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September 8, 1977

Honorable Jerome D. Chapman,
Deputy Commissioner
State Department of Public
Welfare
Reagan Building
Austin, Texas 78701

Open Records Decision No. 175

Re: Are bidders' proposals
for administration of a por-
tion of Texas Medicaid program
which are submitted to
Department of Public Welfare
required to be made available
for public inspection?

Dear Commissioner Chapman:

You have asked whether a bidder's proposal for administration of a portion of the Texas Medicaid program is public information under the Open Records Act, article 6252-17a, V.T.C.S.

In its bid instructions, the Department of Public Welfare (DPW) asked each bidder to identify any data in its proposal which it wished to be kept confidential. The proposal submitted by Electronic Data Systems (EDS), to whom the contract was finally awarded, stated that its bid contained confidential information and indicated generally the subjects it considered confidential, although no data was specifically identified. Subsequently, the Department received a request from another bidder for a copy of the bid proposal submitted by EDS. At the Department's request, EDS indicated specific sections of its proposal which it believes to be excepted from disclosure under the Open Records Act. The requesting party has not submitted any response to the brief filed by EDS, and the factual contentions made by EDS are unchallenged.

EDS contends that certain information contained in its bid proposal, relating to the computer programs, clerical systems and data processing systems which make up the Texas Medicaid Information System (TMIS), is excepted from disclosure under section 3(a)(10) of the Open Records Act, as

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

EDS states that its primary business is "the development of integrated clerical and data processing systems and computer programs such as TMIS for the administration of health care programs." As the Court of Appeals has observed in one case involving EDS:

The company attributes its success, at least in part, to the formulation and development of computer programs that are superior to those used by competing data processing firms. These programs, EDS claims, are more efficient than its competitors' programs, resulting in faster services, a reduced backlog of problems to be solved, and lower cost to the client. In order to perpetuate its success, EDS has made substantial efforts to prevent information regarding its superior programming methods from becoming known and used by its competitors.

Electronic Data Systems Corp. v. Kinder, 497 F.2d 222, 223 (5th Cir. 1974).

On at least two occasions, EDS has sought to enforce restrictive covenants in its employment contracts to prevent former employees from disclosing the type of information contained in TMIS. Electronic Data Systems Corp. v. Kinder, 360 F.Supp. 1044 (N.D. Tex. 1973), aff'd., 497 F.2d 222 (5th Cir. 1974); Electronic Data Systems Corp. v. Powell, 508 S.W.2d 137 (Tex. Civ. App. -- Dallas 1974, no writ). EDS advises us that it has never sold or leased TMIS and maintains extensive security at all its facilities. It includes in each of the contracts it enters appropriate clauses to safeguard the confidentiality of TMIS.

The information regarding TMIS which EDS claims to be exempted from public disclosure was designed, developed and implemented over a ten-year period. Both prior and subsequent to the EDS contract with the Texas DPW, TMIS has formed the basis of contracts for the administration of health care programs in a number of other states, and EDS expects to bid on other such contracts in the future. The competitors of EDS in other states are frequently those same companies which submitted bids on TMIS. As a result, EDS argues that the harm which would result from disclosure of the information did not terminate with the awarding of the contract to EDS by the Texas DPW, but would provide an opportunity for future competitors to obtain a significant advantage.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, which holds it 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. . . .

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). The Restatement lists six criteria for determining whether particular information constitutes a trade secret:

- 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 to guard the secrecy of its 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.

Restatement of Torts, § 757, comment b (1939). In addition, the Penal Code, in making theft of a trade secret a third-degree felony, defines it as:

the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected

by the owner to have access for limited purposes.

Penal Code § 31.05(a)(4).

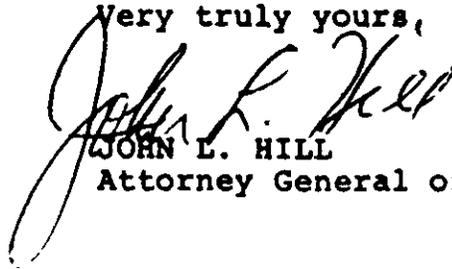
In recent years, a number of courts have held information similar to that which forms the basis of TMIS to be within the scope of the "trade secret" doctrine. University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518 (5th Cir. 1974); Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., 401 F.Supp. 1102 (E.D. Mich. 1975); Com-Share, Inc. v. Computer Complex, Inc., 338 F.Supp. 1229 (E.D. Mich. 1971), aff'd., 458 F.2d 1341 (6th Cir. 1972). Most of these cases have focused upon the manner in which the company has treated its "secret." Structural Dynamics, supra, at 1116; University Computing, supra, at 535. In Rimes v. Club Corp. of America, 542 S.W.2d 909 (Tex. Civ. App. -- Dallas 1976, writ ref'd n.r.e.), a Texas court emphasized that, in order to maintain the law's protection,

the owner of a trade secret must do something to protect itself from the use of such secret.

Id. at 913. See also, Hancock v. State, 402 S.W.2d 906 (Tex. Crim. App. 1966).

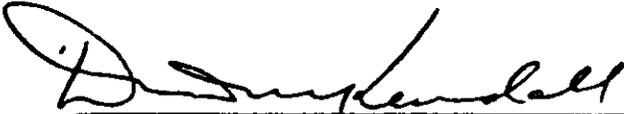
It is undisputed that the amalgam of information which constitutes TMIS represents a unique development within the data processing industry. It is also clear that EDS has made substantial efforts to maintain the confidentiality of TMIS. In the light of the expansive scope given the "trade secret" doctrine by the Supreme Court and by criminal statute, and in reliance upon recent judicial decisions relating to data similar to that considered here, we believe that the technical aspects of TMIS constitute the type of information excepted from disclosure under section 3(a)(10) of the Open Records Act. In our opinion, all information which EDS asked to be treated as confidential in its letter to DPW of March 1, 1977, may be withheld from disclosure under section 3(a)(10), with the exception of that contained in Section V of Volume 1. The latter is made up entirely of resumes listing the education and experience of EDS employees, and cannot, in our view, reasonably be said to fall within the "trade secret" or any other exception to the Open Records Act.

Very truly yours,



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APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee

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