



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 25, 1992

Ms. Donna M. Atwood  
Legal Counsel  
Dallas/Fort Worth International Airport  
Administrative Offices - Airfield Drive  
P. O. Drawer DFW  
Dallas/Forth Worth Airport, Texas 75261

OR92-111

Dear Ms. Atwood:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the act), article 6252-17a, V.T.C.S. Your request was assigned ID# 14456.

The Dallas/Fort Worth International Airport (the Airport) has received a request for four categories of information relating to the Airport's Request for Proposals for a contract for a five channel trunked radio communications system. You advise that the Airport already has released two categories of the requested information in their entirety and a portion of a third category of information. The Airport has not released, however, the following requested information:

All non-proprietary information submitted by Ericsson-General Electric ("EGE") to DFW Airport in response to the above-listed Request for Proposals, including all pricing information submitted with EGE's initial proposal, best and final offer, and revised best and final offer; . . . [and]

All notes, records, memoranda and other written information [prepared by EGE and] . . . utilized by DFW Airport in evaluating and scoring the proposals and best and final offers submitted by EGE and Motorola.

You submitted for our review representative samples of all of the materials you believe are responsive to the request but that you have declined to release to the requestor. We note that the requestor specifically limited his request to "non-proprietary information." Some of the copies of documents you have submitted indicate that the originals were stamped (either by EGE or its subcontractors) "proprietary," "confidential," or "trade secrets." Many of the documents were not stamped. In your initial letter seeking an open records decision, you state, "The Board believes and asserts that items designated by EGE and/or its sub-contractors as 'proprietary,' 'confidential,' or 'trade secrets,' or documents which contain EGE confidential commercial or financial information (including pricing information) are exempt from disclosure pursuant to" sections 3(a)(1), (4), and (10) of the act.

As you felt that the release of the requested information at issue might implicate EGE's privacy or property interests, the Airport declined to release the information pending our opinion. See V.T.C.S. art. 6252-17a, § 7(c). Pursuant to section 7(c) of the act, EGE has submitted its reasons for seeking to withhold the requested information. EGE only seeks to withhold those portions of their proposal and associated documents marked "proprietary" or "confidential" and notes made from those "proprietary" or "confidential" portions. EGE has listed the categories of information it considers proprietary and that it desires to withhold from disclosure:

1. Technical information including radio system description, design, configuration and performance information;
2. Radio system components list with component names and component prices;
3. Description of existing [EGE] trunked radio systems and corresponding customer information, including general system description, system performance and a list of customers;
4. Schedule of system implementation for Dallas/Fort Worth Airport; and

5. [EGE] radio service organization list and related business information about our affiliated service companies which are not part of EGE.<sup>1</sup>

We do not understand either the Airport or EGE to seek to withhold all of the documents you submitted for our review. In our opinion, the documents you seek to withhold and the documents EGE seeks to withhold constitute the same portion of the documents you have submitted. The Airport must release to the requestor the remainder of the documents.

We consider the 3(a)(4) exception first. Section 3(a)(4) of the act excepts from disclosure "information which, if released, would give advantage to competitors or bidders." The principal purpose of this exception is to protect a governmental body's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. Generally, a governmental body invokes section 3(a)(4) to protect the integrity of the competitive bidding process and to preserve the advantages the process offers a governmental body. *Id.* at 4-5. Once 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. *Id.* at 5 (citing Open Records Decision Nos. 514 (1988); 319, 306 (1982)). You have informed us that on December 18, 1991, the Airport Board and EGE executed a contract for the five channel trunked radio communication system. Accordingly, section 3(a)(4) does not except the requested information from disclosure. We therefore turn to the other exceptions you have raised, sections 3(a)(1) and (10) of the act.

Section 3(a)(1) of the act excepts from disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You contend that the trade secrets and confidential information contained in the proposals expressly are made confidential by statute, and you cite section 252.049(b) of the Local Government Code and V.T.C.S. article 2368a, section 2(c). The legislature repealed section 2 of article 2368a, V.T.C.S., in 1987 (*see* Acts 1987, 70th Leg., ch. 149, § 49(1)), codifying the material in sections 252.021, 252.041 through 252.043, and 252.049 of the Local Government Code. In the same session, however,

---

<sup>1</sup>EGE has attached to its January 23, 1992, letter to Robert Patterson of this office a list of specific pages that it considers proprietary (labelled "Attachment A").

the legislature amended section 2 of article 2368a, V.T.C.S. You argue, therefore, that V.T.C.S. article 2368a, section 2(c) still is in effect, and that both article 2368a<sup>2</sup> and Local Government Code section 252.049<sup>3</sup> apply in this situation.

