



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 17, 1992

Mr. Joe Ramirez, Director  
Materials Management  
Capital Metropolitan Transportation Authority  
2910 East Fifth Street  
Austin, Texas 78702

OR92-24

Dear Mr. Ramirez:

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# 14270.

You have received a request for copies of all proposals and related information submitted in response to Capital Metro's Request for Proposals (RFP) No. CMTU-9138-91. You claim the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(4), and 3(a)(10) of the Open Records Act.

Previous open records decisions issued by this office resolve your request. Open Records Decision No. 541 (1990) at 5 held that "[o]nce the competitive bidding process has ceased and a contract has been awarded, section 3(a)(4) will not except from disclosure either information submitted with a bid or the contract itself." As you have informed us that the competitive bidding process engendering these materials has concluded, and the relevant contract has been awarded, you may not properly invoke a section 3(a)(4) exception.

Pursuant to section 7(c) of the act, we have notified the third parties whose proprietary interests may be compromised by disclosure of the requested information. In response, we have received letters from U.S. Creative, Inc., Warren/Martino, and Sherry Matthews. U.S. Creative, Inc., does not object to

release of the proposal to the requestor, except for corporate financial information enclosed in the proposal in the form of income tax returns. Income tax return information is made confidential by section 6103(a) of title 26 of the United States Code and must not be released. Without explicitly claiming the section 3(a)(10) exception under the Open Records Act, Warren/Martino and Sherry Matthews claim that their entire proposals are excepted from disclosure as information falling under the protection of trade secrets and commercial information which, if released, unfairly would advantage competitors in their market.

Section 3(a)(10) excepts from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939), q.v. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). The Restatement lists six factors to be considered in determining whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the proprietor's] business;
- (2) the extent to which it is known by employees and others involved in [the proprietor's] business;
- (3) the extent of measures taken by [the proprietor] to guard the secrecy of the information;
- (4) the value of the information to [the proprietor] and [its] competitors;
- (5) the amount of effort or money expended by [the proprietor] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757, cmt. b (1939). These factors are indicia of whether information constitutes a trade secret; depending on the information being

considered, one factor alone may be indicative of a trade secret. *See* Open Records Decision No. 552 (1990) at 3.

Warren/Martino asserts that its approach to marketing is unique in its industry and that its reactions to specific marketing situations constitute trade secrets. Generally, Warren/Martino exerts trade secret protection for pages 1 through 9 of its proposal. A trade secret, however, is not simply information as to single or ephemeral events in the conduct of the business. Rather, it may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. RESTATEMENT OF TORTS § 757, cmt. b (1939) at 5. We have considered Warren/Martino's arguments and have examined the documents submitted to us for review. With respect to Warren/Martino's marketing approach, we conclude that it has not made a *prima facie* case for the information for which it claims trade secret protection. Accordingly, pages 1 through 9 of the proposal must be disclosed.

Similarly, Sherry Matthews argues that the requested information reveals how it "approaches specific marketing situations." Sherry Matthews has not made a *prima facie* case for the information for which it claims trade secret protection. Accordingly, none of the requested information may be withheld from required public disclosure on the basis that it constitutes trade secrets.

In regard to the other branch of section 3(a)(10), Open Records Decision No. 592 (1991) (copy enclosed) held that "to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, 'commercial or financial information obtained from a person' *must be 'privileged or confidential' under the common or statutory law of Texas.*" Open Records Decision No. 592 at 9 (emphasis added). When an agency or company fails to provide relevant information regarding the factors necessary to make a 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). Open Records Decision No. 402 (1983).

Warren/Martino claims that the sections titled "Fee Structure" (pages 10 through 11), "Qualifications And Related Experience . . ." (pages 12 through 22), and "Allocation of Resources" (pages 23 through 26) include proprietary information involving its finances and billing history, financial relationships with other companies, financial information concerning another private company, and a listing of past and current clients. Warren/Martino, however, does not demonstrate

that the requested information is deemed privileged or confidential under the common or statutory law of Texas. Accordingly, pages 10 through 26 of the proposal may not be withheld from required public disclosure under section 3(a)(10) of the Open Records Act. The Warren/Martino proposal must be released in its entirety.

Sherry Matthews claims that the "Fee Structure," the "Qualifications Related Experience," and the "Allocation of Resources" sections of its proposal include "highly confidential financial information." Sherry Matthews, however, does not indicate that this information is deemed privileged or confidential under the common or statutory law of Texas. Accordingly, the requested information may not be withheld from required public disclosure on the basis that it constitutes privileged or confidential financial information. The Sherry Matthews proposal must be released in its 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 OR92-24.

Yours very truly,



Kym Oltrogge  
Assistant Attorney General  
Opinion Committee

KO/GK/lcd

Ref.: ID# 14270  
ID# 14395  
ID# 14440

Enclosure: Open Records Decision No. 592

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