



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

July 10, 1990

Mr. Ron Lindsey
Commissioner
Texas Department of Human Services
701 West 51st St.
Austin, Texas 78714-9030

OR90-331

Dear Mr. Lindsey:

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# s 9104; 9338; 9547; 9583.

The Department of Human Services received a request for information about certain welfare reform initiative proposals by the department, specifically relating to a transitional benefits initiative project conducted under a waiver from the federal government, concerning childcare and Medicaid benefits. The requestor seeks various information, including: 1) correspondence between the DHS and federal officials; 2) travel records of DHS board members and employees; 3) recordings made by DHS in connection with the its proposal to the federal government; 4) documents relating to federal approval of the proposal; 5) the names of federal officials contacted by DHS regarding the proposal; and 6) any materials submitted to the federal government in seeking approval of the DHS proposal. In a telephone conversation with this office, you indicated that you have released to the requestor all of the information encompassed in the items numbered 1-5, except for number 3, because you indicate that there were no recordings made or submitted by DHS to the federal government. As to the information encompassed by item 6, you have submitted to this office for review two documents you consider responsive: an "Evaluation Plan" for the welfare reform project, and a "Request for Proposals" for the evaluation of the project. You claim that both documents are excepted from required public disclosure under section 3(a)(11) of the Open Records Act, and that the "Request for Proposals" is also excepted from disclosure under section 3(a)(4).

Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation for use in the entity's deliberative process. Open Records Decision No. 464 (1987); 239 (1980).

Neither the "Evaluation Plan" nor the "Requests for Proposals for Evaluation of the Texas Welfare Reform Waiver Project," contain advice, opinion, or recommendation for use in the agency's deliberative process. The "Evaluation Plan" is a plan submitted to the federal government for approval, not information used in the deliberative process. The "Requests for Proposals for Evaluation" sets forth the work activities involved in the evaluation of the program on which contractors will bid and likewise do not consist of opinion, advice, or recommendation used in the agency's deliberative process. See Open Records Decision No. 160 (1977). These documents are not protected from disclosure under section 3(a)(11).

You claim that both documents are protected from disclosure under section 3(a)(4), because release of the reports would allow a bidder to obtain advance information about a procurement, and such notice would give those bidders a sizable advantage over other bidders who would receive notice of the contract only when let out for bids. You claim that premature disclosure of the information pursuant to an open records request would be detrimental to the government's interest in insuring that all companies have an equal opportunity to bid on the contract.

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." The primary purpose of section 3(a)(4) is to protect the government's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. Section 3(a)(4) is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. See, e.g., Open Records Decision No. 463 (1987).

Section 3(a)(4) has been construed by this office to apply to bidding situations prior to the award of a contract, which is the situation here, as no contract has been awarded. See Attorney General Decision JM-48 (1983); Open Records Decision Nos. 319, 302 (1982). Competitive bidding has been interpreted to require due advertisement, opportunity to bid, placing all bidders on the same plane of equality. See Sterrett v. Bell, 240 S.W.2d 516, 520 (Tex.

Civ. App. -- Dallas, 1951, no writ). Release of this information to one bidder before general notice to the public could clearly give an advantage. Accordingly, you may withhold the request for information and all information about cost estimates for the evaluation contained in the Evaluation Plan from disclosure under section 3(a)(4).

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 OR90-331.

Yours very truly,



David A. Newton
Assistant Attorney General
Opinion Committee

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Ref.: ID# 9104

cc: Ms. Claudia Stravato