



Office of the Attorney General  
State of Texas

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DAN MORALES

ATTORNEY GENERAL

Mr. Kevin T. O'Hanlon  
General Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR93-332

Dear Mr. O'Hanlon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), article 6252-17a, V.T.C.S. Your request was assigned ID# 19141.

The Texas Education Agency (the "agency") received a request for certain information concerning the Texas Assessment of Academic Skills ("TAAS") and the Norm-referenced Assessment Program for Texas ("NAPT"). Specifically the request includes:

1. [T]he contract between Texas and the testing company for the NAPT and the TAAS tests used in Texas.
2. [A]ny other public documents on these tests and the company.
3. [T]he proposals and replies for developing and scoring NAPT tests.

You state that you have released to the requestor copies of the contracts with National Computer Systems ("NCS"), Riverside Publishing Company ("Riverside") and Psychological Corporation ("Psycor"). You contend that the balance of the information is excepted from disclosure by sections 3(a)(1), 3(a)(4) and 3(a)(10) of the act. Pursuant to section 7(c) we have also solicited briefs from third parties that may have property interests in the requested information.

You have submitted for our review eight notebooks containing bid proposals from CTB MacMillan/McGraw-Hill ("CTB"), Riverside and Psycor. The information from CTB consists of two notebooks containing CTB's Scoring bid proposal and Support Services For Providing National Comparative Data for Student Performance ("Support Services") bid proposal. The Riverside documentation consists of two notebooks

containing Riverside's Scoring bid proposal (main volume and appendix) and two notebooks containing Riverside's Support Services bid proposal (main volume and appendix). The information from Psycor consists of two notebooks containing Psycor's Support Services bid proposal.

You contend that the information is not subject to the act because the agency does not have a right of ownership of any of the submitted bid materials. Section 3(a) provides:

All information *collected, assembled, or maintained* by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information. . . . [Emphasis added.]

Although the agency may not have a contractual right of ownership to the information submitted by the unsuccessful bidders, it clearly collected and maintains physical custody of the information submitted by all the bidders. Virtually all information in the physical custody of a governmental body is subject to the Open Records Act, unless a section 3(a) exception applies. Open Records Decision No. 549 (1990). Because the agency has physical custody of the requested information, the information is subject to the act.<sup>1</sup>

You claim that the test materials are excepted from disclosure by section 3(a)(1) in conjunction with section 21.556 of the Texas Education Code. Section 3(a)(1) excepts from required public disclosure information deemed confidential by judicial, statutory or constitutional law. Section 21.556 of the Texas Education Code provides:

In adopting basic skills assessment instruments and achievement tests pursuant to this subchapter, the State Board of Education . . . shall insure the security of the instruments and tests in their preparation, administration, and grading. . . . [T]he assessment instruments, items, and tests are confidential.

The TAAS and NAPT tests are student assessment programs that have been mandated by the legislature. See Educ. Code § 21.551. Therefore, the secure test material, including

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<sup>1</sup>"Right of access to or ownership of information" language in section 3(a) pertains to information maintained for a governmental body. Open Records Decision No. 558 (1990) at 2. Information maintained for a governmental body is subject to the Open Records Act even though the body may not have physical custody of the information. *Id.*

the test items, test prompts and test answer sheets or booklets that have been adopted by the agency may not be disclosed.

You contend that all of the bid proposals submitted for our review are excepted from required public disclosure under section 3(a)(4), information which, if released, would give advantage to competitors or bidders. You and Psycor assert that disclosure of the documents would give competitors an advantage in future bidding. The purpose of section 3(a)(4) is to protect the interests of a governmental entity and not the interests of the private party that submits information to the government. Open Records Decision No. 592 (1991). Moreover, section 3(a)(4) does not apply when the bidding on a contract has been completed and the contract is in effect. *Id.* You have stated that NCS, Riverside and Psycor all have contracts with the agency to provide the student assessment programs. Therefore, your section 3(a)(4) claim does not apply to the requested documents.

The agency asserts that all of the bid proposals are excepted from disclosure by section 3(a)(10) as trade secrets. Psycor and Riverside assert that certain parts of their submitted bid proposals are trade secrets. Section 3(a)(10) excepts from public disclosure either trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. This exception protects the property interests of third parties recognized by the courts. Open Records Decision No. 319 (1982). In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert denied*, 358 U.S. 898 (1958), the Texas Supreme Court adopted the Restatement of Torts definition of a trade secret. The following criteria determine whether information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's] business; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken by [the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] 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); *See also* Open Records Decision No. 552 (1990).

We must accept a claim that a document is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. See Open Records Decision No. 592 (1991) at 2. Pyscor and Riverside have addressed each of the six factors as they apply to specifically marked parts of their individual bid proposals, and we agree that the documents contain trade secrets. Riverside and Pyscor have made a *prima facie* case that some of the information is protected as trade secret and you may therefore withhold only those parts of the proposals marked by our office.

With respect to the CTB bid proposal submitted for our review, we conclude that you and CTB did not meet the Restatement of Torts criteria to establish that the proposal is a trade secret. A company or agency must show evidence of the efforts to keep information confidential to qualify as a "trade secret" under section 3(a)(10). Open Records Decision Nos. 402 (1983); 255 (1980). You have not provided us with sufficient evidence of efforts made by CTB to keep the proposals confidential. CTB did not respond to our request for briefs pursuant to section 7(c). Therefore, you must disclose the CTB proposals in their entirety.

As for the Pyscor bid proposals, you may withhold the marked information in Proposal 1 (the tan notebook entitled "The Psychological Corporation"); you must release the remainder of the information not marked for withholding. You must disclose all of Proposal 2 (the blue notebook entitled "Texas Assessment of Academic Skills Norm-Referenced Test 1991-1995") except for Appendix D which you may withhold as a secure test item under section 21.556 of the Texas Education Code.

With respect to the Riverside bid proposals, you must release all of the appendix volume and all information not specifically marked for withholding in the main volume of the Scoring Bid. You must release all of the information not specifically marked for withholding in the main volume of the Test Services Bid, and all of the appendix volume except for the graphs on the right side of the pages of section B.

Riverside asserts that the information on pages B-160 through B-181 of the Test Services Bid main volume contains information excepted from disclosure by section 3(a)(1). Section 3(a)(1) applies to information the disclosure of which would be an invasion of privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 3(a)(1) if

- 1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

*Id.* The resumes of the people nominated to the test services review do not contain highly intimate or embarrassing facts and therefore section 3(a)(1) does not apply to the information. *See also* Open Records Decision Nos. 306 (1982), 175 (1977) (Open Records Act does not except from disclosure resumes of employees of a private company.) You must therefore release the information on pages B-160 through B-181 of the Test Services Bid main volume.

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,



Loretta R. DeHay  
Assistant Attorney General  
Opinion Committee

LRD/jmn

Ref.: ID# 19141  
ID# 19666  
ID# 19696  
ID# 19699  
ID# 19980  
ID# 20017

Enclosures: marked documents

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