



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 11, 1993

Mr. Burton F. Raiford
Commissioner
Texas Department of Human Services
P. O. Box 149030
Austin, Texas 78714-9030

OR93-026

Dear Mr. Raiford:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 17547.

The Texas Department of Human Services (the "department") has received a request for copies of proposals submitted in response to a Request for Proposal (RFP). Specifically, the requestor seeks copies of proposals submitted in response to an RFP to assist the state in restructuring the reimbursement methodologies for the Medicaid Nursing Facility and Intermediate Care Facility for the Mentally Retarded (ICF-MR) programs, as well as any evaluation information available. Because you do not comment on the requested evaluation information, we presume that the department has or will make it available to the requestor. See Open Records Decision No. 363 (1983). You claim, however, that section 3(a)(10) of the Open Records Act excepts the requested proposals from required public disclosure.

Pursuant to section 7(c) of the act, we have notified the two companies whose interests may be affected by disclosure of the requested information. In response, we have received letters from Lewin-ICF ("Lewin") and Peterson Consulting ("Peterson"). Lewin claims that a portion of its proposal is excepted from required public disclosure under section 3(a)(10) of the Open Records Act.¹ Although Peterson does not expressly invoke the protection of section 3(a)(10) of the Open Records Act, it contends that the requested information contains proprietary information and information made privileged or confidential by statute.

Generally, 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

¹Because Lewin does not object to disclosure of the remainder of the proposal, the department must release it to the requestor. See Open Records Decision No. 402 (1983).

(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 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 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.

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

This office previously has 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 party's claim for exception as valid under that branch if that party 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 When neither the agency nor the company provides relevant information regarding factors necessary to make a 3(a)(10) claim, the agency has no basis to withhold the information under section 3(a)(10). *See* Open Records Decision No. 402 (1983).

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

- (1) 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 *supra*; *see also* Open Records Decision Nos. 319, 306 (1982); 255 (1980).

documents submitted to us for review and having considered Peterson's arguments, we have no basis to conclude that Peterson's proposal is excepted from required public disclosure under section 3(a)(10) of the Open Records Act. Accordingly, the department must release Peterson's proposal 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 OR93-026.

Yours very truly,



Kym Oltrogge
Assistant Attorney General
Opinion Committee

KKO/GCK/lmm

Enclosure: Open Records Decision No. 592

Ref.: ID Nos. 17547; 17583
ID Nos. 17714; 17769

cc: Ms. Catherine Sreckovich, Principal
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Lewin seeks "trade secret" protection for the proposed budget printed in section 4.2 of its proposal.³ This document lists the names of persons who will be working on the project, the hourly rate Lewin charges for each person's service, the number of hours each will be working, and other expenses, such as per diems, that Lewin will incur in performing the work. However, as Open Records Decision No. 319 (1982) instructs, information relating to organization, personnel, and pricing are not ordinarily excepted from disclosure under the "trade secrets" branch of section 3(a)(10).⁴ Open Records Decision No. 319 at 3. We have examined the documents submitted to us for review and have considered Lewin's arguments. We conclude that Lewin has not made a *prima facie* case establishing that the proposed budget constitutes "trade secrets." Accordingly, section 3(a)(10) of the Open Records Act does not authorize the department to withhold from required public disclosure Lewin's proposed budget; the department must release it.

Peterson claims (1) that various state statutes make its proposal confidential, (2) that its proposal is of a proprietary nature,⁵ and (3) that some of the information in its proposal "relates to litigation which is usually privileged" and the release of which would require the permission of the involved parties in accordance with various federal and state statutes. Whether Peterson asserts either the "trade secret" or the "commercial or financial information" prong of section 3(a)(10) is unclear. If Peterson asserts that the information in the proposal constitutes a trade secret, Peterson has failed to establish a *prima facie* case.

Additionally, Peterson has not established that the information in its proposal merits protection as commercial or financial information under the second prong of section 3(a)(10). In Open Records Decision No. 592 (1991) (copy enclosed), this office 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." *Id.* at 9 (citing the summary). While Peterson claims that federal and state statutes make some of the information contained in the proposal confidential, Peterson has failed to identify any such statute.⁶ Furthermore, we are unaware of any federal or Texas statutes that make confidential any of the information contained in the proposal.⁷ Having examined the

³Lewin, however, does not object to release of the total amount of the contract as reflected in the proposed budget.

⁴Additionally, the names of Lewin personnel who will be working on the project appear in those portions of the proposal of which Lewin does not contest the release.

⁵We note that information is not confidential under the Open Records Act simply because the party submitting it anticipates that it will be kept confidential. Open Records Decision No. 479 (1987).

⁶Nor, for that matter, has Peterson identified particular information in its proposal that the alleged federal and state statutes make confidential.

⁷Of course, to the extent that a court has ordered any of the information in the proposal confidential, we cannot overrule that court order.

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