



THE ATTORNEY GENERAL
OF TEXAS

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October 25, 1990

Ms. Dorothy Palumbo
Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR90-518

Dear Ms. Palumbo:

You ask whether certain information obtained from General Electric subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 10433.

The City of Midland received an open records request for information provided by General Electric as exhibits to its contract with the city for a Radio Communication System. The city sought the opinion of this office, pursuant to section 7(c) of the Open Records Act, as to whether the requested information should be withheld. This office subsequently invited representatives of General Electric to submit additional legal arguments regarding the proprietary nature of the requested information.

General Electric contends that the requested information constitutes trade secrets and therefore comes under the protection of section 3(a)(10) of the Open Records Act. A "trade secret" is

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) (quoting Restatement of Torts, section 757, comment b (1939); see also Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978)). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 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; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 comment b (1939); see also Open Records Decision No. 232, supra.

General Electric does not, however, explain how any of the requested information meets the tests for trade secrets as outlined above. Other than general assertions that the information in question is confidential, there is nothing to indicate that the information is secret. This office has no basis for determining that the items you seek to protect are in fact trade secrets; these items must therefore be released.

Section 3(a)(10) also protects "commercial or financial information obtained from a person." This material is 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); 107 (1975). 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 Systems, Inc. v. General Services Administration, 627 F. Supp; 1396, 1403 (D.D.C. 1986), rev'd on other grounds, 810 F.2d 1233 (D.C. Cir. 1987).

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. While the city's opinion request correctly states the legal test, you have not asserted nor explained how your ability to obtain information will be impaired.

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.)

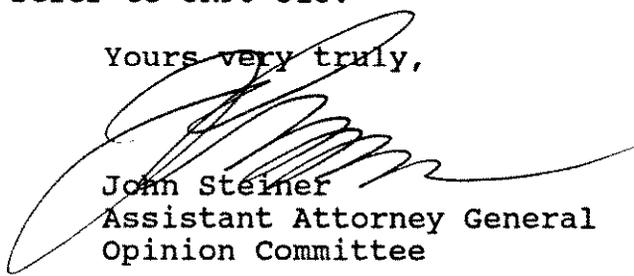
Gulf and Western Industries, Inc. v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); see also National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976).

"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 at 680. As General Electric has not explained how the requested information meets the National Parks test, we have no basis for considering this claim.

The requested information must therefore be released.

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 OR90-518.

Yours very truly,



John Steiner
Assistant Attorney General
Opinion Committee

JS/le

Ref.: ID# 10433, 10751

Enclosures: Documents Submitted

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