



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

January 4, 1991

Mr. Philip Barnes
Commissioner
State Board of Insurance
1110 San Jacinto
Austin, Texas 78701-1998

OR91-001

Dear Mr. Barnes:

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# 10384.

You have received a request for all reports, audits, evaluations, and investigations made by or for your office regarding a named title and abstract company and the operation or maintenance of its abstract plant. The information that you have submitted to us for our examination, as being responsive to the request, consists of the forms that your examiners use when they conduct examinations. You contend that, based upon Open Records Decision Nos. 504, 494 (1988) and 309 (1982), the information requested is excepted from required public disclosure by section 3(a)(10) of the act. That section excepts

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

Section 3(a)(10) protects two different categories of information: (1) trade secrets and (2) commercial or financial information. We understand you to assert that the information requested falls within the second category, that of commercial or financial information.

Commercial or financial information is excepted under section 3(a)(10) if disclosure of the information: (1) is likely 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. Open Records Decision Nos. 406 (1984); 309 (1982). The determination of whether commercial or financial information is excepted depends on the facts in a particular case.

These two tests for commercial or financial information are alternatives. To meet the first test, the governmental body must verify that its ability to obtain the information in the future will be impaired by disclosure. If the law requires the submission of the information at issue, release of the information will not impair the governmental body's ability to obtain the information in the future. Apodaca v. Montes, 606 S.W.2d 734 at 736 (Tex. Civ. App. - El Paso 1980, no writ).

Chapter 9 of the Insurance Code is the Texas Title Insurance Act. Articles 9.21 and 9.22 of the Insurance Code confer authority on the State Board of Insurance to regulate and conduct examinations of title insurance companies in Texas. Article 9.22 of the code provides in pertinent part:

It shall be the duty of the Board, biennially, or oftener if it shall be deemed advisable, in person or through a duly appointed representative, to make a thorough examination of the company's books and affairs and the transactions in which it is engaged at the expense of said company, for which purpose the Board or its representatives shall have access to the books and records of the said company, and shall have the right to interrogate and require answer under oath from any officer, agent or employee of the said company concerning any matters pertaining to the business thereof.

However, as we noted in Open Records Decision No. 504 (1988), not every legal obligation to submit information to a governmental body removes totally the government's right to rely on the impairment prong of section 3(a)(10). The fact that information is submitted voluntarily is relevant. Relying on a case decided under the federal Freedom of Information Act, we noted that the impairment analysis should include consideration of whether alternative means of obtaining the information would result in obtaining the same information, i.e. without a decrease in the quality of the reports and therefore in their value to the agency. In Open Records Decision No. 504, we declared:

The burden, however, is on the party seeking to prevent disclosure to submit detailed factual justification showing how disclosure will impair the government's ability to acquire the same or similar information in the future. (Emphasis added.) [Citations omitted.]

Your argument under the first prong of the test under section 3(a)(10) that your ability to receive information will be impaired, even though disclosure to your agency is required by law, is as follows:

In the present case, the Title Insurance Division auditors and examiners rely to a large extent on their interaction with members of a title company's staff in conducting an audit or examination. Reviewing a case file together with the escrow officer which [sic] closed that file, or auditing an escrow account together with the accountant which [sic] maintains the account will often reveal valuable information not available from the printed record. If such persons were concerned with the confidentiality of their comments, the free flow of information would be severely curtailed.

We conclude that you have not met your burden to provide a "detailed factual justification" showing how disclosure will impair your ability to acquire the same or similar information in the future. The fact that section 9.22 of the code empowers your agency examine the books and to require statements under oath from all company officers, employees, and agents ensures that your agency will be able to obtain all information necessary to carry out properly the duties imposed upon you by statute.

To meet the second test, the entity affected, or the governmental body on its behalf, must show that there exists actual competition and that substantial and specific competitive injury will likely result from release of the information; it is not necessary to to prove actual competitive harm. Open Records Decision Nos. 494, (1988); 309 (1982). Your argument under the second prong that competitive injury is likely is as follows:

Due to the relatively small number of title insurance underwriters providing title

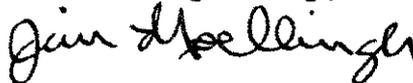
*insurance in Texas, and because of the high cost of establishing a title agency abstract plant¹, there exists a vigorous and continuing competition for the title insurance market. Any confidential information as to the strengths or weaknesses of a particular company or agent, which would become available to a competitor, does provide the likelihood that it would be used to a competitor's advantage. If it became known that such audit and examination information would be available upon request, the ability of the Texas Insurance examiners to conduct valid and thorough audits and examinations would be diminished, and the task of regulating and monitoring the Title Insurance industry would be extremely difficult to accomplish.

We conclude that you have met your burden under the second prong and may withhold the requested information.

We have considered the exception you claimed, and have reviewed the documents at issue. A previous determination of this office, Open Records Decision Nos. 504, 494 (1988); 309 (1982), copies of which are enclosed, resolves your request. For this reason, you may withhold the requested information.

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 OR91-001.

Yours very truly,



Jim Moellinger
Assistant Attorney General
Opinion Committee

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1. The phrase "abstract plant" defined at subpart (i) of article 9.02 of the Insurance Code. (Footnote added.)

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Ref.: ID# 10384

Enclosure: ORD Nos. 504, 494 (1988); 309 (1982)

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