

LAW OFFICES OF

LOCKE PURNELL RAIN HARRELL

(A PROFESSIONAL CORPORATION)

2200 ROSS AVENUE - SUITE 2200
DALLAS - TEXAS 75201-6776
(214) 740-8200
TELECOPIER: (214) 740-8900
TELEX: 73-0911 LOCKE DAL

NEW ORLEANS OFFICE
601 Poydras Street - Suite 2940
NEW ORLEANS - LOUISIANA 70139-6036
(504) 523-2867

WRITER'S DIRECT DIAL NUMBER

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Opinion Committee

VIA HAND DELIVERY

The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548, Capitol Station
Supreme Court Building
Austin, Texas 78711-2548

Re: Open Records Act Request to Dallas Museum of Art

Dear Mr. Morales:

This letter is submitted to you pursuant to § 7 of the Texas Open Records Act, Art. 6252-17a, V.T.C.S. (Supp. 1991) ("the Act"). On August 5, 1991, the Dallas Museum of Art ("DMA") received an Open Records Act request from Jack H. Taylor, Jr., investigative reporter for the Daily News, a publication located in Woodland Hills, California. By his letter, Mr. Taylor requested the following:

(1) All agreements, contracts and/or letters or memoranda of understanding pertaining directly or indirectly to the conveyance of any part of the estate of Wendy Reves, whether already conveyed or which is intended to be conveyed in the future, and whether singular or multiple or at one time or over an extended period of time, to the Dallas Museum of Art.

A true and correct copy of Mr. Taylor's request ("the request") is attached hereto as Exhibit A.

The DMA has construed the request and submits herewith in a sealed envelope the documents it considers to be responsive to the request.¹

¹ Pursuant to § 7(b) of the Act, these documents "shall not be disclosed to the public or the requesting party until a final determination has been made by the attorney general or, if suit is

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The DMA asserts that it is not a governmental body under § 2 or § 3(a) of the Act and is therefore not subject to the Act. Alternatively, the DMA asserts that the section of the DMA which maintains the requested documents is not a governmental body pursuant to §§ 2 and 3(a) and is therefore not subject to the Act. Additionally, if it is determined that the DMA or the section of the DMA maintaining the requested documents is a governmental body under the Act, then the requested documents fall within the exemptions enumerated in §§ 3(a)(1), 3(a)(4), 3(a)(7) and 3(a)(10) of the Act. The DMA requests a decision from the Attorney General regarding the applicability of the Act to the DMA and/or the section maintaining the requested documents, or, alternatively, the applicability of the cited exemptions to the requested documents.

BACKGROUND INFORMATION

The DMA is a private non-profit corporation that receives approximately 85% of its funding from membership fees, auxiliary activities and private corporate, individual and foundation donations. The DMA is located at 1717 North Harwood Street, Dallas, Texas. Pursuant to an agreement with the City of Dallas ("the City"), the City holds title to the land and buildings located at 1717 North Harwood Street. See Second Amendment to Contract: Dallas Museum of Art, a true and correct copy of which is attached hereto as Exhibit B ("the City Contract"). Additionally, pursuant to the City Contract, the City of Dallas holds title to all artworks purchased by, or given to, the City or the DMA prior to September 12, 1984. The DMA holds title to all art objects bought by, or given to, the DMA on or after September 12, 1984. See City Contract, page 1.

The City Contract specifically provides that the contract is entered into

in consideration of the services provided on behalf of the City by DMA for the maintenance, operation and management of the [art museum facilities] ... and the professional services related to the care and preservation of the City's works of art...

See City Contract, page 2.

Also pursuant to the City Contract, the City has certain funding obligations to the DMA, as set forth in paragraph 9 of the

filed under the provisions of this Act, until a final decision has been made by the court with jurisdiction over the suit."

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City Contract. Specifically, the City's funding obligations are limited to structural maintenance and insurance for the City-owned building and grounds and the payment of gas, electricity, water and wastewater utilities. Additionally, the City has agreed to pay the DMA for services rendered in the protection, storage and care of the City-owned artworks in the DMA's possession, and to pay the City's pro-rata portion of fine arts insurance coverage relating to the City-owned artworks in the DMA's possession. See City Contract, pages 3-5. As set forth in the City Contract, the City has no other funding obligations. The financial support the DMA has received from the City has been limited to the funding described in paragraph 9 of the City Contract and has accounted for less than 15% of the DMA's annual expenditures.

