



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 4, 1993

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

OR93-282

Dear Ms. Schwender:

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# 18039.

Harris County received a request for "a copy of the RFP [request for proposals] that was submitted by All Seasons Travel on May 5, 1992." When All Seasons Travel Corporation [All Seasons] submitted its response to Harris County's RFP, it marked two portions of its response as confidential. You seek to withhold these portions of the requested information based on sections 3(a)(4) and 3(a)(10) of the Open Records Act.<sup>1</sup>

The portions of the requested information which you seek to withhold include a customer list and an annual financial report for All Seasons. Section 3(a)(10) of the Open Records Act excepts

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<sup>1</sup>Pursuant to section 7(c) of the Open Records Act, we notified All Seasons of this open records request. In response to this notification, All Seasons did not raise any specific exceptions in the Open Records Act to the release of the requested information; however, it did identify several portions of its response to the RFP which it does not want released. Based on the arguments it made, we think All Seasons seeks to establish that portions of the requested information constitutes trade secrets, which are excepted from required disclosure under section 3(a)(10) of the Open Records Act. You informed us, however, that, except for the two portions of the requested information which All Seasons marked as confidential when it submitted its response to the RFP to you, you have already released the requested information. Thus, as you have not preserved the issue of the availability of the released materials, we will confine this letter to consideration of the application of exceptions to the disclosure of only the two portions of the response to the RFP which All Seasons marked as confidential and which have not been released.

trade secrets and 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 which 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.

RESTATEMENT OF TORTS § 757, cmt.b (1939). Whether information constitutes a trade secret is a question of fact. Open Records Decision No. 552 (1990). The Restatement lists six factors to consider when determining whether information constitutes a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is know 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 to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this 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). When determining whether information constitutes a trade secret for purposes of section 3(a)(10) of the Open Records Act, this office accepts a claim as valid if the *prima facie* case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law. See Open Records Decision No. 552.

All Seasons informs us that the customer list is comprised of five client references in the Houston area with trade in excess of \$750,000 annually. All Seasons says that the customer list is a trade secret because this "office has made the determination in other opinions that customer lists are exempt from disclosure under . . . section 3(a)(10) . . ." All Seasons contends that the release of the lists would be "detrimental to our business," and that "the only individuals at S.B. Wood Investments, Inc. that are aware that these accounts do in excess of \$750,000.00 annually are two [ ] officers, two[ ] executives and two[ ] managers." All Seasons further states that "[v]ery few individuals with the corporate accounts listed are aware of this information."

Thus, in contending that the consumer list is a trade secret, All Seasons relies on two of the Restatement factors, the extent to which the customer list is known by employees and others in the company, and the extent to which the information is known outside the business, in particular, the extent to which individuals with accounts with All Seasons in excess of \$750,000 are aware of the information. However, All Seasons has failed to provide any information about the other four trade secret factors in regard to your customer list. We therefore cannot conclude that All Seasons has established a *prima facie* case that the customer list constitutes a trade secret. *See id.* Accordingly, you must release the customer list.

As for the annual financial report, you do not say why section 3(a)(10) applies to this information. All Seasons states that

as S.B. Wood Investments, Inc. is a privately held Texas Corporation, this information is not available to the general public. This information is only available to or can be released by two [ ] officers and two [ ] executives of S.B. Wood Investments, Inc. Furthermore, this information was provided only upon request of Harris County, Texas.

While these statements about the availability of the financial report relate to some of the six trade secret indicators provided in the Restatement of Torts, they do not establish that the financial report is a "formula, pattern, device," or even a "compilation of information" which is used in the travel agency business, or which gives All Seasons an advantage over its competitors in the travel agency business. RESTATEMENT OF TORTS § 757, cmt.b (1939). In other words, the financial report is not a secret of the trade. Thus, you may not withhold the financial report under section 3(a)(10) as a trade secret.

Section 3(a)(10) also excepts "commercial and financial information obtained from a person and privileged or confidential by statute or judicial decision." Commercial and 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)(overruling Open Records Decision No 309 (1982) to the extent of conflict).

We are aware of no statute or common law doctrine which would deem the financial report confidential. Thus, you may not withhold the financial report under section 3(a)(10) of the Open Records Act as confidential commercial or financial information obtained from a person.

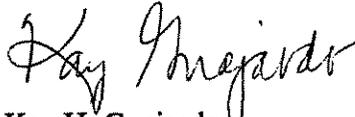
You also raise section 3(a)(4) which excepts from required public disclosure information which, if released, would give advantage to competitors or bidders.

Section 3(a)(4) is designed to protect the interest of a governmental body in a competitive situation and not the interest of a private party which submits information to the governmental body. *Id.* at 8. The exception is usually applied in competitive bidding situations before a contract is awarded. Open Records Decision No. 593 (1991). Ordinarily, it does not except bids from disclosure after the bidding has been completed and the contract awarded. Open Records Decision No. 514 (1988). In this case, the contract has been awarded. However, you say "Harris County has a strong interest in protecting information designated [as] confidential [when] submitted with a bid because it is highly probable that disclosure would allow competitors to accurately estimate and undercut *future* bids--especially clearly identified competitors." (Emphasis added). Apparently, your concern is that the release of the financial reports will allow All Season's competitors to undercut unspecified future bids for a contract with Harris County.

Section 3(a)(4) applies when a governmental body shows some specific actual or potential harm in a particular competitive situation. *See id.* A general allegation or remote possibility that a competitor will gain an unfair advantage will not suffice. *See id.* You have not specified a particular competitive situation in which the release of the report would harm All Seasons. We therefore conclude that section 3(a)(4) does not apply. You must release the financial reports.

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 any questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/SG/le

Ref: ID# 18039  
ID# 18184

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