



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

November 21, 1989

Mr. William D. Taylor
Executive Director
Department of Commerce
P.O. Box 12728
Capitol Station
Austin, Texas 78711

Dear Mr. Taylor:

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# 7647; this decision is OR89-393.

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. Attorney General Opinion H-436 (1974). 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 Department of Commerce received a request for copies of all information relating to inducements offered to U.S. Memories, Inc., by various Texas cities to locate in those cities. The department served as a contact for U.S. Memories in its dealings with cities in Texas. The department transmitted the "bids" from local governments in Texas to U.S. Memories. You contend that section 3(a)(4) protects the "bids" or inducements from required public disclosure.

Section 3(a)(4) protects the government's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. The test for determining whether section 3(a)(4) applies is whether there has been a showing of some specific actual or

Mr. William D. Taylor

November 21, 1989

Page 2

potential harm in a particular competitive situation. A general allegation or a remote possibility that an unknown competitor might gain an advantage by disclosure is not sufficient to invoke section 3(a)(4). Open Records Decision No. 463 (1987). Section 3(a)(4) is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. When the information sought is not actually part of a bid, section 3(a)(4) is more difficult to apply and depends on a strong showing of potential harm to the overall competitive process. See generally Apodaca v. Montes, 606 S.W.2d 734, 736 (Tex. Civ. App. - El Paso 1980, no writ). Governmental bodies are not regarded as being in competition with private enterprises for purposes of section 3(a)(4). For example, in Open Records Decision No. 463, the attorney general held that the state treasurer cannot withhold inventories of the contents of safe deposit boxes subject to escheat from persons attempting to find persons who might have an interest in their contents. See also Open Records Decision Nos. 231 (1979); 99 (1975).

Similar considerations apply here. When various cities offer incentives to companies to locate in those cities, they can be deemed to be competitors only in the general sense of the word. They do not constitute "competitors or bidders" within the meaning of section 3(a)(4). Section 14(d) of the Open Records Act requires that its provisions be construed narrowly, in favor of granting requests for information. Moreover, the residents of the cities at issue have a strong interest in the incentives offered by their cities because the incentives often involve the expenditure of public funds. We decline to expand the scope of section 3(a)(4).

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 OR89-393.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
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Mr. William D. Taylor
November 21, 1989
Page 3

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ID# 7752

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