



THE ATTORNEY GENERAL  
OF TEXAS

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October 17, 1990

Ms. Sandra J. Bockelman  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR90-503

Dear Ms. Bockelman:

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# 9071.

The City of Austin received an open records request for copies of proposals submitted in response to certain requests for proposals. The city sought the opinion of this office, pursuant to section 7 of the Open Records Act, as to whether the requested information should be withheld pursuant to section 3(a)(10) of the Open Records Act. This office subsequently invited representatives of the parties from whom the proposals were obtained by the City of Austin to submit additional legal arguments regarding the proprietary nature of the requested information. Two of the parties, Upjohn Healthcare Services and Hooper Holmes, Inc., responded with arguments that materials obtained from them contain proprietary information. You advise that the City of Austin endorses these arguments.

Upjohn and Hooper Holmes contend that the requested information constitutes trade secrets and therefore comes under the protection of section 3(a)(10) of the Open Records Act. 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.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958) (quoting Restatement of Torts, section 757, comment b (1939); see also Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978). There are six factors to be assessed in 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 the 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; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 comment b (1939); see also Open Records Decision No. 232, supra.

While Upjohn and Hooper Holmes do not couch their responses directly in terms of the Restatement test, their responses effectively demonstrate a prima facie case that the materials they consider proprietary are trade secrets within this definition. Open Records Decision No. 552 (1990).

Section 3(a)(10) also protects "commercial or financial information obtained from a person." This material is clearly commercial information. To fall within section 3(a)(10), however, it must be "privileged or confidential by statute or judicial decision."

Section 3(a)(10) is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 et. seq. Open Records Decision Nos. 309 (1982); 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive

position of the person from whom the information was obtained. (Emphasis added.)

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). A factor to be considered in these tests is whether the information is of a type that is customarily released to the public. See, e.g., AT&T Information Systems, Inc. v. General Services Administration, 627 F. Supp. 1396, 1403 (D.D.C. 1986), rev'd on other grounds, 810 F.2d 1233 (D.C. Cir. 1987).

The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. You assert that the release of the materials considered proprietary by Upjohn and Hooper Holmes will impair the city's ability to obtain such information in the future.

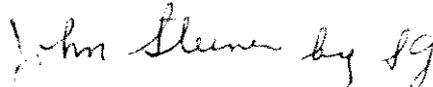
Accordingly, the materials designated as proprietary by Upjohn & Hooper Holmes may be withheld.

With respect to materials obtained from proposers other than Upjohn and Hooper Holmes, this office has no basis for determining that any materials in their proposals are in fact trade secrets; these items must therefore be released. See Open Records Decision No. 552 (1990).

Finally, we note Upjohn's discussion of its copyright. In this respect, your attention is directed to Open Records Decision No. 550 (1990) (copy enclosed) which discusses the manner of compliance with Open Record requests for copyrighted materials.

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 OR90-503.

Yours very truly,



John Steiner  
Assistant Attorney General  
Opinion Committee

JS/le

Ref.: ID# 9071, 9507, 9545, 9600, 10306

Enclosure: Open Records Decision No. 550

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