



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

March 17, 1989

Mr. Lias B. "Bubba" Steen
Executive Director
State Purchasing and General Services Commission
P. O. Box 13047, Capitol Station
Austin, Texas 78711-3047

Dear Mr. Steen:

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# 5444; this decision is OR89-89.

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 State Purchasing and General Services Commission received an open records request for a copy of an unsolicited AT&T proposal submitted as plan to "optimize" the TEXAN II data network. You have submitted to this office a copy of the requested information and AT&T's letter to you containing its contentions that the requested information is excepted from required public disclosure by subsections 3(a)(4) and (10) of the Open Records Act. You have not, however, voiced your contentions as to whether the requested information in fact protected by these exceptions.

Section 3(a)(4) of the Open Records Act protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) is generally invoked to except information submitted

to a governmental body as part of a bid or similar proposal. See, e.g., Open Records Decision No. 463 (1987). Section 3(a)(4) was not intended to protect business entities that are in competition in the private sector. The primary purpose of section 3(a)(4) is to protect the government's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. Moreover, a general allegation or mere possibility that an unspecified competitors might gain advantage by disclosure will not invoke section 3(a)(4). Open Records Decision No. 463 (1987).

You have not indicated that there is at this time a competitive situation to which the information at issue relates. Consequently, unless you submit to this office, within ten days of receipt of this letter ruling, additional information specifying otherwise, you may not withhold this information pursuant to section 3(a)(4).

Section 3(a)(10) of the Open Records Act excepts from required public disclosure:

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

This section protects two categories of information:
1) trade secrets and 2) commercial or financial information.

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) (quoting Extrin Foods, Inc. v. Leighton, 202 Misc. 592, 115 N.Y.S.2d 429, 433 (1952)). There are six factors to be assessed in determining whether information qualifies as a trade secret:

1) the extent to which the information is known outside 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 its competitors;

5) the amount of effort or money expended by the company in developing the information; and

6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757, Comment b (1939). See also Open Records Decision Nos. 232 (1979); 175 (1977).

As noted above, however, section 3(a)(10) also protects "commercial or financial information obtained from a person." This material is clearly commercial information. To fall within section 3(a)(10), however, it must be "privileged or confidential by statute or judicial decision."

Section 3(a)(10) is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 et. seq. Open Records Decision Nos. 309 (1982). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) 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.)

National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). A factor to be considered in these tests is whether the information is of a type that is customarily released to the public. See, e.g., AT&T Information Sys., Inc. v. General Services Admin., 627 F.Supp; 1396, 1403 (D.D.C. 1986), rev'd on other grounds, 810 F.2d 1233 (D.C. Cir. 1987).

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The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. You have expressed no opinion on this subject. If the second test is satisfied, the information may be withheld. The courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is [sic] all that need be shown. (Emphasis added.)

Gulf and Western Indus. v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); see also National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. See National Parks v. Kleppe, 547 F.2d at 680.

You have not shown how the requested information meets these tests. Because your request for a decision implicates certain interests of AT&T, you should notify them about this letter ruling and invite them to submit comments as to how the requested proposal meets the tests for section 3(a)(10). The State Purchasing and General Services Commission must, however, endorse AT&T's section 3(a)(10) arguments in order for this office to rule that the proposal may be withheld. Please submit this information within ten days of receipt of this letter.

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 OR89-89.

Yours very truly,

Open Government Section
of the Opinion Committee

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