



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

August 31, 1989

Mr. Allen P. Beinke
Executive Director
Texas Water Commission
P. O. Box 13087, Capitol Station
Austin, Texas 78711-3087

Dear Mr. Beinke:

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# 6077; this decision is OR89-284.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Texas Water Commission (the commission) received a request for copies of information submitted to the commission by Texas Industries, Inc. concerning the recycling of aqueous secondary material, commonly termed "waste water." On behalf of Texas Industries, Inc., you raise sections 3(a)(4) and 3(a)(10) of the Open Records Act as exceptions to required public disclosure.

Section 3(a)(4) protects "information which, if released, would give advantage to competitors or bidders." This section is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. The test for determining whether section 3(a)(4) applies is whether there has been a showing of some specific actual or potential harm in a particular competitive situation. You have made no showing of how release of the requested information would harm the competitive interests

of any individual or entity. Therefore, the information is not protected from disclosure under section 3(a)(4).

Section 3(a)(10) of the act excepts from required public disclosure commercial or financial information obtained from a person that is privileged or confidential by statute or judicial decision. The requested material is clearly commercial information. To fall within section 3(a)(10), however, it must be "privileged or confidential by statute or judicial decision." Similarly, section 3(a)(10) protects information that constitutes a trade secret under the Restatement of Torts, section 757, adopted by the Texas Supreme Court. The Restatement lists six criteria for 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 its 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.

You have submitted for our consideration a letter from the attorneys for Texas Industries, Inc., explaining why waste water analysis reports, a list of waste water generators and waste water pump rate information should be protected as trade secrets under section 3(a)(10). We believe these arguments are reasonable and that this information should be protected as the type of information protected under the trade secret aspect of section 3(a)(10). Specifically, you may withhold under the Open Records Act the waste water analysis reports dated February 28, 1989, the waste water analysis report date March 6, 1989,

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including "Attachment C", as well as the list of waste water generators, dated March 30, 1989.

You have expressed no opinion, however, nor is it apparent to this office how the rest of the information submitted satisfies the requirements of sections 3(a)(4) and 3(a)(10). You must release as requested all information not protected under the act by this ruling. Further, this decision does not address whether any of the information is available through discovery. See Attorney General Opinion JM-1048 (1989).

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 refer to OR89-284.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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of the Opinion Committee
Prepared by David A. Newton
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DAN/FAF/bc

Ref.: ID# 6077
6139

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