



May 12, 2000

Ms. Stacy Sallee
Associate Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2000-1865

Dear Ms. Sallee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135131.

The Texas Health and Human Services Commission (the "commission") received a request for certain information relating to the Texas Children's Health Insurance Program procurement. Specifically, the requestor seeks (1) technical and cost proposals submitted by Birch & Davis; (2) the Birch & Davis contract; (3) technical and cost proposals submitted by MAXIMUS; and (4) executive summaries and cost proposals for Benova and DHACS. In your letter to this office dated March 10, 2000, you stated that this office has "already ruled on the technical and cost proposals submitted by Birch and Davis in OR2000-0541, and the commission is in the process of copying the public information in those proposals, together with the contract, to send to [the requestor]." At that time, you stated that "no ruling [was] needed on that information." However, in your subsequent letter to this office dated March 27, 2000, you informed us that the commission does, in fact, request our decision regarding whether the Birch & Davis contract is excepted from required public disclosure under chapter 552 of the Government Code. We therefore assume that you did not release a copy of the Birch & Davis contract to the requestor. You also inform us in your March 27, 2000, letter that the requestor has informed the commission that he seeks executive summaries *prepared and submitted by* Benova and DHACS as part of their proposals, rather than copies of the commission's evaluations of those proposals. You inform us that no such executive summaries exist; therefore, you do not request a ruling on that information. Accordingly, your request for our decision is limited to the Birch & Davis contract and the MAXIMUS proposal. You do not raise any exceptions against disclosure of the Birch &

Davis contract or the MAXIMUS proposals on behalf of the commission; however, you state that these documents may implicate the proprietary or property interests of third parties.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. You acknowledge that you did not request a decision within ten business days and thus failed to meet your statutory burden. Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision Nos. 552 (1990), 319 (1982), 150 (1977). Here, we agree that the application of section 552.110 and the interests of third parties present compelling reasons to overcome the presumption of openness.

Section 552.305 of the Government Code provides that if release of a third party's proprietary information may be subject to exception under section 552.110, a governmental body must make a good faith effort to notify that party of its right to submit reasons why such information should be withheld from disclosure. *See Gov't Code § 552.305(d)*; Open Records Decision No. 542 at 2-3 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In this instance, you inform us that the commission provided the notice required by section 552.305(d) to MAXIMUS and Birch & Davis. MAXIMUS responded to your notice by asserting that portions of its proposal contain confidential and proprietary information which should be excepted from disclosure under sections 552.104 and 552.110. Accordingly, we address MAXIMUS's arguments against disclosure. However, Birch & Davis has not submitted arguments for withholding the submitted contract as required under 552.305(d). Therefore, we have no basis to conclude that the Birch & Davis contract is excepted from disclosure by section 552.110. *See Gov't Code § 552.110(b)* (to prevent disclosure of commercial or financial information, party 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), Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990); *see also Gov't Code § 552.022(a)(3)* (contracts with governmental body expressly made public); Open Records Decision No. 541 at 8 (1990) (terms of contract with state agency are public); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Therefore, we find that the commission must release the Birch & Davis contract to the requestor.

We now address MAXIMUS's arguments against disclosure. Section 552.110 of the Government Code protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as 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 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; and
- 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. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

MAXIMUS asserts that its Cost and Pricing Information, Training Modules, Business Rules, Implementation Work Plan, and its description of the MAXSTAR Software constitute trade secret information under section 552.110. After examining all of the arguments and the submitted documents, however, we find that only a portion of this information, which we have marked, is protected as trade secret information under section 552.110. We do not believe that the Training Modules contain trade secret information, *see generally* Open Records Decision No. 319 (1982) (information relating to organization, personnel, qualification, and experience not ordinarily trade secret information), nor do we believe that the Cost and Pricing Information may be protected under section 552.110. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see generally* Open Records Decision No. 319 (1982) (stating that pricing proposals are entitled to protection only during bid submission process); Freedom of Information Act Guide & Privacy Act Overview 136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 184 (1978). In addition, it appears to this office that the Implementation Work Plan relates exclusively to a particular circumstance, that is, “single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Record Decision Nos. 319 at 3 (1982), 255 (1980). Accordingly, you may not withhold the Implementation Work Plan pursuant to section 552.110.

We note that MAXIMUS also asserts that its Cost and Pricing Information is excepted from disclosure under section 552.104 of the Government Code. The purpose of section 552.104 is to protect the interests of a *governmental body* in situations such as competitive bidding and requests for proposals in which the governmental body may wish to withhold information to obtain more favorable offers. *See* Open Records Decision No. 592 at 8

(1991). Section 552.104 is not designed to protect the interests of private parties that submit information, such as bids and proposals, to governmental bodies. *Id.* At 8-9. Accordingly, because MAXIMUS is prohibited from asserting the protection of section 552.104, we do not address its arguments under that exception. Therefore, the Cost and Pricing Information must be released.

In summary, we have marked the portions of the MAXIMUS proposal that the commission must withhold pursuant to section 552.110. The unmarked portions of the MAXIMUS proposal, as well as the Birch & Davis contract, must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kathryn S. Knechtel
Assistant Attorney General
Open Records Division

KSK/ljp

Ref: ID# 135131

Encl. Submitted documents

cc: Mr. Michael Reitz
EDS
5400 Legacy Drive
Plano, Texas 75024
(w/o enclosures)

Mr. David R. Francis
General Counsel
MAXIMUS
1356 Beverly Road
McLean, Virginia 22101
(w/o enclosures)

Ms. Debra L. Glickfeld
Staff Attorney
Birch & Davis Health Management Corporation
8905 Fairview Road
Silver Spring, Maryland 20910
(w/o enclosures)