Approximately one-half of the artworks housed in the museum are City-owned artworks. The other half consists of artworks either owned by the DMA or on loan from private foundations.

Among the artworks owned by the DMA are the artworks donated on May 23, 1985 by the Wendy and Emery Reves Foundation, Inc. and Mrs. Emery Reves to the DMA. These artworks, designated as the Wendy and Emery Reves Collection ("the Collection"), are exhibited at the DMA in rooms which recreate the essential character and atmosphere of the rooms in which the artworks were displayed at Mrs. Reves' home. The Wendy and Emery Reves Collection is part of the permanent collection of the DMA.

The documents responsive to the request which are submitted herewith pertain to the donations to the DMA by the Wendy and Emery Reves Foundation, Inc. and Mrs. Emery Reves. The documents include privileged communications between the DMA and its counsel, agreements regarding the donation of the Collection and correspondence and other documentation from Mrs. Reves regarding her personal financial affairs and her intent and wishes regarding donations she has made and those she intends to make in the future. The documents include personal hand-written correspondence from Mrs. Reves to various close friends associated with the DMA.

For the fiscal year ending September 30, 1990, the DMA received \$62,660 from the Texas Commission on the Arts and the Texas Commission for the Humanities. This sum represents less than 1% of the total expenditures for the DMA for the fiscal year 1990. In prior years subsequent to the acquisition of the Collection, awards made by these State agencies have not accounted for more than 1-2% of the annual expenditures for the DMA. The DMA applied for and received such awards in connection with special projects and exhibits, not in connection with its permanent collection.

APPLICABILITY OF THE OPEN RECORDS ACT

Section 2(1)(F) of the Act defines a governmental body as including:

the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds. . . .

The DMA concedes that the monies it receives from the City of Dallas and the State of Texas are public funds. However, the DMA disputes whether those funds constitute the "support" envisioned by the Act. Accordingly, the DMA maintains that it is not a governmental body subject to the Act, or, alternatively, that the section of the DMA related to the Wendy and Emery Reves Collection is not a governmental body subject to the Act.

The Texas Attorney General has concluded that the Act does not apply to private persons or businesses simply because they provide specific goods or services under a contract with a governmental body. Tex. Att'y Gen. ORD-1 (1973). In Kneeland v. National Collegiate Athletic Association, 850 F.2d 224, 230 (5th Cir. 1988), cert. denied, 488 U.S. 1042 (1989), the 5th Circuit determined that the NCAA was not a governmental body since the members of the NCAA received a quid pro quo, in sufficiently identifiable and measurable quantities of services, for any public fund expenditures inherent in hosting a championship event. 850 F.2d at 230. The Fifth Circuit also recognized that members of the NCAA individually and collectively received the benefit of the association's investigatory service and capability in exchange for funds paid to the association. Id. Similarly, the Fifth Circuit ruled that the Southwest Conference provides specific "gaugeable" services to member schools which negate the general support element required for governmental body designation. 850 F.2d at 231.

As demonstrated by the City Contract, the DMA also provides specific "gaugeable" services to the City of Dallas in exchange for the public funds paid to the DMA by the City. As provided on page 2 of the City Contract, the City's agreement to fund the DMA is

in consideration of the services provided on behalf of the City by DMA for the maintenance, operation and management of the [art museum facilities]. . . and the professional services related to the care and preservation of the City's works of art. . . .

Further, as specified in paragraph 9 of the City Contract, the

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City's funding obligations are related solely to the structural maintenance of the building owned by the City, maintenance of the building grounds, payment of certain utilities, and payment for the professional care and preservation of the City's works of art.

The City Contract demonstrates a clear intent on the part of the City and the DMA that the City has agreed to compensate the DMA for the services it renders the City in maintaining and operating the City's building and grounds and in housing, caring for and preserving the City's artworks. Clearly, the City funds paid to the DMA may not be considered unrestricted grants for the general support of the DMA. The City receives a quid pro quo in sufficiently identifiable and measurable quantities of services for the public fund expenditures it makes to the DMA. 850 F.2d at 230.

Nor can the State funds paid to the DMA constitute unrestricted grants for the general support of the DMA. First, the State funds constitute only a tiny percentage of the annual expenditures for the DMA. Secondly, (since the acquisition of the Collection,) the State grants have been for specific purposes unrelated to the Collection. These grants cannot constitute the general support contemplated by Section 2(1)(F) of the Act. If they do constitute such support, however, no such support was given to that section of the DMA related to the Collection.

