



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2009

Ms. L. Renée Lowe
Assistant County Attorney
Harris County Attorney's Office
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2009-07607

Dear Ms. Lowe:

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# 344941.

The Harris County Hospital District (the "district") received three requests from different requestors for pricing information related to specified requests for proposals ("RFP").¹ You state that you have released some of the requested information to the requestors.² Although we understand you to take no position as to whether the submitted information must be released to the requestor, you state that the submitted documents may contain proprietary information subject to exception under the Act.³ You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the district has notified the interested third parties of the request and of their right to submit arguments to this office

¹We note that the district asked for and received clarification regarding these requests. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

²You explain to this office that you have released to the requestors the pricing information of four of the winning bidders pursuant to their written consent. These companies are: Advantage Nursing Services, Inc.; Rad-Link Staffing, Inc.; Star Nursing, Inc.; and JWS d/b/a UltraStaff.

³Although you raise section 552.104 of the Government Code, you have not submitted an argument explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, 302.

explaining why this information should not be released.⁴ *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also received comments from Maxim Staffing Solutions ("Maxim") pursuant to section 552.305(d) of the Government Code.

Initially, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(a), (b). You state that the district received requests for information on March 10th, 11th, and 12th of 2009. However, you did not request a ruling from this office until March 27, 2009. Thus, with respect to all three of the requests, the district failed to comply with the procedural requirements mandated by section 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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because a third party interest can provide a compelling reason to withhold information, we will address whether the submitted information is excepted from disclosure under the Act.

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(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Maxim has submitted to this office reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of the remaining third parties' records constitutes proprietary information. *See* 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

⁴The notified third parties are: Maxim Staffing Solutions; Qualicare Staffing Services, Inc.; Progressive Nursing Staffers of Texas, Inc.; SEV Staffing, Inc.; Supplemental Health Care; Advance Health Education Center, d/b/a MEDRelief Staffing; and Trii-Star Medical Staffing Agency.

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). Therefore, the district may not withhold the remaining companies' records on the basis of any proprietary interest they may have in them.

Maxim generally asserts that its pricing information is confidential. Thus, we understand Maxim to assert that its pricing information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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 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. . . . 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 Huffines*, 314 S.W.2d at 776. 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.⁵ Restatement of Torts § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch

⁵The following are the six factors that the Restatement gives 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 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to 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; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). In this instance, Maxim generally asserts that their pricing information is subject to section 552.110. However, we find that Maxim has failed to establish that their pricing information meets the definition of a trade secret, and this information may not be withheld from disclosure under section 552.110(a).

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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

In this instance, Maxim generally states that release of their pricing information could provide an unfair advantage to the requestors. However, we note that Maxim was selected as a winning bidder with respect to the proposal at issue. Pricing information of a winning bidder, such as Maxim in this instance, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We therefore conclude that the district may not withhold any portion of Maxim's pricing information under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). As no further exception to disclosure is raised for this information, it must be released to the requestors.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/cc

Ref: ID# 344941

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

General Counsel's Office
Maxim Staffing Solutions
2600 South Loop West, Suite 645
Houston, Texas 77007
(w/o enclosures)

General Counsel's Office
Qualicare Staffing Services, Inc.
9555 W. Sam Houston Parkway S.
Suite 310
Houston, Texas 77099
(w/o enclosures)

General Counsel's Office
Progressive Nursing Staffers of Texas, Inc.
1 Bala Plaza, Suite 401
Bala Cynwyd, Pennsylvania 19004
(w/o enclosures)

General Counsel's Office
SEV Staffing, Inc.
4000 Garth Road, Suite 140
Baytown, Texas 77521
(w/o enclosures)

General Counsel's Office
Supplemental Health Care
2005 Sheridan Drive
Buffalo, New York 14223
(w/o enclosures)

General Counsel's Office
Trii-Star Medical Staffing Agency
2656 South Loop West, Suite 395
Houston, Texas 77054
(w/o enclosures)

General Counsel's Office
Advanced Health Education Center
d/b/a MEDRelief Staffing
8502 Tybor Drive
Houston, Texas 77074
(w/o enclosures)