



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

December 3, 1991

Ms. Rosalinda Garcia  
Assistant County Attorney  
Harris County  
1001 Preston, Suite 634  
Houston, Texas 77002-1891

OR91-611

Dear Ms. Garcia:

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# 13690.

The Purchasing Agent of Harris County has received a request for information relating to the bid documents submitted by HTE, Inc. for the purchase of software and software support services for the 1st and 14th Courts of Appeal. The requestor specifically seeks "copies of the other respondent's bid documents." At issue here is whether the requested information is excepted from required public disclosure by section 3(a)(10) of the Open Records Act.

Pursuant to section 7(c) of the act, we have notified the third party whose proprietary interests may be compromised by disclosure of the requested information. In response, we have received a letter from HTE. HTE claims that the requested information is excepted from disclosure under the Open Records Act, that the bid documents contain audited financial statements, client lists, and information which reflects computer software design "which has not been previously used in this country." Although not expressly stating so, it appears that HTE is claiming exception under section 3(a)(10).

Section 3(a)(10) ~~excepts from required public disclosure~~ two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776

(Tex.), *cert. denied*, 358 U.S. 898 (1958). The Restatement lists six factors to be considered in determining whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the proprietor's] business;
- (2) the extent to which it is known by employees and others involved in [the proprietor's] business;
- (3) the extent of measures taken by [the proprietors] to guard the secrecy of the information;
- (4) the value of the information to [the proprietors] and [their] competitors;
- (5) the amount of effort or money expended by [the proprietors] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757, cmt. b (1939). These factors are indicia of whether information constitutes a trade secret; depending on the information being considered, one factor alone may be indicative of a trade secret. *See* Open Records Decision No. 552 (1990) at 3.

In regard to the other branch of section 3(a)(10), Open Records Decision No. 592 (1991) (copy enclosed) 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.*" Open Records Decision No. 592 at 9 (emphasis added). When an agency or company fails to provide relevant information regarding the factors necessary to make a 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). Open Records Decision No. 402 (1983).

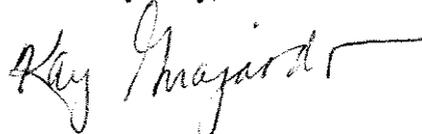
HTE asserts that the software proposed in its bid has not been previously used in the industry and that release of the requested information would "put HTE,

Inc. at a severe competitive disadvantage because our competitors would be able to use this information to compete against us before the product has been introduced to the market." HTE further asserts that they are "a privately held Company which does not disclose its financial records to anyone who does not have a need to know this information." We conclude that HTE has established that the information about the software design constitutes a trade secret which is excepted from required disclosure by section 3(a)(10). However, such is not the case for the customer list of HTE, Inc. By providing no facts about its customer list in regard to the six Restatement criteria for determining a trade secret, HTE, Inc. has failed to establish that its customer list constitutes a trade secret. Furthermore, we know of no common or statutory law which would impart confidentiality to the financial information in the proposal, as required by the financial information branch of section 3(a)(10). Accordingly, the financial information and the customer list are not excepted from public disclosure by section 3(a)(10) of the Open Records Act.

Upon review of the requested documents, we note that HTE, Inc. submitted with its bid proposal a "Nondisclosure Statement," which states that the proposal is protected by copyright law. The release of copies of computer programs or any information which is protected by copyright violates federal law. Attorney General Opinion JM-672 (1987); Open Records Decision No. 505 (1988). Consequently, you need not furnish copies of the information which we have determined is not excepted from required public disclosure under the Open Records Act; rather, you should allow public inspection of same. *Id.*; Attorney General Opinion MW-307 (1981).

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 OR91-611.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/GK/lcd

Enclosures: Open Records Decision No. 592, 552, 505  
Return Documents

Ref.: ID#s 13690, 13968

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