



Office of the Attorney General
State of Texas

May 21, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Charles E. Griffith, III
Deputy City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767

OR93-250

Dear Mr. Griffith:

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# 19114.

The City of Austin (the "city") has received a request for documents submitted by CodeMaster Corporation ("CodeMaster") and Medicus Systems Corporation ("Medicus") in response to a request for proposals ("RFP"). Specifically the requestor wants "copies of RFPs submitted by all other vendors responding to this RFP."

You contend that the documents are excepted from required public disclosure by sections 3(a)(1) and 3(a)(10) of the Open Records Act. Pursuant to section 7(c) we have also solicited briefs from third parties whose property interests may be implicated by disclosure of the requested documents.

You assert that the information is excepted by section 3(a)(1) as information deemed confidential by statutory, judicial or constitutional law. You do not claim that the information is made confidential by statutory or constitutional law. You assert that section 3(a)(1) excepts the documents from disclosure because one proposal was marked as containing proprietary information, and the city's contract with Medicus, the successful bidder, contains a confidentiality provision. However, information is not confidential under the Open Records Act merely because a private company submitting the information expects confidentiality. *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) *cert denied*, 430 U.S. 931 (1977). A governmental body or private company cannot prevent disclosure of public information by marking documents "confidential". Open Records Decision No. 575 (1990). Moreover, a contract cannot overrule the Open Records Act, it is only evidence of an attempt to keep information confidential. Attorney General Opinion JM-672 (1987). A governmental body may not enter into agreements or contracts to keep information confidential. Open Records

Decision No. 514 (1988). The city's contract with Medicus and CodeMaster's proposal marked as containing proprietary information are therefore not sufficient to prevent disclosure under the Open Records Act.

Because sections 3(a)(1) and 3(a)(10) both include aspects of the common law, we will combine our discussion of the common law under section 3(a)(1) with our discussion of section 3(a)(10). *See* Open Records Decision 592 (1991). Section 3(a)(10) excepts from public disclosure either trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Section 3(a)(10) protects the property interests of third parties recognized by the courts. Open Records Decision No. 319 (1982). In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert denied*, 358 U.S. 898 (1958), the Texas Supreme Court adopted the RESTATEMENT OF TORTS definition of a trade secret. The following criteria determine whether information constitutes a trade secret:

- (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] 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.

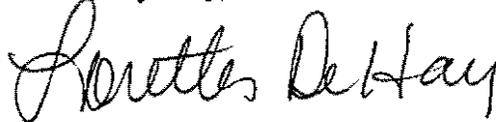
RESTATEMENT OF TORTS, § 757 cmt. b (1939); *See also* Open Records Decision No. 552 (1990).

We must accept a claim that a document is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592 at 2. However, when a governmental agency or company fails to provide any evidence of the factors necessary to establish a trade secret claim, we cannot conclude that section 3(a)(10) applies. Open Records Decision No. 402 (1983). We have not been provided with any information to establish a *prima facie* case that the requested information is a trade secret. Accordingly, you must disclose the requested information in its entirety.¹

¹Although CodeMaster has reserved its Federal copyright to the proposal you must allow inspection of the copyrighted materials; you need not furnish copies of copyrighted materials. Attorney General Opinion JM-672.

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 contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Opinion Committee

LRD/SG/le

Ref: ID# 19114

Enclosures: submitted documents

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