



Office of the Attorney General
State of Texas

June 30, 1993

DAN MORALES
ATTORNEY GENERAL

Ms. Claudia Nadig
Assistant General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704

OR93-392

Dear Ms. Nadig:

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# 19652.

The Texas Workers' Compensation Commission (the "commission") has received a request for information regarding Protective Insurance Company and Yellow Freight Systems. Specifically, the requestor seeks:

Records of health and safety program as submitted by Protective Insurance as a prerequisite for underwriting Yellow Freight's insurance in Texas.

All records pertaining to the following Texas Administrative Codes:
166.102.-166.104.-166.105.-166.106.-166.107.-166.108. 166.109.-
166.111.-166.113.

Any complaints not related to specific WC claim

Any investigative reports of alleged violations

Any fines or citations issued.

You advise us that some of the requested information will be made available to the requestor. In addition, you advise us that the commission is not in possession of information responsive to the first and last items above. The Open Records Act does not ordinarily require a governmental body to obtain information that it does not possess. See Open Records Decision No. 558 (1990). You object, however, to release of the remaining information and claim that it is excepted from required public disclosure by sections 3(a)(1) and 3(a)(10) of the Open Records Act.

Pursuant to section 7(c) of the act, we have notified the company whose interests may be affected by disclosure of the requested information. In response, we have received a letter from an attorney representing Protective Insurance Company ("Protective"). Protective claims that some of its proposal is excepted from required public disclosure under section 3(a)(10) of the Open Records Act.¹

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. Protective claims that some of its proposal constitutes trade secrets and commercial or financial information that is privileged or confidential by statute or judicial decision.² 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

¹In addition, Protective claims that the information at issue here is protected by section 3(a)(12) of the Open Records Act, which excepts "information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act." We note, however, that section 3(a)(12) is a discretionary exception to required public disclosure, designed to protect the interests of governmental bodies and not third parties. Accordingly, as the commission has not asserted section 3(a)(12), we need not address whether it applies to the information submitted to us for review.

²Protective also asserts that the requested information is excepted because its release would either 1) impair the city's ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. Past open records decisions issued by this office have relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 3(a)(10) to commercial information. *See National Parks & Conservation Ass'n v. Morton*, 498 F2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991), this office reexamined its reliance on federal interpretations of exemption 4 of FOIA. As a consequence of this reexamination, we overruled open records decisions exempting commercial and financial information pursuant to federal interpretations of exemption 4. Unless the information requested constitutes "trade secrets" or is "privileged or confidential" under the common or statutory law of Texas, a governmental body may not withhold it under section 3(a)(10). Protective has not cited any applicable statutory provisions or judicial decisions under which the requested information is "privileged or confidential."

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 5-6.³ On the other hand, 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).

Protective seeks "trade secret" protection for those portions of the documents submitted to us for review which contain the names of policyholders, premiums charged, policy expiration dates, a list of field safety representatives, and certain handwritten notes. We have examined the information submitted to us for review. Protective's arguments supporting non-disclosure are conclusory and offer little more than a restatement of the Restatement criteria. Protective has failed to provide this office with information demonstrating the applicability of the Restatement criteria. We conclude, therefore, that Protective has not made a *prima facie* case establishing that any of the information submitted to us for review constitutes trade secrets. Furthermore, we are unaware of any federal or Texas statutes that make confidential any of the information

³The six factors that the Restatement lists 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.

RESTATEMENT OF TORTS § 757 *supra*; see also Open Records Decision Nos. 319, 306 (1982); 255 (1980).

submitted to us for review. Accordingly, section 3(a)(10) of the Open Records Act does not authorize the commission to withhold from required public disclosure the submitted information; the commission must release the requested information in its entirety.

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 this office.

Yours very truly,



Rick Gilpin
Assistant Attorney General
Opinion Committee

RG/GCK/jmn

Ref.: ID# 19652
ID# 20066
ID# 20406
ID# 20539
ID# 20560
ID# 20756
ID# 20782

cc: Ms. Barbara Jarvis
Route 1 Box 233G
Whitesboro, Texas 76273

Mr. Barry Senterfitt
Akin, Gump, Strauss, Hauer
& Feld, L.L.P.
2100 Franklin Plaza
111 Congress Avenue
Austin, Texas 78701

Mr. Joseph J. DeVito
Vice President Administration
Protective Insurance Company
1099 North Meridian Street
Indianapolis, Indiana 46204