



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 3, 1991

Ms. Georgia Flint
Acting Commissioner
Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR91-610

Dear Commissioner Flint:

Your predecessor in office asked whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. This request was assigned ID# 13075.

The State Board of Insurance (the board) has received a request for "all documents collected, assembled, prepared or maintained by the State Board of Insurance . . . concerning . . . the calculation of the experience modifier applicable to workers' compensation insurance premiums for **corporations** . . . which had, or allegedly had, a change in ownership during the period of November 1, 1989 through February 1, 1990." (Emphasis in original.) We have been advised that information contained in the board's experience rating files is responsive to the request. Such files typically include the following information:

- 1) data used to calculate the experience modifier;
- 2) unit statistical reports;
- 3) applications for policies through the Texas Workers' Compensation Facility Rejected Risk Fund (the Facility);
- 4) inspection reports;

- 5) copies of policies;
- 6) information concerning the ownership of the insured; and
- 7) correspondence between the agency and the company.

The board asserts that only information contained in items (3), (6), and (7) is responsive to the request and claims that much of this information is excepted from required public disclosure by sections 3(a)(4) and 3(a)(10) of the Open Records Act.

Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) applies primarily to competition for governmental contracts and specifically protects the sealed bid process; decisions under section 3(a)(4) generally involve specific commercial and contractual matters. Open Records Decision No. 463 (1987). Section 3(a)(4) is intended to protect the government's interest in purchasing by assuring that the bidding process will be truly competitive. Open Records Decision No. 583 (1990). It has not been demonstrated how this issue involves a competitive bidding process and how release of the requested information would harm the governmental body's purchasing interests. The board's application of the 3(a)(4) exception appears to be inappropriate in this instance; accordingly, you may not withhold any of the requested information under section 3(a)(4).

Pursuant to section 7(c) of the act, third parties whose proprietary interests may be compromised by disclosure of the requested information have been notified and asked to submit arguments in support of a section 3(a)(10) claim. In response, we have received letters from Acoustical Structures, Inc., Temp Associates, Inc. of Dallas, and King & Prince Seafood Corporation. These companies generally claim that the requested information is privileged and confidential and that its release would undermine their competitive advantage in the marketplace. Because we have received letters from no other companies to which portions of the requested information might relate, we will limit the scope of this ruling to the claims made by these three companies. Information relating to other companies must be released.

Section 3(a)(10) 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." In making trade secret determinations

under section 3(a)(10), this office will accept a claim as valid if the claimant establishes a *prima facie* case for its assertion of trade secrets that is unrebutted *as a matter of law*. Open Records Decision No. 552 (1990) at 5. Whether a claimant makes a *prima facie* case depends on whether its arguments, as a whole, correspond to the criteria for trade secrets detailed in the Restatement of Torts and adopted by the Texas courts. *Id.* at 2-3. Section 3(a)(10) also protects certain commercial and financial information that need not constitute a trade secret. Open Records Decision No. 592 (1991) held that "[i]n order to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, 'commercial or financial information obtained from a person' must be 'privileged or confidential' under the common or statutory law of Texas." *Id.* at 9 (citing the summary). When an agency or company fails to provide relevant information regarding factors necessary to make a 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). *See* Open Records Decision No. 402 (1983).

We have examined the documents submitted to us for review and have considered the arguments presented to us by the board and the three companies. Neither the board nor the three companies have demonstrated how the requested information constitutes a trade secret. Further, it has not been demonstrated whether the requested information is deemed privileged or confidential by law. Accordingly, the requested information may not be withheld from required public disclosure by section 3(a)(10) of the Open Records Act and must 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 OR91-610.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

SG/GK/mc

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Enclosures: Open Records Decision Nos. 463, 592

Ref.: ID#s 13075, 13323, 13877, 13899, 13964

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