:

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

Section 3(a)(10) is designed to protect third-party interests that have been protected by the courts.

The definition of "trade secret" was stated by the Texas Supreme Court in Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958):

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. . . .

The definition was adopted from the Restatement of Torts, which also lists six criteria for determining whether particular information is 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).

In Open Records Decision No. 426 (1985) this office determined that particular computer programs and formulas are trade secrets. It has also been held that a successful bidder's system concept, scope of work description and program proposal were excepted by section 3(a)(10) where substantial compliance with the criteria of the Restatement of Torts was shown. Open Records Decision No. 306 (1982). In the absence of such a showing, the information is subject to public disclosure. See, e.g., Open Records Decision No. 198 (1978).

This office has previously said that a governmental body holding information is in the best position to determine whether the information satisfies the six criteria listed above. See Open Records Decision No. 426 (1985). The governmental body, however, must provide an explanation as to why the information is a trade secret. A mere assertion that particular information is a trade secret, without further explanation, will not suffice. In the alternative, the governmental body or the company generating the information claimed to be a trade secret may supply this office with information demonstrating substantial compliance with the above listed Restatement criteria. Open Records Decision No. 306 (1982).

Your letter requesting this decision does not explain how the successful bidder's proposal meets the six criteria of the Restatement. You state only that the bidder's disclosure statement inserted at the front of the bid proposal demonstrates the bidder's proprietary interest in the information subject to the disclosure restriction. At best, this statement gives some indication of the value of the information to the bidder and of the measures taken by the company to guard the secrecy of the information. But it does not establish substantial compliance with the other Restatement criteria. It is therefore insufficient to warrant a conclusion that the information subject to it consists of trade secrets. However, because this office has in the past accepted arguments from companies generating information alleged to contain trade secrets, or from governmental bodies on behalf of such companies, we believe it is appropriate to extend additional time in which your office, or the company submitting the successful bid, may submit arguments concerning substantial compliance with the

six trade secret criteria. You have ten days from the receipt of this letter in which to submit such information. If we receive no response within ten days, the information shall be deemed public information.

The same approach may be taken with respect to the successful bidder's answers to questions from your office concerning their bid. You contend that since the answers contain some of the same information as the bid proposal, the bidder's proprietary statement (the disclosure statement) and the confidential nature of the information restricts disclosure of answers containing trade secret information under sections 3(a)(4) and 3(a)(10). Again, this assertion does not demonstrate substantial compliance with the trade secret criteria. Consequently, we offer you an additional ten days from the receipt of this letter in which to submit such information. If no response is received within ten days, the information shall be deemed public information.¹

Section 3(a)(10) also protects commercial or financial information if disclosure of the information is likely to (1) impair the government'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 Nos. 406 (1984); 309 (1982). The two tests are alternates.

To meet the first test, the governmental body must verify and explain how its ability to obtain the information would be impaired in the future as a result of disclosure. To meet the second test, the entity affected, or the governmental body on its behalf, must show that there exists actual competition and that substantial and specific injury will result from release of the information. Open Records Decision Nos. 309 (1982); 271 (1981). Your letter requesting this decision does not provide explanations sufficient to meet either test.

1. Because the successful bidder's proprietary interests concerning the requested information are involved, it is appropriate that the bidder be notified immediately upon your receipt of this letter so that it may, if it chooses, communicate its interest in the confidentiality of the information directly to this office. Your office should notify the appropriate officials with the company.

We note that there is other information contained in the folder you submitted, including the successful bidder's best and final offer and licensing agreement. This office will presume that you do not seek to withhold information not addressed in your letter and will assume that you intend to release that information.

You stated that sections 3(a)(10) and 3(a)(11) of the act exempt certain intra-office memoranda concerning the award of the contract. One memorandum has three attachments, two of which contain information that may be considered trade secrets by the successful bidder and the unsuccessful bidder on the contract. It appears that the attachments are photocopies of pages taken from their respective bid proposals. These attachments should thus be reevaluated for compliance with the trade secret criteria described above, and arguments should be submitted to this office within ten days from the receipt of this letter.² The attachments have been marked. None of the other memoranda in the folder contain information that falls under section 3(a)(10). They will be evaluated under section 3(a)(11).

Section 3(a)(11) of the Open Records Act applies to advice, recommendation, and opinion used in the deliberative process. Open Records Decision No. 464 (1987). Facts and written observations of facts cannot be withheld under this section. Open Records Decision No. 450 (1986). The bulk of the information you submitted contains advice, opinion, or recommendation and may be withheld under section 3(a)(11). This information has been marked. The remainder of the information is factual and must be released.

2. The third attachment consists of information submitted to the Comptroller by the company making this Open Records request. The company likely would not object to receiving copies of this information. However, since release of this information pursuant to the Open Records Act would mean that the information is available to any person requesting access to it, see sec. 14(a) and Open Records Decision No. 463 (1987), the requestor should be advised of this prospect.

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In closing, we repeat that you have an additional ten days from the receipt of this letter in which to submit information demonstrating compliance with the relevant trade secret criteria described in this letter. This extension applies only to the bid proposal submitted by the successful bidder on the contract, the successful bidder's answers to questions concerning the bid proposal, and the attachments marked in the folder containing internal memoranda. Prior published open records decisions resolve your request with respect to the remainder of the memoranda submitted for our review. In future correspondence concerning this matter, please refer to OR89-56.

Yours very truly,

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of the Opinion Committee*

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SA/bc

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Enclosures: (copies of documents marked for review)