EXEMPTION UNDER § 3(a)(1)

Section 3(a)(1) of the Act exempts from public disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Among other things, this exemption includes information made confidential by common law privacy. Tex. Att'y Gen. ORD-545 (1990). The Texas Attorney General has long employed a two-part test with regard to common law privacy, applying the holding in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). See, e.g., Tex. Att'y Gen. ORD-545. Pursuant to the Industrial Foundation test, information is protected by common law privacy if 1) it contains highly intimate or embarrassing facts about a person's private affairs the publication of which would be highly objectionable to a reasonable person and 2) the information is not a legitimate concern to the public. 540 S.W.2d at 682-83.

In Tex. Att'y Gen. ORD-545, the Attorney General concluded that information regarding whether a specific public employee is participating in a deferred compensation plan, whether or how much that employee is contributing to any specific vendor, and that employee's cumulative account balance with any specific vendor is

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protected from public disclosure by common law privacy. As part of that decision, the Attorney General concluded that personal investment decisions appear to be of the kind of financial information that a person of ordinary sensibilities would object to having publicly disclosed. Additionally, the Attorney General concluded, with respect to the second prong of the Industrial Foundation test, that an individual's investment decisions with respect to a deferred compensation plan, including his choice of investment product and the amounts invested in a product, are not the kinds of financial transactions that are ordinarily of legitimate public interest.

In construing § 3(a)(1), the Attorney General has made a distinction between background financial information furnished to a public body about an individual and the basic facts regarding a particular financial transaction between the individual and the public body. Tex. Att'y Gen. ORD-385 (1983). In making that distinction, the Attorney General has protected from disclosure federal tax returns, tax return information and background financial information included in the loan file of a participant in the Veterans Land Program (Tex. Att'y Gen. ORD-523(1989)), as well as financial information relating to an individual applicant for a housing rehabilitation grant (Tex. Att'y Gen. ORD-373 (1983)). The Attorney General has decided that certain objective information such as patients' names, account numbers, amounts owed and dates upon which the accounts became delinquent is not excepted from disclosure. Tex. Att'y Gen. ORD-385 (1983). Similarly, in Tex. Att'y Gen. ORD-590 (1991), the Attorney General decided that information identifying donors and the amount of donations to West Texas State University were not exempted under a common law privacy exemption, although noting in that opinion that background financial information furnished to a public body about an individual is protected by privacy law.

The requested information at issue satisfies both prongs of the Industrial Foundation test and is therefore exempted under § 3(a)(1) on common law privacy grounds. First, the information sought contains highly intimate or embarrassing facts about a person's private affairs the publication of which would be highly objectionable to a reasonable person. Mrs. Emery Reves is a private citizen who has made a personal decision to donate a substantial portion of her assets to the DMA. The information sought not only contains information regarding the nature of Mrs. Reves' financial affairs and assets but also her personal desires and feelings in connection with her donations. In essence, in choosing to donate assets to the DMA, Mrs. Reves has made a personal decision not unlike the personal investment decisions which were protected in Tex. Att'y Gen. ORD-545.

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Secondly, the information sought is not of legitimate concern to the public. Mrs. Reves' decision to donate her art collection to the DMA is a personal decision similar to an investment decision, which is not of legitimate public interest. The documents responsive to the request include documents pertaining to the private details of Mrs. Reves' financial affairs and personal correspondence to Mrs. Reves' close friends at the DMA. Additionally, the Collection is owned by the DMA, not the City of Dallas. As such, the City's funds do not go to the care and preservation of the Collection. There can be no legitimate public interest in the donation of artworks by a private citizen to a private non-profit corporation such as the DMA. And although the DMA has received State grants constituting a tiny percentage of its annual budget, such grants were never made in connection with the Wendy and Emery Reves Collection.

Further, the requested information constitutes "background financial information" which has been exempted in the past. See, e.g., Tex. Att'y Gen. ORD-523 (1989) and Tex. Att'y Gen. ORD-373 (1983). The information which has not been exempted in prior decisions -- "the basic facts" -- is already public information. With respect to the Collection, the identity of the donor and the substance of the donation is already public information. The artworks donated by Mrs. Reves are on display at the DMA. Additionally, object files on each of the artworks donated by Mrs. Reves are available for public inspection at the DMA. The intricate financial details regarding the donation of these artworks and the agreements between a private benefactor and a private non-profit corporation constitute the protected "background financial information" and are not of legitimate public interest.

