



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 15, 1993

Mr. Jim Dickinson
Deputy Executive Director
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR93-108

Dear Mr. Dickinson:

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# 17380.

The Texas Parks and Wildlife Department (the "department") has received two requests for information relating to a certain request for proposals. Specifically, the requestors seek "copies of all materials including bid responses, evaluations and rankings, and the purchase order for the Texas Parks and Wildlife Request for Proposal, dated April 4, 1992, for consulting services for the assessment of current and future information system(s) needs." You have submitted the requested information to us for review and claim that it is excepted from required public disclosure by sections 3(a)(4), 3(a)(10), and 3(a)(11) of the Open Records Act.

Pursuant to section 7(c) of the Open Records Act, we have notified the companies whose interests may be affected by disclosure of the information submitted to us for review. In response, we have received letters from Sterling Information Group, Inc. ("Sterling") and Tracor Applied Sciences, Inc. ("Tracor"). While neither of these companies expressly invoke the protection of any exception under section 3(a) of the Open Records Act, both object to release of portions of their proposals.¹

¹We did not receive a response from the other notified companies. Because we have no basis to withhold the information under section 3(a)(10) or any other exception under the Open Records Act, the

We turn first to section 3(a)(4). 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 to competition for governmental contracts and specifically protect the sealed bid process. Open Records Decision No. 463 (1987). Section 3(a)(4) is not applicable when the bidding on a contract has been completed and the contract is in effect. Open Records Decision No. 541 (1990). Neither the department nor the respondents indicate how the requested information relates to a pending competitive bidding situation to which the department is party. Accordingly, section 3(a)(4) does not except from required public disclosure the information at issue here.

We turn next to section 3(a)(10). 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. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9. 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).

(footnote continued)

information concerning these companies may not be withheld from required public disclosure. *See, e.g.*, Open Records Decision Nos. 405, 402 (1983).

This office has previously 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 excepting the information and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6.²

Sterling objects to release of the names and telephone numbers of its references and client contacts. Tracor objects to release of the portions of its proposal titled "General Approach" and "Budget," which include information relating to the company's billing rates and its "approach to solving a customer's problems." Neither of the respondents, however, has addressed the Restatement criteria, nor have they in any way indicated that this information constitutes trade secrets. We conclude, therefore, that neither Sterling nor Tracor has made a *prima facie* case establishing that any information in their proposals constitutes trade secrets. Nor have the companies referred us to any state judicial decision or statute holding such information either privileged or confidential. Accordingly, the proposals of Sterling and Tracor may not be withheld from required public disclosure under section 3(a)(10) of the Open Records Act. All of the requested proposals must be released.

Finally, we address your claim that some of the requested information constitutes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure.

For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, writ ref'd), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the

²The 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.

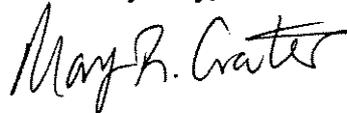
Id.; see also Open Records Decision Nos. 319, 306 (1982); 255 (1980).

civil discovery context." *Gilbreath* at 413. 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) or any other exception that you have previously raised. 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.

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 OR93-108.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GCK/mc

Ref.: ID# 17380
ID# 17449
ID# 17542

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Enclosures: Open Records Decision Nos. 226, 373, 600