



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

January 4, 1991

Mr. Charles C. Johnstone
Comptroller of Public Accounts
LBJ State Office Building
Austin, Texas 78774

OR91-010

Dear Mr. Johnstone:

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 letters were assigned ID#'s 9175, 9128, 8964, 8963, 8853, 8852, 8838, and 8837.

The Comptroller of Public Accounts received an open records request for certain information pertaining to Uniform Statewide Accounting System Request for Proposals. The requested information includes the proposals of certain vendors and copies of the Comptroller's evaluations associated with this request for proposals.

With respect to the information contained in the proposals of vendors, you sought the opinion of this office, pursuant to section 7(c) of the Open Records Act, as to whether the requested information should be withheld. This office subsequently invited representatives of two vendors, Management Science America, Inc., and Oracle Corporation, to submit additional legal arguments regarding the proprietary nature of the requested information. The vendors were furnished copies of open records decisions demonstrating how similar questions are resolved by this office.

Oracle Corporation contends that "[s]ections V through VIII of Oracle's response contain information which, if released, would give advantage to competitors or other bidders and includes trade secrets and commercial and financial information which would be considered confidential under the rules of evidence."

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, 764-66 (Tex.) cert. denied, 358 U.S. 898 (1958); 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 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 its competitors;
- 5) the amount of effort or money expended by the company in developing the information; and
- 6) the ease of difficulty with which the information could be properly acquired or duplicated by others.

4 Restatement of Torts, § 757.

Oracle does not explain how any of the requested information meets the tests for trade secrets as outlined above. Other than a general assertion that the information in question includes trade secrets, there is nothing to indicate that the information is secret. Therefore, this office has no basis for determining that the items Oracle seeks to protect are in fact trade secrets.

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 on 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 & Conservation Ass'n 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 Admin., 627 F. Supp 1396, 1403 (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 have expressed no opinion on this subject.

The courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is [sic] all that need be shown. (Emphasis added.)

Gulf and Western Industries v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); see also National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976).

"Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. See National Parks v. Kleppe, at 680. Because Oracle has not explained how the requested information meets the National Parks test, we have no basis for considering this claim.

Dun & Bradstreet Software Services, Inc. [DBS], the successor in interest to Management Science America, Inc., responds by asserting that the requested information is not "public information" within the meaning of section 3(a) of the Open Records Act. Section 3(a) provides, in pertinent part:

All information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only:

. . . (Emphasis added.)

DBS asserts as follows:

The RFP response and materials in question are the DBS's proprietary, copyrighted, and confidential and trade secret information and prospective licensees are granted access only through a duly executed license agreement which the Comptroller of Public Accounts never obtained. No entity ever gets access to DBS's materials without executing a license or nondisclosure agreement. The cover letter to DBS's response to Mr. Mariano Camarillo, Director, State Government Accounting Division, Comptroller of Public Accounts dated September 29, 1989 stated that ". . . the State of Texas shall return [DBS's] response along with the notice of [its] election not to further consider [DBS's] bid." To date, DBS has not had its RFP response and included materials returned. Demand is hereby made for the return to DBS of its RFP responses and materials. (Emphasis in original.)

The underlined language in the above-quoted portion of section 3(a) of the Open Records Act was added to the statute in 1989. Acts 1989 71st Leg., ch. 1248, § 9, at

5023. It exempts materials from coverage by the Open Records Act in situations where materials are produced for a governmental body by the governmental body has neither ownership in nor a right of access to the materials. This exemption is a codification of principles enunciated in previous open records decisions. See e.g. Open Records Decision Nos. 462 (1987); 445 (1986); see also Attorney General Opinion JM-1143 (1990).

Governmental bodies may not withhold information merely because they have agreed to do so. Nor may a governmental body obtain information subject to conditions inconsistent with the Open Records Act. Attorney General Opinion H-258 (1974). In this instance, the Comptroller clearly has access to the requested information. Accordingly, the requested information is "public information" unless it is shown that an enumerated exception under section 3(a) is applicable.

DBS also asserts that the requested information is excepted from public disclosure by section 3(a)(4) of the Open Records Act. The 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. This section was designed to protect the government's purchasing interests in a competitive bidding situation, not the commercial or financial interests of private entities. See Open Records Decision Nos. 541 (1990); 514 (1988); 463 (1987); 331, 319, 302 (1982); 170 (1977). No bidding situation exists in this instance, and consequently section 3(a)(4) is not applicable.

DBS does not explain how any of the requested information meets any test for non-disclosure under section 3(a)(10).

As neither DBS nor Oracle has established a prima facie case for exception from required public disclosure for the requested information, it must be released. We note that both Oracle and DBS have requested notification prior to the release of any of the requested information. The Open Records Act does not address such a request for notice, but merely required the governmental body to "promptly" produce the requested information. See V.T.C.S. art. 6252-17a, § 4.

We further note that some of the requested information is copyrighted. While copyrighted information may be subject to public disclosure under the Open Records Act, the custodian of public records must comply with copyright law

and is not required to produce copies of copyrighted materials. See Attorney General Opinion MW-307 (1981); Open Records Decision No. 550 (1990).

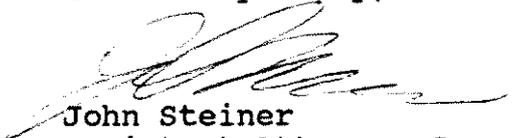
Finally, we turn to the requested evaluations of proposals. With respect to this materials, you claim exception under section 3(a)(11) of the Open Records Act. Section 3(a)(11) excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. Factual information, where severable, is not excepted by section 3(a)(11). See e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision Nos. 559, 538 (1990).

You have marked the materials submitted for our review to indicate which portions of the materials you believe to be excepted from public disclosure under section 3(a)(11) as well as those portions which you edited pursuant to an agreement with the requestor. One document titled Report of Arthur Andersen & co. RAMP-C Benchmark dated June 1, 1989, contains no markings. Accordingly, this document must be released. The remaining documents we find to be somewhat confusing. Information marked as coming within section 3(a)(11) is indistinguishable from information deleted pursuant to your agreement with the requestor. Some information which appears to be observation of fact is marked as being within the exception provided by section 3(a)(11). For example, see pp. 3 through 5 and pp. 28 through 30 of the document which appears to be the final evaluation of the submitted proposals. Moreover, the marking seems to be inconsistent with the nature of the information marked. Your burden under section 7(a) is to request a decision on whether specific information is within specific exceptions. A claim that an exception applies with no explanation of why it applies will not suffice. Attorney General Opinion H-436 (1974). The submitted documents are provided with not explanation of their nature, propose, or their intended audience. With no context in which to consider these documents, most of the marked material appears not to be within the exception provided by section 3(a)(11). Consequently, this office cannot consider your claims.

We are returning to you the documents you submitted for review. Please resubmit the documents with markings to correlate with the specific exception you claim, and clearly explain how the exception you claim applies to specific documents or portions thereof. You have 10 days from receipt of this letter in which to resubmit the documents at issue. Otherwise, the information must be released.

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 OR91-010.

Yours very truly,



John Steiner
Assistant Attorney General
Opinion Committee

JS/le

Ref.: ID#'s 8964, 8963, 8837, 8838, 8852, 8853, 9174, 9128,
9971, 10072

Enclosures: Documents Submitted

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