



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTON
ATTORNEY GENERAL

March 21, 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:

This will acknowledge receipt of your request for reconsideration of OR88-391, under the Texas Open Records Act, art. 6252-17a, V.T.C.S. Your request for reconsideration has been assigned ID# 5313. This decision is OR89-94.

We decline to reconsider our decision in OR88-391. In a letter dated October 14, 1988 the State Purchasing and General Services Commission requested a decision from this office concerning the public availability of information in travel agent service, car rental service, and corporate charge card proposals submitted to the commission. Informal decision OR88-391 described the specific technical information and customer information with detailed purchasing histories in one proposal that constituted "trade secrets," as well as detailed commercial/financial information in other proposals that satisfied the test articulated in National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The decision noted that information such as general descriptive financial or service information must be released as public information. Only one proposal, from Supertravel, demonstrated how its customer list and sales volume constituted trade secrets. Section 3(a)(10), however, also protects certain commercial information, the release of which would cause substantial competitive injury.

With OR88-391, we marked representative samples of the type of information that is protected under the commercial/financial aspect of section 3(a)(10) of the Open Records Act. OR88-391 expressly states "[y]ou must apply the guidance in the representative samples to all of the proposals submitted for review." You responded that "[i]t

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is, additionally, extremely difficult, if not impossible, to relate all of the material excluded in the representative samples to the legal principles set out in the ruling, for there is no cross-referencing between the ruling and the samples." All of the proposals you submitted for review contain the same categories of information. The marked proposal this office returned to you clearly designated the categories that may be withheld. OR88-391 addresses all of the information in the proposals submitted. For example, balance sheets and sales volume information may be withheld in each proposal under the commercial/financial aspect of section 3(a)(10). Specific inventory information in each proposal may be withheld (i.e. p. 18 of the Advantage bid). Rate information may not be withheld once the contract is awarded.

It is the responsibility of the governmental body to select information that clearly represents the volume of information in its entirety, to clearly mark what the governmental body considers protected, and to submit that information for review. Nevertheless, we have extracted from each proposal you submitted for review the specific information that may be deleted. In the future, if the specific information the commission contends is ^{not} public is not marked by the commission, the entire proposal shall be deemed public.

You also contend that OR88-391 did not address exceptions claimed by the private entities involved. The act places on the custodian of records the burden of proving that information is excepted from public disclosure, not private entities. See Attorney General Opinion JM-672 (1987). If a governmental body wishes to adopt a private entity's arguments, it must do so expressly. Section 3(a)(10) is intended ^{to} protect governmental bodies, not private entities. If the governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See id. The act does not require this office to raise and consider exceptions that you have not raised. In your letter of October 14, 1988, you raised only section 3(a)(10) of the act.

On the enclosed documents, the first page shows the proposal from which the documents are drawn. The pages copied are the ones that may be withheld from public disclosure under section 3(a)(10). On some pages both "RELEASE" and "WITHHOLD" are stamped; this indicates that only the marked portion of the page may be withheld. On some pages "WITHHOLD" is stamped and the specific

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information that may be deleted is circled. Information in the proposals that is not enclosed and marked may not be withheld.

With regard to the proposals for corporate credit card services, the availability of two categories of information is not clear. First, the American Express and the Citicorp proposals both contain specific revenue and earnings information in a form that may have been distributed to the public (Citicorp Exhibit "4" and American Express Exhibit "B"). For example, Exhibit "A" of the American Express proposal states "As seen in USA Today." Information voluntarily published in a newspaper cannot be withheld under section 3(a)(10). Additionally, Citicorp Exhibit "7" and American Express Exhibit "F" contain technical specifications. With regard to these exhibits, Citicorp's Exhibits "4" and "7" and American Express's Exhibits "B" and "F," the commission must notify the companies that they have 10 days to submit evidence of how release of this information would cause substantial competitive injury or how it meets the tests in Texas for trade secret information. A broad, general statement of "proprietary" information will not suffice.

Finally, with regard to Citicorp's Exhibit "11," we note that the software is protected by copyright. The Open Records Act does not require governmental bodies to make copies of information protected by copyright. Attorney General Opinion MW-307 (1981).

If you have any questions about this ruling, please refer to OR89-94.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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of the Opinion Committee
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JSR/FAF/bc

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