Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 28, 1992

Ms. Sandra C. Joseph
Disclosure Officer
Comptroller of Public Accounts
LBJ State Office Building
Austin, Texas 78774

OR92-625

Dear Ms. Joseph:

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# 16849.

The Comptroller of Public Accounts (the "comptroller") has received a request for "copies of all vendor responses" to the comptroller's request for proposal for certain computer and telecommunications disaster recovery planning services. You have forwarded to us for review the proposals submitted by SunGard Recovery Services, Inc. ("SunGard") and Comdisco Disaster Recovery Services, Inc. ("Comdisco"). Since the only other proposer submitted the request, you have not forwarded its proposal to us for review. You explain that the contract has been awarded to Comdisco, but that the formal agreement has not yet been executed.

While you do not assert any exception to disclosure under the act, you ask whether either proposal contains confidential information that must be withheld under the act. In response to your request, we notified both SunGard and Comdisco pursuant to section 7(c) of the act. In turn, they have submitted briefs arguing that parts of their proposals are protected from disclosure by section 3(a)(1), 3(a)(4) or (3)(a)(10) of the act.

We turn first to section 3(a)(4). Section 3(a)(4) excepts from required public disclosure "information, which if released, would give advantage to competitors or bidders." Section 3(a)(4) is designed to protect the government's interests and not a third party's interests in a particular competitive situation. Open Records Decision No. 593 (1991). Section 3(a)(4) generally excepts from disclosure information submitted to a governmental body as part of a bid or similar proposal. In so doing,

the section protects the governmental body's interest in obtaining the most favorable terms possible from the proposers or bidders by denying access to the proposals prior to award of the contract. *See, e.g.*, Open Records Decision No. 463 (1987). In this instance, the contract has been awarded, and neither you, SunGard nor Comdisco have established that the release of the information at issue here will harm the comptroller with regard to a pending competitive transaction. Thus, section 3(a)(4) does not protect the requested information from required public disclosure.

We turn next to section 3(a)(10). Section 3(a)(10) protects the property interests of private persons by excepting from required 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.[1] The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert denied*, 358 U.S. 898 (1958). Section 757 provides that 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. 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. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business*. . . .[It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management (emphasis added).

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[1]We do not discuss the "commercial or financial" branch of section 3(a)(10) since neither company asserted it applied here. Nor do we separately address section 3(a)(1), which protects from disclosure information made confidential by judicial decision, since it provides no greater protection here than the "trade secrets" branch of section 3(a)(10).

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 552 (1990) at 2.

This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.[2]

In its initial brief, SunGard presented no specific argument with regard to particular business operations or processes reflected in the proposal, but instead asserted in general terms that all or nearly all of its proposal satisfied the Restatement test. In response to our request for specific arguments, SunGard marked the particular portions of the proposal that constituted "trade secrets" and submitted additional information, including a copy of its confidentiality agreement with its employees. That agreement requires its employees to maintain the confidentiality of the company's proprietary information, including the identities of its customers and their requirements, its documentation for applications and administrative software, its physical security systems, and its particular methods of delivering services and products.

After review of the additional information, we conclude that SunGard has made a *prima facie* case for exception for certain portions of the marked information. SunGard, in particular, has advised that its disaster recovery approach

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[2]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

> (1) the extent to which the information is known outside [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] competitor; (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 cmt. b (1939); *see also* Open Records Decision Nos. 319, 306 (1982); 255 (1980).

and processes represent a substantial development expense to the company and that knowledge about these items are not obtainable outside the company without a current or former employee violating his confidentiality agreement or a court order mandating the release of the information. No information has been submitted that rebuts their argument as a matter of law. Accordingly, you must withhold the marked portions of the proposal containing details of the company's impact analysis, program development approach, and recovery test methods (*e.g.*, pages 10-17); security and multiple disaster processes (*e.g.*, pages 53, 57-58, 66-71, 85-86, 95, 114); and equipment and telecommunication provisions (*e.g.*, pages 59-65, 75-77, 91). We provide these page references to assist you in evaluating the other marked portions of the document for similar information. Given the technical nature of the proposal, we believe your office is better positioned to review the other marked pages of the document in light of our particular references. You must, however, release the marked portions containing the price terms to be provided the comptroller for various services (*e.g.*, pages 6, 34-35 & attachments (general price details only) 94, 98 (declaration fees)); and general descriptions of personnel, the company's experience and operations, and its competitors' practices (*e.g.*, pages 5, 25-26 (items 2, 3, & 4), 49, 109-111, 116, 120). *See generally* Open Records Decision No. 319 (1982) (information relating to personnel, pricing, professional references, qualifications, market studies not ordinarily excepted as trade secrets). [3]

We now turn to Comdisco's trade secrets argument. In response to our request to mark the particular portions of its proposal excepted by section 3(a)(10), Comdisco marked portions revealing its disaster recovery approach and methodologies. It advises that these processes were developed after considerable time and expense, that its employees are required to maintain their confidentiality, and that their confidential nature gives the company a competitive advantage in its business.

We conclude that Comdisco has made a *prima facie* case for exception of the marked portions concerning these processes and related equipment. *See, e.g.*, markings on pages 1 & 3, B; 3, C; pages in D on backup and recovery strategy, project phases; pages in D on hotsite and coldsite services. However, you must release the marked portions containing pricing information, general business operations descriptions not specific to disaster recovery security and equipment

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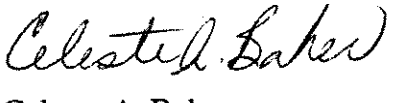
[3]Matters of general knowledge are not trade secrets and cannot be transformed into trade secrets merely by collecting information in a certain way. *Reading & Bates Construction Co. v. O'Donnell*, 627 S.W.2d 239, 243 (Tex. App.--Corpus Christ 1982, writ ref'd n.r.e.).

services, and personnel and their qualifications and experience. *See, e.g.*, Open Records Decision No. 319. For instance, the marked information in or on the following sections or pages must be released. *See* first page, April 27, 1992 letter; pages 2, 4 & 5, B; 3, C; the 3 resumes in part VII.1, D; timeframe and staffing descriptions in part VII.1, D; part X, D on company background; XI, D on costs; E (Staffing); F (Costs); G (Qualifications); and Attachment C (except to extent reveals protectible processes). Again, our page references are to be used as guidelines for your review of the entire proposal. Given the technical nature of the proposal, you are in a better position to make a final determination with regard to marked information in sections or on pages not directly referred to in this paragraph.

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 OR92-625.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/lmm

Ref.: ID#s 16849, 16983, 17007, 17045
ID#s 17056, 17070, 17078, 17637
ID#s 17638, 17693

Enclosures: Submitted documents
Open Records Decision Nos. 552, 319

cc: Mr. Donald W. McKenzie
Senior Corporate Counsel
Comdisco, Inc.
6111 North River Road
Rosemont, Illinois 60018
(w/o enclosures)

Ms. Lillian S. Kachmar
Senior Counsel
Sungard Systems Inc.
1285 Drummers Lane
Wayne, Pennsylvania 19087
(w/o enclosures)

Mr. Charles L. Nicholson
Senior Industry Specialist
IBM
301 Congress Avenue
Austin, Texas 78701
(w/o enclosures)