



Office of the Attorney General  
State of Texas

April 23, 1993

DAN MORALES  
ATTORNEY GENERAL

Ms. Ann S. Fuelberg  
Executive Director  
Department of Information Resources  
P.O. Box 13564  
Austin, Texas 78711-3564

OR93-091

Dear Ms. Fuelberg:

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# 17193.

The Department of Information Resources (the "department") has received a request for information relating to a certain computing project. Specifically, the requestor seeks "access to procurement records and documents related to the proposed Lamar University administrative computing project acquisition." You have submitted to us for review the file containing the requested information. You claim some or all of the file is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), 3(a)(4), 3(a)(10), and 3(a)(11) of the Open Records Act.

Because your assertion of the section 3(a)(3) exception is most inclusive, we address it first. Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). "Whether litigation is reasonably anticipated must be determined on a case-by-case basis." Open Records Decision No. 452 (1986) at 4. Section 3(a)(3) requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 518 (1989); 328 (1982).

You claim that the requestor seeks the information submitted to us for review to evaluate whether to engage in litigation against the department; on this basis you believe that litigation is "imminent." You have submitted to us for review, however, no concrete evidence supporting your claim that litigation is reasonably anticipated. We thus have no basis to conclude that the requested information may be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.

We consider next your assertion of the section 3(a)(4) exception. Section 3(a)(4) of the Open Records Act excepts "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests during the competitive bidding or competitive proposal process. *See* Open Records Decision No. 463 (1987). However, once the bidding or proposal process has ceased and a contract has been awarded, section 3(a)(4) is no longer applicable. *See* Open Records Decision No. 541 (1990). We are advised that the contract at issue here has been awarded. Accordingly, the section 3(a)(4) exception is no longer applicable here.

Generally, section 3(a)(10) protects the property interests of private persons by excepting 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 section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that 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. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

This office previously has held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private party's claim for exception as valid under that branch if that party establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552

(1990) at 5-6.<sup>1</sup> When neither the agency nor the company provides relevant information regarding factors necessary to make a 3(a)(10) claim, the agency has no basis to withhold the information under section 3(a)(10). *See* Open Records Decision No. 402 (1983).

The file submitted to us for review was generated in fulfillment of department responsibilities outlined in section 18, article 4413(32j), V.T.C.S., regarding the review and approval of agency requests for the procurement of information resources technology and services. While none of the documents in the file were generated by the private company whose services to Lamar University were the subject of the department's review under section 18, you claim that some of the information in the file is nonetheless proprietary. You advise that the department "is merely the custodian of the information which may be confidential or trade secret in nature and for which Lamar University would seek exception from disclosure." However, aside from your conclusory assertion of the trade secrets branch of section 3(a)(10), neither the department, nor Lamar University, nor any private entity has provided us with arguments establishing a *prima facie* case that information in the requested file constitutes "trade secrets." We thus have no basis to conclude that the requested information may be excepted from required public disclosure under the trade secrets branch of section 3(a)(10) of the Open Records Act.

Additionally, you have not established that information in the file merits protection as commercial or financial information under the second prong of section 3(a)(10). In Open Records Decision No. 592 (1991) (copy enclosed), this office held that "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 (summary). While you claim that some of the information contained in the file is made confidential by law, you have failed to identify any such law. Furthermore, we are unaware of any law that makes confidential any of the information contained in the file. Having examined the documents submitted to us for review and having considered your arguments, we have no basis to conclude that the file is excepted from required public disclosure by section 3(a)(10) of the Open Records Act.

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

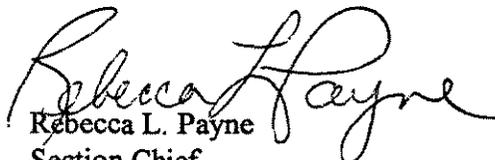
*Id.*; *see also* Open Records Decision Nos. 319, 306 (1982); 255 (1980).

You also claim that some of the requested information is excepted from required public disclosure by section 3(a)(11) of the Open Records Act. For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Dep't of Pub. Safety v. Gilbreath*, No. 3-92-024-CV (Tex. App.--Austin, November 25, 1992, n.w.h.), the Third Court of Appeals recently held that § 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 7. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review the information and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information. Of course, information for which you have not raised the section 3(a)(11) exception must be released at this time.

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 OR93-091.

Yours very truly,



Rebecca L. Payne  
Section Chief  
Open Government Section

RLP/GCK/lmm

Ref: ID# 17193

Enclosure: Open Records Decision No. 592

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