



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 14, 1996

Ms. Cathy Cunningham
Senior Assistant City Attorney
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR96-2098

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID#101818.

The City of Irving (the "city") received a request for "a copy of the City of Irving Annual Service Contract for Emergency Medical Services Billing and Collection Services . . . and all related documents including Exhibit 'A' (Bid No. 271-94F) and Exhibit 'B' (Vendors Response) of the contract." The city asserts that the requested information is excepted from required public disclosure pursuant to Government Code section 552.110 because the information constitutes a trade secret of Texas Medical Data Systems, Inc. ("TMDS"). Pursuant to Government Code section 552.305, this office notified TMDS of this request. TMDS likewise asserts that the requested information is excepted from disclosure based on Government Code section 552.110.

Section 552.110 excepts from public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." TMDS asserts that its procedures, forms, reports, and key working and phrasings used in its collection business are trade secrets. 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, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. The Restatement lists the following six factors to be considered in 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 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;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch 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. Open Records Decision No. 552(1990) at 5-6. We conclude that TMDS has established that its procedures, forms, reports, and key wording and phrasings used in its business are trade secrets. The city must withhold this information from required public disclosure based on section 552.110.

However, the responsive information includes additional information which TMDS has not established as trade secrets. TMDS asserts that the release of this information will cause substantial harm to its competitive position. When 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). A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by a mere conclusory assertion of a possibility of commercial harm. 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. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755

F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985)). We believe that TMDS's assertions are conclusory and generalized, and do not establish that the release of the information will cause substantial harm to its competitive position. Furthermore, neither the city nor TMDS contends that the release of the information would impair the city's ability to obtain necessary information in the future. Consequently, we conclude that the city may not withhold the remaining information from disclosure based on section 552.110.

We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 101818

Enclosures: Submitted Information

cc: Mr. Larry Clark
Project Director
Southwest General Services, Inc.
P.O. Box 50460
Dallas, Texas 75250-2016
(w/o enclosures)

Mr. Kevin Sigler, President
Texas Medical Data Systems, Inc.
3301 South Alameda, Suite 101
Corpus Christi, Texas 78411
(w/o enclosures)