



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2006

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P. O. Box 13247
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OR2006-02962

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 244924.

The Texas Health and Human Services Commission (the "commission") received two requests for the following information pertaining to the commission's Integrated Eligibility and Enrollment Services contract with Accenture, LLP ("Accenture"): (1) "[t]he names and addresses of each subcontractor with whom Accenture has contracted for services" and (2) copies of the contracts between Accenture and its subcontractors. You state that the commission does not maintain some of the requested contracts because, under its contract with Accenture, "the Commission reviews only certain contracts between Accenture and its subcontractors."¹ Although you make no arguments as to whether the remaining requested information is excepted from disclosure, you believe that this information may implicate the proprietary interests of the following third parties: Accenture; Knowledge Planet, Inc. ("Knowledge"); Empirix, Inc. ("Empirix"); eLoyalty Corporation ("eLoyalty"); Dynamic Computing Services ("Dynamic"); The Caprock Group, LLC ("Caprock"); Burson-Marsteller, LLC ("Burson"); Avanade, Inc. ("Avanade"); Northrop Grumman Information Technology, Inc. ("Northrop"); Trinco Technologies, LLC ("Trinco"); Witness Systems, Inc.

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

("Witness"); Mr. Dennis Karbach ("Karbach"); EMC Corporation ("EMC"); MAXIMUS, Inc. ("MAXIMUS"); MicroAssist, Inc. ("MicroAssist"); and Malteo, Inc. ("Malteo"). Accordingly, you state, and provide documentation showing, that the commission notified these third parties of the request for information and of their right to submit arguments to this office as to why the information should not be released. *See Gov't Code § 552.305(d)*; *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the arguments that have been submitted to this office by some of these third parties and have reviewed the submitted information. We have also considered arguments submitted by one of the requestors. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(c) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, the following third parties have not submitted comments explaining why their information should be withheld from disclosure: Accenture; Knowledge; Empirix; eLoyalty; Dynamic; Caprock; Burson; Trinco; Witness; Karbach; EMC; and MicroAssist. Thus, these third parties have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any of the submitted information on the basis of any proprietary interest that these third parties may have in the information.

However, Avande, Northrop, MAXIMUS, and Malteo have submitted arguments to this office objecting to the release of their subcontract agreements or portions thereof. Initially, we note that MAXIMUS seeks to withhold certain information that the commission has not submitted for our review.² We do not reach MAXIMUS' arguments with regard to information that has not been submitted for our review by the commission. *See Gov't Code § 552.301(e)(1)(D)* (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

Next, Northrop asserts that because its "information is confidential and proprietary between [it and Accenture], any release of [this] information would require the consent and approval

²Specifically, the commission has not submitted Exhibits 2.5.3 and 7.2 to MAXIMUS' subcontract agreement with Accenture.

of both parties.” The company further argues that because the State of Texas is not a party to the contract and has no privity of contract with Northrop, the information is not releasable by the commission. Section 552.002 of the Government Code defines “public information” as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a). Northrop’s subcontract with Accenture is maintained by the commission in connection with the commission’s official business. It is therefore public information subject to the Act. Information subject to the Act is not confidential simply because the parties submitting the information anticipate or request that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, governmental bodies or third-parties cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Attorney General Opinion JM-672* (1987). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

MAXIMUS and Northrop both raise section 552.101 of the Government Code as an exception to disclosure. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See Open Records Decision Nos. 600 at 4* (1992) (constitutional privacy), *478 at 2* (1987) (statutory confidentiality), *611 at 1* (1992) (common-law privacy). Neither MAXIMUS nor Northrop has directed our attention to any law, and this office is not otherwise aware of any law, under which any of the information at issue is considered to be confidential for purposes of section 552.101. Therefore, the commission may not withhold any of the information at issue on that basis.

Next, Avande, Northrop, MAXIMUS, and Malteo all claim exception to disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret 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.” *See Gov’t Code § 552.110(a)-(b)*.

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.³ *See* Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

Section 552.110(b) excepts from disclosure “[c]ommercial 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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999).

Having considered the companies’ arguments and reviewed the submitted information, we find that Avanade, Northrop, MAXIMUS, and Malteo have not established by specific factual evidence that any of the information at issue is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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).

release of which would cause the companies substantial competitive harm under section 552.110(b). See RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); Open Records Decision Nos. 552 (1990), 651 (1999). Thus, none of the submitted information may be withheld under section 552.11C.

We note, however, that some of the submitted information indicates that it is protected by copyright law. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright law unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials that are protected by copyright law, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

Accordingly, we conclude that all of the submitted information must be released to the requestors. However, in releasing any information that is protected by copyright, the commission must comply with copyright law.

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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

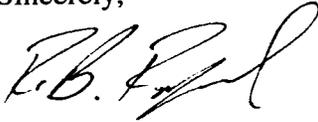
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schless at the Office of the Attorney General at (512) 475-2497.

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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
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Open Records Division

RBR/krl

Ref: ID# 244924

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