



THE ATTORNEY GENERAL
OF TEXAS

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Ms. Paula K. Williamson
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OR90-182

Dear Ms. Williamson:

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# 9019.

Grey Forest Utilities received two requests. The first was for a list of utility customers paying utility and use tax and for a list of commercial/industrial utility customers who have claimed exempt status. Grey Forest does not have the information as requested, but has offered to have it compiled, if the requestor would pay the cost of the compilation. Although it is making this offer, Grey Forest asserts that "the tax information is not information collected, maintained, or assembled in a form sufficient to consider this information a record under the Texas Open Records Act."

The second request was for the standard Grey Forest Utilities monthly printout for all customers. Grey Forest contends that the information that is the subject of the second request is excepted from public disclosure by section 3(a)(4) of the Texas Open Records Act, article 6252-17a, V.T.C.S., which protects from required public disclosure "information which, if released, would give advantage to competitors or bidders."

Grey Forest asserts that compliance with the second request would require the disclosure of both the customer billing report and the meter master list which would reveal all of the customers of Grey Forest Utilities and would supply only a small amount of tax information per page. Grey Forest maintains that the release of this information in the second request would assist a competitor in

soliciting its customers, who were secured over a long period of time and at a great expense.

The sales tax status of commercial and industrial utility customer accounts and the billing amounts for these customers are not exempt from disclosure under sections 3(a)(4) or 3(a)(10) of the Texas Open Records Act. See Open Records Decision No. 520 (1989). Although the Open Records Act does not require a governmental body to prepare or create new information, some compilation may be required under the act. See Attorney General Opinion JM-672 (1987). The required compilation may include the "calling up" of public information under an existing computer program. Id. Further, the Open Records Act requires the requestor to bear the cost of compilation, V.T.C.S. art. 6252-17a, § 9, including the cost of providing information stored in a computer. See Attorney General Opinion JM-292 (1984). Thus, you must release the information sought in the first request; the cost of the compilation of this information must be borne by the requestor.

You state that granting the second request amounts to a release of the Grey Forest customer list and that such a release would be useful to the competitors of Grey Forest. Section 3(a)(4), which you claim excepts this information from disclosure, is generally used to protect the purchasing interests of a governmental entity and applies primarily to the competitive process in a particular situation, usually for the bidding of government contracts. The exception applies when the governmental body shows some specific and actual harm, rather than a general allegation of an advantage being gained, which would result from disclosure in a particular situation. See Open Records Decision No. 463 (1987). You have not shown how a particular utility customer would be affected by the release of this information. Therefore, section 3(a)(4) does not apply in this situation. See Open Records Decision No. 520 (1989).

Because you refer to customer lists, we assume you intend to raise section 3(a)(10) as an exception to the disclosure of this information. For future requests, be advised that you must raise specific exceptions if you wish to withhold the information.

Section 3(a)(10) excepts

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

There are two parts to section 3(a)(10): trade secrets and commercial or financial information. Each part has its own test for application. The facts of this case will be examined to determine if the criteria for each test is met.

Texas courts follow the definition for trade secrets found in the Restatement of Torts:

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. It may be . . . a list of customers.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958).

Whether information qualifies as a trade secret is determined by examining six factors set forth in the Restatement:

1. the extent to which the information is known outside of [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 the 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). A customer list is considered a trade secret entitled to protection from public disclosure only if each of these six criteria are met. See Open Records Decision No. 494 (1988).

You have not shown, nor is it apparent on its face, how the information in the monthly printout of all Grey Forest customers meets the six trade secret criteria. A list of utility customers would include virtually everyone in the community; utility consumers are not a select group of customers, a fact that is common knowledge and certainly known by the employees of Grey Forest. Such information would not be new or valuable information to Grey Forest competitors, except for the fact that the printout would provide an alphabetized listing of all utility customers. A subcategory of all utility customers, the commercial and industrial municipal customers, is not within the definition of trade secret. See Open Records Decision No. 520 (1989). The larger, more comprehensive list of all customers cannot be considered a "trade secret," as defined by the Texas Supreme Court. See Hyde Corp. v. Huffines, 314 S.W.2d 763 (Tex. 1958).

The second part of section 3(a)(10) requires that the information comprise commercial or financial information that is likely to 1) impair the government's ability to obtain necessary information in the future, or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. See Open Records Decision No. 406 (1984).

The meter master list and customer billing report are part of the billing process of Grey Forest and necessary for its record-keeping purposes. The release of this information would not effect Grey Forest's ability to produce this information in the future, because Grey Forest computers generate this information. Further, no showing of substantial harm to the competitive position of Grey Forest has been made. This information is not exempt from disclosure by section 3(a)(10).

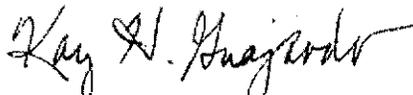
We note that our conclusion is supported in two ways. First, section 6(3) of the Open Records Act makes public "information in any account, voucher, or contract dealing with the receipt or expenditure of public . . . funds." This section does not overrule any of the Open Records Act exceptions, but it is reflective of the legislature's intent that the information in section 6(3) should ordinarily be available.

Second, water utility customer information is public information under section 3(a)(1). Open Records Decision No. 443 (1986). The information in utility bills is not protected based on common law privacy rights, because of the

legitimate interest of the public in its disclosure. See id; Open Records Decision No. 63 (1974).

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 OR90-182.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/le

Ref.: ID# 9019

cc: Mr. Phil Francesco
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