The language on which you rely in the amended article 2368a, section 2(c) is substantially identical to the language on which you rely in Local Government Code section 252.049(b). Thus, the significant language in article 2368a, section 2(c) has been codified, and we can limit our discussion to section 252.049(b) without determining whether article 2368a, section 2(c) remains viable. Section 252.049(b) of the Local Government Code provides as follows:

If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

---

<sup>2</sup>Article 46d-14(b) V.T.C.S. of the Municipal Airports Act authorizes two or more public agencies, including municipalities, to contract with each other for the joint acquisition and operation of airports. Article 46d-14(c) requires public agencies acting jointly to create a joint board to operate the airport, and states that the joint board "may exercise on behalf of its constituent public agencies all the powers of each with respect to" the airport, subject to certain enumerated limitations which are not applicable here. Acting pursuant to their authority under article 46d-14, in 1968 the cities of Dallas and Fort Worth executed a contract and agreement "[c]ontinuing, expanding and further defining the powers and duties of the Dallas-Fort Worth Regional Airport Board, . . . and providing for the construction and operation of the Dallas-Fort Worth Regional Airport." Accordingly, in their contract and agreement, the cities provided the Airport board with "the general power to enter into contracts subject to all of the statutory, legal requirements and restrictions applicable to the two Cities, expressly including when applicable the requirements and restrictions contained in Article 2368a, Texas Revised Civil Statutes." Contract and Agreement at 6-7. Thus, assuming it is still in effect, the Airport is subject to article 2368a, although the article generally applies only to cities and counties. V.T.C.S. art. 2368a, § 1(a).

<sup>3</sup>As we stated in footnote 2, *supra*, the contract and agreement provides the Airport board with the power to contract subject to, among other things, the requirements and restrictions of article 2368a, V.T.C.S. The contract and agreement does not expressly require the Airport board to be subject to the provisions of Local Government Code section 252.049; however, the contract and agreement subjects the board's contracting powers "to all of the statutory, legal requirements and restrictions applicable to the two Cities." As section 252.049 of the Local Government Code applies to the two cities (Local Gov't Code § 252.021), for purposes of this opinion we will assume that the Airport board is likewise subject to the requirements and restrictions of section 252.049.

As section 3(a)(10) of the act excepts trade secrets, we will discuss whether the requested information constitutes trade secrets *infra*, in connection with the exception you claim under section 3(a)(10). As for any requested information that may be "confidential" under section 3(a)(1) of the act, incorporating section 252.049(b) of the Local Government Code, you do not refer us to, nor do we find, any statutes or case law that would except the requested information from disclosure (with the exception of trade secret laws, discussed *infra*).

Section 3(a)(10) of the act excepts from public disclosure

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

Section 3(a)(10) comprises two separate categories of information: (1) trade secrets, and (2) commercial and financial information. Open Records Decision No. 552 (1990) at 2. The legislature designed the whole of section 3(a)(10) to preserve only those third party interests that statutes or judicial decisions protect. Open Records Decision No. 541 (1990) at 6. However, each of the two categories requires the application of different criteria; thus, we must consider the two categories separately. Open Records Decision Nos. 550, 541 (1990) at 3, 6 (respectively).

**Trade secrets**

In making trade secret determinations under section 3(a)(10), this office will accept a claim as valid if the claimant establishes a *prima facie* case for its assertion of trade secrets that is unrebutted *as a matter of law*. Open Records Decision No. 552 (1990) at 5. Whether a claimant makes a *prima facie* case depends on whether the claimant's arguments as a whole correspond to the criteria for trade secrets detailed in the Restatement of Torts and adopted by the Texas courts. *Id.* at 2-3. According to section 757 of the Restatement of Torts, 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.), cert. denied, 358 U.S. 898 (1958). The Restatement lists six criteria for determining whether particular information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the owner's] business;
- (2) the extent to which it is known by employees and others involved in [the owner's] business;
- (3) the extent of measures taken by [the owner] to guard the secrecy of the information;
- (4) the value of the information to [the owner] and to [its] competitors;
- (5) the amount of effort or money expended by [the owner] 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, comment b (1939). To secure trade secret protection under section 3(a)(10) of the act, the governmental body or the business entity that generated the information must submit information that explains why the requested information is a trade secret. Open Records Decision No. 541 (1990) at 7. The Airport has failed to establish a *prima facie* case that any of the information it seeks to withhold is a trade secret. We therefore consider only EGE's arguments.

Analyzing the information in the first category of material EGE considers "proprietary," *i.e.*, technical information including radio system description, design, configuration and performance information, we find that EGE has established a *prima facie* case, unrebutted as a matter of law, that this information constitutes trade secrets. We note, however, that some of the information EGE describes as proprietary includes descriptions of the physical appearance of the components. Matters which are disclosed completely by the goods one markets cannot be considered a trade secret. Open Records Decision No. 550 (1990) at 3-4. Accordingly, the Airport only may withhold all technical information from the

requestor, but not information about the physical appearance of the components. *See* Open Records Decision No. 319 (1982) at 2-3.

The second category of information EGE considers "proprietary" is "the radio system components list with component names and component prices." EGE argues that, if the component prices are released, "a competitor could possibly extrapolate and estimate our pricing on future proposals, permitting them to narrowly undercut us." Information relating to pricing is not excepted as a trade secret. Open Records Decision Nos. 319, 309 (1982) at 3, 3 (respectively); 184 (1978) at 2; *see also* Open Records Decision No. 592 (1991) at 2-4.

