



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

May 9, 1989

Mr. Marlin W. Johnston
Commissioner
Texas Department of Human Services
P. O. Box 2960
Austin, Texas 78769

Dear Mr. Johnston:

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# 5300; this decision is OR89-101.

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 Texas Department of Human Services received proposals in response to the department's request for bids concerning a state contract for the administration of the Texas Medical Assistance Program. Your letter of December 29, 1988, indicates that the department awarded the contract to the National Heritage Insurance Company (NHIC) and that the department considers some of the information contained in the proposals submitted by the NHIC to be public information. The NHIC, however, contends that the information contained in its proposal is protected from required public disclosure by exception 3(a)(10) of the Open Records Act. Because your letter of December 29, 1988, withdraws exception 3(a)(4) of the act from consideration, see Open Records Decision Nos. 306 (1982); 184 (1978); this ruling will address only the applicability of exception 3(a)(10).

Section 3(a)(10) protects primarily the governmental body's interest in obtaining information. To do this, section 3(a)(10) preserves protection for third-party interests that have been protected by courts. Open Records Decision No. 319 (1982). Section 3(a)(10) protects from disclosure information that qualifies as a "trade secret." In some instances, a private entity may waive trade secret information by voluntarily submitting information as part of a proposal.

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).
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 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.

Restatement of Torts § 757, Comment b (1939). Open Records Decision Nos. 255, 232.

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The information requested must satisfy all six criteria cited in Hyde Corp. v. Huffines, supra, to qualify as a "trade secret" under Texas law and, therefore, under section 3(a)(10). Technical material that relates to the substance of a proposal may be shown to meet the trade secret aspect of section 3(a)(10). See Open Records Decision No. 319. Upon careful review of the information submitted, we have determined that some of the information in the NHIC proposal meets the criteria of the Restatement. NHIC may withhold the following: section III.C, Surveillance and Cost Control Activities; section III.D, EDP, Hardware, and MMIS; section III.E, Provider Relations; and section III.F, Conversion and Implementation.

However, information relating to organizational and information and to personnel matters such as, professional references and qualifications is not exempt. Id. Specifically, information such as resumes, professional references, licenses or certificates, job descriptions, summaries of proposed services, and organizational charts do not fall under the trade secret aspect of section 3(a)(10) and must be made available for public inspection.

Section 3(a)(10) also protects certain commercial/financial information that need not constitute a "trade secret." Open records decisions rely on federal cases using 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 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).

Only some of the information contained in the NHIC proposal is detailed information that on its face satisfies the test in National Parks and Conservation Ass'n, supra. The department may withhold only the information stamped

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"withhold" in Volume II of the NHIC proposal. NHIC has not shown that the remainder falls within section 3(a)(10).

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 OR89-101.

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

Ref.: ID# 5300

Enclosures