



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL  
ATTORNEY GENERAL

July 28, 1977

Honorable Charles A. LeMaistre  
Chancellor  
The University of Texas System  
601 Colorado  
Austin, Texas 78701

Open Records Decision No. 171  
Re: Whether comparative  
evaluation of hospital beds  
and related furnishings is  
public under Open Records Act.

Dear Dr. LeMaistre:

An unsuccessful bidder has requested the reports, evaluations and studies which led to the specifications and bidding requirements decided upon by the University in connection with the purchase of hospital beds and related furnishings, and also that information which led to the selection of the successful bidder. The University has declined to provide the requested information. You request our decision pursuant to section 7 of the Open Records Act, article 6252-17a, V.T.C.S., on whether the requested information is excepted from required public disclosure under section 3(a)(11), the interagency memorandum exception, or 3(a)(3), the "information relating to litigation" exception.

It is the University's position that the materials contain opinions and recommendations with respect to the proposed purchase of hospital furniture and should not be disclosed because to do so would discourage open and frank discussion on policy matters within the decision-making process.

The information submitted consists of a report of an evaluation of selected hospital beds, a furniture purchase schedule, and an estimate of patient room furniture costs. A three-page supplemental report deals with maintenance considerations in evaluating electric beds. Copies of letters to potential bidders who had loaned beds for evaluation advise that the evaluation was completed and explained: "Each bed was tested under a variety of conditions and situations, and every effort was made to maintain objectivity." Other information submitted consists of justifications for accepting other than the low bid on hospital beds, special bed-side cabinets and overbed tables.

The evaluation study materials are not excepted under the intra-agency memorandum exception, section 3(a)(11). The information is basically factual and comparative of the characteristics and operation of the equipment evaluated. It constitutes a completed report or evaluation of the type expressly made public by section 6(a)(1) of the Act. See Open Records Decision Nos. 160 (1977); 149, 137 (1976); 48, 27 (1974). See also Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973); Ethyl Corp. v. Environmental Protection Agency, 478 F.2d 47, 49 (4th Cir. 1973); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971); Bristol-Myers Co. v. Federal Trade Comm'n, 424 F.2d 935, 939 (D.C. Cir. 1970); Verrazzano Trading Corp. v. United States, 349 F.Supp. 1401, 1406-07 (Customs Ct. 1972); Consumers Union of United States, Inc. v. Veterans Administration, 301 F.Supp. 796 (S.D. N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

The material justifying acceptance of the higher bid is not excepted as an intra-agency memorandum under section 3(a)(11). This is the type of material referred to under section 6(3) of the Act which specifically makes public:

- (3) information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law. . . .

The State Purchasing Act of 1957, as amended, article 664-3, V.T.C.S., provides in section 8(g) that:

When an award is made a statement of the basis for placing the order with the successful bidder shall be prepared by the purchasing division and filed with other papers relating to the transaction.

The justification information is also in the nature of a final opinion which is expressly made public under section 6(12) of the Act. It serves as the basis for the policy determination made. As we said in Open Records Decision No. 137 (1976) at 4, addressed to the University of Texas System:

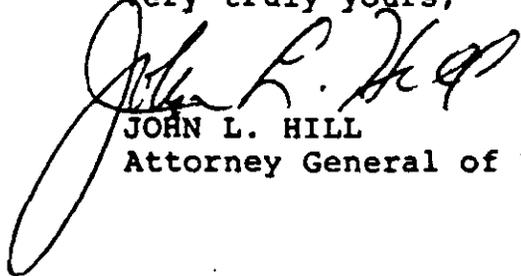
[T]he great public interest in knowing the basis for agency policy already adopted renders the intra-agency memorandum exception inapplicable to this type of information.

The federal courts interpreting the similar exception in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5) have uniformly distinguished between predecisional communications and those made after the decision and designed to explain it, and have held the latter to be public. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 151-152 (1975). See Ash Grove Cement Co. v. Federal Trade Comm'n, 519 F.2d 934, 935 (D.C. Cir. 1975); Bannercraft Clothing Co. v. Renegotiation Board, 466 F.2d 345, 352 (D.C. Cir. 1972); Tennessean Newspapers, Inc. v. Federal Housing Authority, 464 F.2d 657 (6th Cir. 1972); Sterling Drug Inc. v. Federal Trade Comm'n, 450 F.2d 698, 708 (D.C. Cir. 1971); General Services Administration v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

The suggestion that the information might be excepted under section 3(a)(3) as information relating to litigation is not supported by any showing that litigation is pending or reasonably anticipated. This exception is not applicable.

It is our decision that the information requested is not excepted from disclosure and must be made public.

Very truly yours,

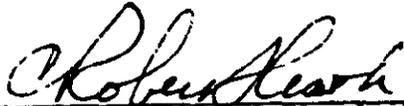


JOHN L. HILL  
Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman  
Opinion Committee

klw