



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 7, 1992

Ms. Barbara B. Deane
Assistant General Counsel
Texas Department of Agriculture
P. O. Box 12847
Austin, Texas 78711

OR92-683

Dear Ms. Deane:

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# 16872.

The Texas Department of Agriculture (the "department") has received a request for information relating to applications for certain loan guarantees. The requestor seeks:

documents from the four applications of floricultural or horticultural enterprises which received loans or loan guarantees for the amounts of \$500,000, \$1,050,000, \$1,225,000, and \$2,000,000 respectively from the Texas Agricultural Fund . . . [specifically] the following documents:

1. Project Review Form.
2. Written Summary.
3. Business Financials.
4. Resumes.
5. Indebtedness.
6. Personal History Questionnaire (Secs. I, II, III, and IV, Question 4 only).

You claim that the requested information is excepted from required public disclosure by sections 3(a)(4) and 3(a)(10).

Pursuant to section 7(c) of the act, we have notified the four companies whose interests may be affected by disclosure of the requested information. In response, we have received letters from George Mea, Inc, Wolfe the Florist, Inc., and Agri-Gold, Inc.¹ The three responding parties contend that the requested information is protected from disclosure by either section 3(a)(4) or section 3(a)(10) of the Open Records Act (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." The purpose of section 3(a)(4) is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990). Neither the department nor the respondents indicate how the requested information relates to a competitive bidding situation or to a commercial transaction to which the department is party. Accordingly, the section 3(a)(4) exception may not be properly invoked.

We turn next to section 3(a)(10). Section 3(a)(10) protects the property interests of private persons by excepting 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. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.

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); *see also* Open Records Decision No. 552 (1990) at 2. 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

¹We did not, however, receive a response from Tyler Rose Nursery, Inc.. Because we have no basis to withhold the information under section 3(a)(10), the information concerning Tyler Rose Nursery, Inc. may not be withheld from required public disclosure under section 3(a)(10). *See, e.g.*, Open Records Decision Nos. 405 (1983); 402 (1983).

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.]*

RESTATEMENT OF TORTS § 757, cmt. b (1939).

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 at 5-6.²

George Mea, Inc. asserts that section 3(a)(10) protects the requested information from disclosure without providing any evidence indicating that the information satisfies the definition of trade secret set forth in the Restatement of Torts. Nor does the company refer us to any state judicial decision or statute holding such information either privileged or confidential. George Mea, Inc. thus

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

the extent to which the information is known outside of [the company]; (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 the 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; (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).

has failed to establish the applicability of section 3(a)(10). *See* Open Records Decision Nos. 552 at 5 (company must establish *prima facie* case that trade secret status applies); 592 at 7-8 (company must show information made confidential or privileged by state law or decision). George Mea, Inc., also claims that the requested information is made confidential by the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et. seq.* The federal Right to Financial Privacy Act, however, regulates only the release of financial records by financial institutions to the federal government, and consequently, is inapplicable to the release of records by a Texas state agency under the act. *See* 12. U.S.C. §§ 3401(3), 3402-03. Accordingly, the requested information concerning George Mea, Inc. must be released.

Wolfe the Florist, Inc., ("Wolfe") advises us that release of the requested financial information concerning the company, the company's business plans and projections, and information on the company's indebtedness "would give advantage to competitors or bidders." Wolfe further advises us that such information is

furnished solely to its secured lenders and its attorneys and accountants, and a disclosure to its competitors could be used by them to tailor their operations to meet the future plans of Wolfe, and to disseminate negative historical information.

These statements do not establish that the information at issue "gives [the company] an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT OF TORTS § 757, cmt. b; Open Records Decision No. 592 at 4. Nor do they otherwise establish a *prima facie* case that the information is a trade secret. Open Records Decision No. 552 at 5.³ Finally they do not demonstrate that the information at issue is otherwise deemed privileged or confidential by common or statutory law. Accordingly, the information must be released.

³Internal operating or business information, as well as technological processes or ideas, may constitute a trade secret. *See* R. Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* §§ 14.06, 14.09; "What is a 'trade secret' so as to render actionable under state law its use or disclosure by former employee," 59 ALR4th 641; *see, e.g. Gonzales v. Samora*, 791 S.W.2d 258 (Tex. App.--Corpus Christi 1990, no writ) (evidence supported status of business procedures and forms as trade secrets). We have not found, nor have you referred us to any judicial decision protecting a business' income statement, balance sheet, creditor information or general history as a trade secret.

Agri-Gold, Inc., ("Agri-Gold") claims that some of the requested information constitutes a trade secret within the meaning of section 3(a)(10) of the Open Records Act. Agri-Gold advises us that information

outlining the history, operation, marketing strategies, and management of the company includes a description of the operation, marketing strategies, and management techniques implemented by Agri-Gold, Inc. in the production and marketing of canna bulbs and iris rhizomes. Agri-Gold, Inc. has assumed leadership in the mechanization of the production and processing of bulbs and rhizomes as well as diversification of marketing techniques.

Although Agri-Gold addresses the Restatement Criteria, it does so only in general terms and does not therefore elaborate how the requested information falls within any of the criteria. Accordingly, we conclude that Agri-Gold has not established a *prima facie* case that any of the requested information constitutes a trade secret. Moreover, Agri-Gold has not demonstrated that any of the requested information is privileged or confidential by law. Accordingly, the requested information concerning Agri-Gold must be released.⁴

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

⁴This office has been advised that the request encompasses tax return information provided by the four companies to the department. Prior decisions of this office have held that title 26, section 6103(a), of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 226 (1979) (W-2 forms); Open Records Decision No. 600 (1992) (W-4 forms) (copy enclosed). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F.Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, the requested information must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act to the extent that it contains tax return information made confidential by federal statute.

a published open records decision. If you have questions about this ruling, please refer to OR92-683.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/GCK/lmm

Ref.: ID#s 16872; 17055; 17124
ID#s 17236; 17252; 17262
ID# 17265

Enclosure: Open Records Decision No. 600

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