EXEMPTION UNDER §§ 3(a)(1) and 3(a)(7)

A small portion of the requested information is also exempted from disclosure under §§ 3(a)(1) and 3(a)(7) of the Act as confidential attorney-client communications. These documents, which are specifically identified, constitute communications between the DMA and its counsel made with the intent that they be kept confidential. Such communications are privileged as provided in Tex. R. Civ. Ev. 503; see also Tex. Att'y Gen. ORD-574 (1990).

EXEMPTION UNDER §§ 3(a)(4) AND 3(a)(10)

Section 3(a)(4) exempts from disclosure "information which, if released, would give advantage to competitors or bidders." Competition among art museums for donations and benefactors is fierce. The information requested is of a highly confidential and private nature. The disclosure to the public of the information

requested could severely damage the DMA's relationship with Mrs. Reves and the DMA's prospects of receiving future donations from Mrs. Reves. This could harm the DMA's competitive position in relation to other art museums if Mrs. Reves were to take her generosity elsewhere. Additionally, disclosure of the information could provide information to other museums which could allow them an opportunity to vie for Mrs. Reves assets. Section 3(a)(4) is specifically designed to prevent such an injury.

Similarly, the requested information is protected under § 3(a)(10), excepting from 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) protects two different categories of information:

1. trade secrets, and
2. commercial or financial information.

Tex. Att'y Gen. ORD-552 (1990). The DMA maintains that the requested information falls into both of these categories.

The Attorney General has recognized a trade secret to be

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 machine or other device or a list of customers.

Tex. Att'y Gen. ORD-552, citing Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). In determining what constitutes a trade secret, the Attorney General has also referred to the Restatement of Torts, § 757, comment b (1939), identifying the following six factors:

- 1) the extent to which the information is known outside of [the company's] business;
- 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's] to guard the secrecy of the information;

- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Tex. Att'y Gen. ORD-552; Tex. Att'y Gen. ORD-554 (1990).

Although, obviously, the DMA is not in the business of manufacturing machine parts or inventing tools and dyes, the nature of the DMA's business which makes it competitive is its ability to obtain well-known and outstanding works of art. Indeed, the hallmark of a museum and that which attracts museum-goers is the permanent collection of the museum. If the requested information were disclosed, it would reveal the particular methods by which the DMA acquired one of its most noteworthy collection of artworks. The DMA's relationship with Mrs. Reves is also tantamount to a trade secret, as it is a unique asset of the DMA by which the DMA maintains and acquires its permanent collection.

Certainly, the DMA's relationship with Mrs. Reves can be described by the six factors enumerated in the Restatement of Torts. Although the existence of the relationship is public knowledge, the uniqueness and financial and legal details of the relationship are known only to certain individuals associated with the DMA. The requested information is kept highly confidential within the DMA, and is available only to the Director and the President of the DMA. As has been demonstrated, the information is invaluable to the DMA and would be extremely valuable to competitors of the DMA. The requested information also indicates the amount of effort and time expended by the DMA in developing and nurturing the relationship with Mrs. Reves. Lastly, in light of the fierce competition for donations of the sort, and the uniqueness of the DMA's relationship with Mrs. Reves, it would be impossible to duplicate the relationship.

The requested information is also protected under the second category protected by § 3(a)(10) of the Act. The Attorney General, in Tex. Att'y Gen. ORD-256 (1980), relied on National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974), for articulation of the standard for determining the confidentiality of financial information:

[C]ommercial or financial matter is "confidential" for purposes of the exemption, if disclosure of the

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information is likely to have either of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Tex. Att'y Gen. ORD-256, citing 498 F.2d at 770.

In this regard, it is important to note the highly confidential nature of gifts of this sort. While Mrs. Reves has not made her donation to the DMA an anonymous one, the details, private financial information and personal interests and desires expressed in connection with the donation are generally presumed to be confidential, and have been presumed to be confidential at any time that Mrs. Reves has indicated her intent to donate any of her personal assets to the DMA. The DMA's ability to obtain similar information in the future could be severely impaired if future potential benefactors were to believe that the documents concerning their relationship with the DMA could be made public. The public policy behind protecting the confidentiality and privacy of private endowments is compelling. Disclosure of the information could have devastating consequences not only for the DMA but also for other similar institutions in the State of Texas.

Respectfully submitted,

LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)

By: Laura Peterson House
Laura Peterson House
State Bar No. 10042450

By: Stuart M. Bumpas
Stuart M. Bumpas
State Bar No. 03340000 *by permission JPH*

2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8000

ATTORNEYS FOR DALLAS MUSEUM
OF ART