



February 18, 1999

Ms. Joan Carol Bates  
Staff Attorney  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR99-0496

Dear Ms. Bates:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request were assigned ID# 122079.

The Texas Department of Health (the "department") received a request for four categories of information submitted in response to the Enrollment Broker Contractor Request for Proposal ("RFP"). Specifically, the requestor requests copies of the "Maximus, Inc. response/proposal," "[a]ny clarifications to that response," "cost exhibit for the Maximus contract," and "[a]ny additional exhibits to the final executed contract." In response to the request, you submit to this office for review the information you assert is responsive. You state that the department "has already released to the requestor a copy of the Enrollment Broker contract;" however, you claim that the cost exhibit at issue is excepted from disclosure. You contend that the "cost exhibit" and other submitted information "marked as confidential by Maximus" may be considered "proprietary" and excepted from required public disclosure by section 552.110 of the Government Code.<sup>1</sup> We have considered the exception and arguments you have raised and have reviewed the submitted information.

As a preface to our discussion, we note that this office has previously addressed whether records responsive to similar requests for information were subject to an exception to required disclosure. In Open Records Letter Nos. 97-0856 (1997), 97-1564 (1997), 97-1675 (1997), 97-2209 (1997), and 97-2718 (1997), our office specifically addressed the release of related information pursuant to section 552.104 of the Government Code. However, since a contract has apparently been awarded, and this requestor has submitted a new request for the information, you ask this office whether a portion of the requested information must be withheld under section 552.110. *See* Open Records Decision No. 541 (1990).

---

<sup>1</sup>We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

Pursuant to section 552.305 of the Government Code, we notified MAXIMUS, Inc. ("MAXIMUS") of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. MAXIMUS responded to our notification and asserted that "[t]he sections of the referenced RFP that have been marked as 'MAXIMUS Proprietary Information' are protected from disclosure" under sections 552.101, 552.104,<sup>2</sup> and 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> Facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party's duty to establish how and why exception protects particular information). Therefore,

---

<sup>2</sup>Section 552.104 is not applicable to protect the proprietary interests of a third party. *See* Open Records Decision No. 592 (1991). Section 552.104 protects the government's interest in purchasing by assuring that the bidding process will be truly competitive. *See* Open Records Decision Nos. 583 (1990), 554 (1990). Therefore, you may not withhold the requested information under section 552.104.

<sup>3</sup>The six factors that the Restatement gives 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 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes confidential “commercial or financial information.” Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the “commercial or financial information” branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (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. *See National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Consequently, if a governmental body or other entity can meet the test established in *National Parks*, the information may be withheld from disclosure.

It is our understanding that the information at issue was submitted to the department in response to the Enrollment Broker Contract RFP. Therefore, the information was required to be submitted. Thus, we conclude that neither the department nor MAXIMUS has established the applicability of the impairment prong in this instance. *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (no impairment where information was required for bid or contract; contractors “will continue bidding for [agency] contracts despite the risk of revealing business secrets if the price is right”); *McDonnell Douglass Corp. v. National Aeronautics & Space Admin.*, 895 F. Supp. 316; (D.D.C. 1995); *see Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984, 113 S.Ct. 1579 (1992). *See generally* OFFICE OF INFORMATION & PRIVACY, UNITED STATES DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (1997) 149-152, 156-161, n. 142 (discussing “confidential” information under *Critical Mass* and impairment prong under *National Parks*).

To be held confidential under *National Parks*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks*, 498 F.2d at 766. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). “To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.” *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted); *see* Open Records Decision No. 639 (1996). Based on a review of the submitted records and MAXIMUS’s brief, we conclude that MAXIMUS has not provided specific factual or evidentiary material for this

office to determine that release of the submitted information will cause substantial harm to their competitive position. Therefore, neither the department nor MAXIMUS has established that releasing the requested information would likely cause MAXIMUS to suffer substantial competitive injury. Accordingly, we conclude that MAXIMUS has not met its burden under either prong of section 552.110, and the requested information is not excepted from disclosure.<sup>4</sup>

Finally, we consider whether section 552.101 excepts any of the submitted information. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. We have examined the submitted information and we are not aware of any law that makes the requested information confidential, nor do you raise any such statute.<sup>5</sup> Accordingly, we conclude the department may not withhold any portion of the submitted information based on section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

---

<sup>4</sup>For information to be protected under section 552.110, it must be information that is not publicly available or readily ascertainable by independent investigation. *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 435 (Tex. App.--Forth Worth 1987, no writ); see generally Open Records Decision Nos. 541 (1990) (contracts between governmental bodies and third parties are generally considered public information), 514 (1988), 306 (1982) (resumes listing education and experience of employees of private company are not excepted by predecessor to section 552.110), 319 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted by the predecessor to section 552.110), 175 (1977), 125 (1976).

<sup>5</sup>Corporations do not have a protected common-law privacy interest. Open Records Decision Nos. 620 (1993), 192 (1978).

Ref.: ID#s 122079

Enclosures: Submitted documents

cc: Ms. Kathy Mitchell  
Consumers Union  
1300 Guadalupe, Suite 100  
Austin, Texas 78701  
(w/o enclosures)

Ms. Kari Dingman  
Project Manager  
Maximus, Inc.  
1212 East Anderson Lane, # 200  
Austin, Texas 78752  
(w/o enclosures)