



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 31, 1992

Mr. James L. Crouch  
Executive Director  
Public Utility Commission of Texas  
7800 Shoal Creek Boulevard  
Austin, Texas 78757

OR92-34

Dear Mr. Crouch:

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# 13536.

A member of the public has asked to inspect a cogeneration agreement between Bayou Cogeneration and Houston Lighting & Power. These two entities requested certification of the cogeneration agreement pursuant to section 41A of article 1446c, V.T.C.S., the Public Utility Regulatory Act. *See generally* Attorney General Opinion JM-353 (1985) (describing cogeneration). Section 41A sets out certain requirements for a cogeneration agreement and provides that, if the commission determines that the agreement meets those requirements, it shall certify this fact. When the two parties to the cogeneration agreement applied for certification, they also requested the Public Utility Commission to enter a protective order protecting the confidentiality of the agreement. A brief submitted in connection with this request states that the Office of Public Utility Counsel and an energy company intervened and opposed entry of the protective order. The hearing examiner issued a protective order limiting access to the entire cogeneration agreement.

You claim that section 3(a)(3) of the Open Records Act, as interpreted in Open Records Decision No. 588 (1991), excepts the cogeneration agreement from disclosure to the public. Section 3(a)(3) excepts from mandatory disclosure:

information relating to litigation of a criminal or civil nature  
and settlement negotiations, to which the state or political

subdivision is, or may be, a party . . . ;

Open Records Decision No. 588 concluded that a contested case held under the Texas Administrative Procedure and Texas Register Act, V.T.C.S. art. 6252-13b, is "litigation" within the section 3(a)(3) exception. However, we are informed that the Final Order in this matter has been signed and the opportunity to file a motion for rehearing has passed. Thus, no administrative litigation in this matter is pending. Nor can there be an appeal to the courts "to which the state . . . may be, a party." Accordingly, section 3(a)(3) does not apply to the information.

If section 3(a)(3) does not except the cogeneration agreement, you ask that we consider the issues raised by the attorneys for the parties to the cogeneration agreement. Pursuant to section 7(c) of the Open Records Act, the attorneys for the parties to the agreement have raised sections 3(a)(1), 3(a)(4), and (3)(a)(10). After examining the information and reviewing the arguments submitted by the parties to the agreement and the person requesting the information, we have concluded that it is excepted from public disclosure by section 3(a)(10) of the Open Records Act.

Section 3(a)(10) provides for the exception of

(10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision . . . .

Open Records Decision No. 552 (1990) states how this office will resolve a private entity's claim that information requested from a governmental body constitutes a trade secret of the private entity, when the governmental body does not present arguments on this issue. This decision points out that the Texas Supreme Court, in *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958), adopted the definition of "trade secret" from the Restatement of Torts, section 757. The Restatement defines a "trade secret" as "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." It lists six factors to be considered in determining whether particular information constitutes a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;

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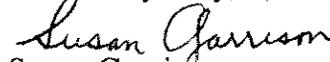
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measure taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money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

Restatement of Torts section 757, comment b (1939).

Where, pursuant to section 7(c) of the Open Records Act, a governmental body takes no position on a claim that information is excepted from public disclosure by a third party's property interests, in particular, a trade secret, and where relevant facts are in dispute, we will accept the claim for exception as valid if a *prima facie* case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law. Open Records Decision No. 552 (1990). We conclude that a *prima facie* case has been made by Bayou Cogeneration and Houston Lighting & Power, and that the opposing argument has not established that, as a matter of law, the information cannot be considered a trade secret. We will accept the trade secret claim made by Bayou Cogeneration and Houston Lighting & Power as valid for purposes of rendering this determination. Accordingly, the requested information should be withheld.

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 OR92-34.

Yours very truly,

  
Susan Garrison

Assistant Attorney General  
Opinion Committee

SG/mc

Ref.: ID#s 13536, 13558, 13763, 13771, 14036, 14138, 14146, 14336

Enclosure: Open Records Decision No. 552

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