



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 2, 1993

Mr. Charles E. Griffith  
Deputy City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR93-287

Dear Mr. Griffith:

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# 19549.

The City of Austin (the "city") has received an open records request for records pertaining to the proposed construction of a shopping mall development project in the city. Specifically, the requestor seeks:

- 1) All financial information, including the Dunn & Bradstreet report, on Bennett Consolidated . . . [and its] applications to the city for zoning and development, and any other information you may have.

You state that although the city has released much of the requested information to the requestor, you seek to withhold pursuant to section 3(a)(4) of the Open Records Act (the "act") a portion of a consultant's report prepared for the city by the National Development Council regarding the proposed project. Because you have clearly marked or described the portions of the other records that either you or Bennett Consolidated Properties ("Bennett") believe to be protected from required public disclosure, this office will assume that the city has released all of the remaining information.

Section 3(a)(4) of the Open Records Act protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect the government's interests when it is involved in commercial transactions. For example, section 3(a)(4) is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal, Open Records Decision No. 463 (1987), or where the governmental body is specifically authorized by constitutional or statutory law to compete in the marketplace. Open Records Decision No. 593 (1991).

You contend that

[r]eleasing this sensitive information might prejudice the developer by allowing its shopping mall competitors to have access to the developer's proposed major tenant list. The City's interests could be harmed by this release. If released future participants of tax increment financing proposals might be less inclined to release similar sensitive information that the City could use to evaluate a financial proposal's credit worthiness. The City wants to preserve its ability to fully evaluate bond proposals and not in any way inhibit a free flow of sensitive information to City staff charged with evaluating a tax increment financing proposal in the future.

This argument appears to meet a legal test this office once used for withholding "commercial or financial information" pursuant to section 3(a)(10) of the Open Records Act. *See, e.g.,* Open Records Decision No. 309 (1982) *overruled by* Open Records Decision No. 592 (1991). However, this argument does not comport with the purpose of section 3(a)(4). You have not, for example, established that the information pertains to a competitive bidding situation currently before the city. Consequently, we conclude section 3(a)(4) does not protect the information at issue here.

Pursuant to section 7(c) of the Open Records Act, the developer of the proposed project has also submitted its arguments for the withholding of certain information held by the city. Bennett first contends that much of the information it has submitted to the city constitutes trade secrets and thus is protected by section 3(a)(10). Section 3(a)(10) protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." 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 machine or other device, or a list of customers.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert denied* 358 U.S. 898 (1958) (adopting Restatement § 757 definition of trade secret). There are six factors to be assessed in determining whether information qualifies as 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 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 to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.

Bennett contends that although the financial reports prepared by Dunn & Bradstreet are commercially available they are not "generally available to the public" and thus should be withheld pursuant to section 3(a)(1)<sup>1</sup> and 3(a)(10). Bennett has not established a *prima facie* case that this report constitutes a "trade secret."<sup>2</sup> *See also M.N. Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 632-33 (Tex. Civ. App.-- Houston [14th Dist.] 1992, writ denied) (information readily obtainable in the general industry could not be appropriated as confidential). Because Bennett has not met its burden under section 3(a)(10) regarding the report, the city must release this information.<sup>3</sup>

On the other hand, Bennett has made a *prima facie* case for the identities of its prospective tenants, portions of the separate demographic study of the Austin area, and the market studies compiled for the prospective tenants. In particular, Bennett has explained to this office that the market studies prepared for the prospective tenants were produced at great cost to Bennett and were then provided to those tenants under a confidentiality agreement that prohibited their subsequent release of the information. Furthermore, Bennett has explained that the identities of the prospective tenants are known only by a limited class of individuals who have agreed to maintain the tenants'

---

<sup>1</sup>Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." In this instance, because trade secrets are made confidential by law, the protection of section 3(a)(10) is co-extensive with that of section 3(a)(1).

<sup>2</sup>We also note that Bennett has not established that this information is "commercial or financial information . . . privileged or confidential by statute or judicial decision." *See* V.T.C.S. art. 6252-17a, § 3(a)(10); Open Records Decision No. 592 (1991).

<sup>3</sup>It is not clear to this office whether Dunn & Bradstreet has reserved its federal copyright to this report. We note, however, that to the extent that the requested records consist of copyrighted materials, the city is only required to allow inspection of those materials and need not provide copies of such. Attorney General Opinion JM-672 (1987).

identities as confidential.<sup>4</sup> Accordingly, the city may withhold the letters of interests from the prospective tenants, the market studies compiled for those tenants and the executive summary and section V of the demographic study of Austin.

Bennett also seeks to withhold pursuant to section 3(a)(10) a large portion of the cover letter transmitting Bennett's project binder to the city. However, Bennett has demonstrated a *prima facie* case for withholding only the names of the prospective tenants from this letter; accordingly, this is the only information the city may withhold from this document.

Bennett also contends that the consultant report prepared for the city by the National Development Council comes under the protection of section 3(a)(4) because the release of this information "will prejudice Bennett by allowing its shopping mall competitors to have access to its proposed major tenant list." Bennett lacks standing to raise section 3(a)(4) because that section is intended to protect only governmental interests. However, because Bennett has demonstrated the applicability of section 3(a)(10) to the identity of the prospective tenants, the city may withhold those portions of the report that identify them.

Finally, the requestor also seeks:

- 2) All financial information and application information on Barstow-Glickman Association, including the Dunn & Bradstreet report, if available.

You inform us that the city possesses no information coming within the ambit of this request; if so, the city need not comply with this portion of the request.<sup>5</sup> See Open Records Decision No. 430 (1985) at 4. We note, however, that there are numerous references to "Barstow-Glickman" and "Barstow-Glickman Associates" throughout the

---

<sup>4</sup>Information need not be absolutely secret to be withheld as a trade secret. The holder of a trade secret

may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy . . . . Nevertheless, a substantial element of secrecy must exist, so that except by the use of improper means, there would be difficulty in acquiring the information.

*Metallurgical Industries, Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986) (quoting Restatement of Torts, § 757 comment b (1939)).

<sup>5</sup>We note, however, that the city has the duty to advise the requestor of the existence of all documents that may come within the ambit of this request so that the requestor may narrow the request. See Open Records Decision No. 87 (1975).

requested records. Because neither the city nor Bennett has otherwise argued that this information is excepted from required public disclosure, this office will assume that the city will release this information to the requestor.

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 contact our office.

Yours very truly,



Celeste A. Baker  
Assistant Attorney General  
Opinion Committee

CAB/RWP/le

Ref.: ID# 19549  
ID# 19901  
ID# 19936

Enclosures: Submitted documents

cc: Ms. Louisa C. Brinsmade  
Assistant Politics Editor  
The Austin Chronicle  
P.O. Box 49066  
Austin, Texas 78765

Mr. William Terry Bray  
Graves, Dougherty, Hearon & Moody  
P.O. Box 98  
Austin, Texas 78767

Mr. Ed Barstow  
Barstow-Glickman Associates  
2200 South Haven Road  
Claremore, Oklahoma 74017

(w/o enclosures)