EGE argues that information in the third category, that is, descriptions of existing EGE trunked radio systems and corresponding customer information, is a trade secret and of competitive value because a competitor could use the information to "access those customers and sell goods or services to those customers in competition with [EGE]." Customer lists are not protected as trade secrets unless a consideration of the six Restatement criteria indicates that the customer lists are trade secrets. *See* Open Records Decision 494 (1988) at 3, citing *Expo Chemical Co. v. Brooks*, 572 S.W.2d 8, 12 (Tex. Civ. App.--Houston [1st Dist.] 1978), *rev'd on other grounds*, 576 S.W.2d 369 (Tex. 1978). EGE states that the list of customers "is not generally made public in its entirety," implying that EGE has released portions of the list to other entities outside of EGE. EGE thus has failed to demonstrate that it has undertaken specific and concrete measures to protect the confidentiality of the information. Additionally, although EGE describes the value of this information to EGE's competitors, EGE fails adequately to show how this customer information meets any of the remaining trade secret criteria. *See* Open Records Decision No. 402 (1983) at 3 (stating that when agencies or companies fail to provide this office with relevant information regarding six Restatement criteria, we have no basis upon which to conclude that information is protected as trade secret).

According to EGE, the fourth category of information, schedule of system implementation, is a trade secret and useful to competitors because "it defines a benchmark for how rapidly and in what steps [EGE] can install an [enhanced digital access communications] System." EGE claims that competitors might use this information to EGE's disadvantage in a sales and marketing effort. EGE has failed adequately to show how this scheduling information meets the six trade secret criteria. *See id.*

EGE explains that the fifth category of information, EGE's radio service organization list and related information, gives detailed information about EGE's affiliated service companies, including their general capabilities. EGE contends that this information would be valuable to its competitors "because they may be interested in contacting these organizations for competitive purposes or in organizing their own service affiliates using this list or in using the information competitively in marketing or sales efforts." EGE admits that it does not "generally" make the information available in its entirety, implying that it has failed to undertake specific and concrete measures to protect the confidentiality of the information. Additionally, EGE has failed adequately to show how this allegedly proprietary information meets any of the other six trade secret criteria.

The fifth category of information also includes the company's affirmative action policy. We therefore consider as a subpart of the fifth category EGE's affirmative action policy, on which EGE has stamped "Company Confidential subject to Trade Secrets Act, 18 U.S.C. § 1905." Section 1905 prohibits an employee of the federal government from disclosing any trade secrets and other confidential information the employee received in the course of her employment. Section 1905 does not explicitly list affirmative action plans or company policies as a category of information subject to section 1905, and EGE has not directed us to any other statutory or case law holding an affirmative action policy to be confidential. Accordingly, we do not believe the Airport can withhold this information under section 3(a)(10) of the act.

Thus, the Airport may withhold from public disclosure under the trade secrets portion of section 3(a)(10) of the act only the information in the first category of information that is technical information.

#### **Commercial or financial information**

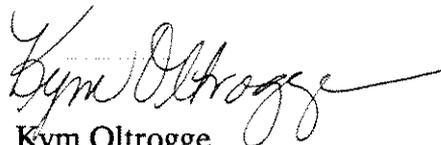
The Airport's and EGE's claim for exception from public disclosure also relies on the assertion that the requested information is commercial or financial information obtained from a person, excepted under section 3(a)(10) of the act. To be excepted as commercial or financial information under section 3(a)(10), information must be (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 5, citing Attorney General Opinion H-258 (1974) at 5-6. To qualify as "commercial or financial information," the information must relate to the commercial or financial condition of the person supplying the

information. Open Records Decision 550 (1990) at 5. In addition to the three express requirements found in section 3(a)(10), this office has stated that section 3(a)(10) excepts commercial and financial information only if disclosure is likely either to (1) impair the governmental body's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. Open Records Decision Nos. 568, 541 (1990) at 3, 13 (respectively). General allegations of unspecified harm will not suffice to meet the 3(a)(10) standard. Open Records Decision No. 568 (1990) at 3, citing Open Records Decision 494 (1988).

We already have concluded that you may withhold as a trade secret information in the first category, that is, technical information (excepting information describing the physical attributes of the components, which you must release). The information in the second category, comprised of component pricing information, relates to EGE's commercial or financial condition, but we find no statute or judicial decision that holds pricing information confidential. Information in the remaining three categories (categories 3, 4, and 5) do not relate to EGE's commercial and financial position. Thus, the "commercial or financial information" prong of section 3(a)(10) does not permit the Airport to withhold from the requestor any information in categories 2, 3, 4, or 5. In sum, then, the Airport must release to the requestor all information in categories 2, 3, 4, and 5, as well as portions of the proposals describing the components' physical attributes.

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 OR92-111.

Yours very truly,



Kym Oltrogge  
Assistant Attorney General  
Opinion Committee

KKO/nhb

Ref: ID# 14456

cc: Terry Salazar  
Winstead Sechrest & Minick  
5400 Renaissance Tower  
1201 Elm Street  
Dallas, Texas 75270