



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

June 5, 1989

Ms. Rose Ann Reeser
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P. O. Box 12548
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Dear Ms. Reeser:

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# 5758; this decision is OR89-163.

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 Charitable Trust Section of the Office of the Attorney General of Texas received an open records request from a reporter with the Houston Chronicle for "all records retained by your office regarding the estate of Mr. H.H. Coffield." You state that you released to the requestor the same information that this office previously ruled as being public pursuant to a prior open records request made by the executors of the Coffield Estate. You seek a decision from this office, however, as to whether certain financial information voluntarily supplied to your office by the executors of the Estate may also be released to the current requestor.

You apparently believe that none of the act's exceptions apply to the financial information. Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to

claim, see Open Records Decision No. 455 (1987), we will examine the Estate's contention that the financial information is protected from public disclosure by section 3(a)(10) of the act because the release of confidential information could impair the rights of the Estate and because its improper release constitutes a misdemeanor. See V.T.C.S. art. 6252-17a, § 10(e).

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. There is nothing to indicate that the information at issue here is a trade secret. See Open Records Decision Nos. 232 (1979) (trade secret defined). This material is, however, 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 Association 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.)

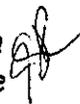
Gulf and Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)

Representatives of the Estate contend that "the release of this information will substantially impair the Estate's competitive position in that the financial information contains cost information as to properties that would hurt the bargaining position of the Estate in negotiations with potential buyers of Estate property." Although conclusory and generalized allegations of competitive harm have been held insufficient to satisfy the requirements for non-disclosure, see National Park v. Kleppe, 547 F.2d 673, 680 (1976), this office agrees that section 3(a)(10) protects those portions of the financial statements that reflect the value of and revenues from identifiable properties that the Estate currently controls. Other general financial information, such as the total worth of the Estate, listings of revenue from groups of holdings, e.g., oil sales, royalties, rentals, etc., and general expenses incurred by the Estate are not sufficiently specific to damage the Estate's competitive position and must, therefore, be released. Where the protected worth or income of properties is listed along with the non-protected financial information, the total value of the listed properties may also be withheld so as not to indirectly reveal protected information.

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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 OR89-163.

Yours very truly,

*Open Government Section
of the Opinion Committee* 

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