



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 10, 1989

Mr. Clayton T. Garrison
Executive Director
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

Dear Mr. Garrison:

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# 7552; this decision is OR89-364.

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. Attorney General Opinion H-436 (1974). 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 Employees Retirement System of Texas (ERS) received an open records request for all information the ERS received through its Request for Proposal (RFP) for Master Trust/Custodian Services. The RFP, which was provided to various financial organizations, contained a provision stating that all proposals submitted to the ERS would be subject to the Open Records Act, that the proposer should therefore identify any information contained in its proposal that it considered confidential, and that the proposer should provide legal arguments as to why that information is excepted from required public disclosure. You contend, however, that all of the proposals should be withheld from the public pursuant to sections 3(a)(4) and 3(a)(10) of the Open Records Act.

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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." Section 3(a)(4) does not, however, except bids or proposals from disclosure once the bidding is over and the contract has been awarded. Open Records Decision No. 306 (1982). This office confirmed through a telephone conversation with the ERS that the contract has in fact been awarded.

You contend that the release of the proposals may result in an unfair competitive advantage with regard to an RFP by some other entity. This office views such a result, though possible, as too speculative and remote to require the withholding of this information because any similar proposal to another entity would necessarily differ from that received by the ERS. Because there is currently no ongoing competitive situation between the ERS and other entities to which the information at issue relates, section 3(a)(4) does not apply to the requested information.

Section 3(a)(10) of the Open Records Act excepts from required public disclosure trade secrets and commercial or financial information that is privileged or confidential by statute or judicial decision. Of the nine companies that submitted proposals to the ERS, only Texas Commerce Bank (TCB) argued that portions of its proposal detailing its proposed fees for services consists of confidential financial information. Although technical material which relates to the substance of a proposal is generally excepted from disclosure as a trade secret, pricing proposals are not so excepted and may be withheld only during the bid submission process. See Open Records Decision No. 306 (1982).

As noted above, however, section 3(a)(10) also protects commercial or financial information. The material TCB seeks to protect is clearly financial information. To fall within section 3(a)(10), however, it must be "privileged or confidential by statute or judicial decision." Commercial or financial information is "confidential" for purposes of this exemption if disclosure of the information is likely to: 1) impair the government's ability to obtain necessary information in the future; or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. See Open Records Decision No. 309 (1982).

The information at issue here meets neither of these tests. The RFP specifically required that the pricing proposals be submitted to the ERS. Further, had the TCB been awarded the contract, this information would

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necessarily become public information. See V.T.C.S. art. 6252-17a, § 6(3) (information in any contract dealing with the expenditure of public funds is public information). It cannot be said that the release of the proposed fees would cause substantial harm to TCB's competitive position because, as noted above, similar proposals submitted to other entities would necessarily differ from that submitted to the ERS. Consequently, all of the proposals, including that of Texas Commerce Bank, must be released to the requestor in their 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 refer to OR89-364.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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of the Opinion Committee
Approved by David A. Newton
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DAN/RWP/le

Ref.: ID# 7552

cc: Sherry A. McGillicuddy
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