



August 15, 2000

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2000-3106

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137991.

The Texas Department of Health and Human Services (the "department") received a written request for the "Technical Proposals" and "Cost Proposals" submitted to the department by three unsuccessful proposers for a contract awarded by the commission for the administration of the Children's Health Insurance Program. You have submitted to this office as responsive to the request the proposals of Electronic Data Systems Corporation¹ ("EDS"), MAXIMUS, Incorporated ("MAXIMUS"), and Benova, Incorporated ("Benova"). You do not contend that these proposals are excepted from public disclosure; rather, you have sought a decision from this office pursuant to section 552.305 of the Government Code, which authorizes parties with a privacy or proprietary interest in requested information to submit arguments to this office as to why the information is excepted from required public disclosure. In accordance with section 552.305(d), the department notified the three companies of the current records request and invited them to submit comments to this office as to why their respective proposals are excepted from public disclosure.

One of the companies that you notified, Benova, did not submit a response to your notice. Consequently, this office has no basis on which to conclude that any portion of Benova's proposals are excepted from required public disclosure under the Public Information Act. Accordingly, we conclude that the department must release Benova's proposals to the requestor in their entirety.

¹You informed a member of our staff in a telephone conversation that although the requestor actually sought the proposals submitted by "National Heritage Insurance Corporation," that company did not submit a responsive proposal, and the EDS is a wholly-owned subsidiary of National Heritage Insurance Corporation.

Although MAXIMUS submitted arguments to this office regarding portions of its proposals, we note that this office has previously ruled on the public nature of these documents. In Open Records Letter No. 2000-1865 (2000), this office concluded 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.

Because this office issued a prior determination regarding MAXIMUS’ proposals in OR2000-1865, we need not further address the public nature of those proposals here. *See* Gov’t Code § 552.301(a). The department must release to the requestor those portions of the proposals that this office previously determined to be public in OR2000-1865. Similarly, the department must withhold those portions of the MAXIMUS proposals that we have held to be protected from public disclosure under section 552.110 of the Government Code.

Finally, we address the arguments for non-disclosure submitted by EDS. EDS contends that specific portions of its proposals are protected from public disclosure pursuant to section 552.110 of the Government Code, which protects the property interests of private persons 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. EDS contends that both branches of section 552.110 apply to portions of its proposals.

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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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.² *Id.* 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 at 5-6 (1990). In this instance, although EDS contends that specific portions of its proposals constitute trade secret information, it has not demonstrated how any of the six factors apply to the information at issue. We conclude, therefore, that EDS has not established a *prima facie* case for trade secret protection.

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). EDS makes specific arguments under the commercial or financial branch of section 552.110 only with regard to "detailed data pertaining to EDS' assets, liabilities, and financial resources." EDS contends that if this information is released, "EDS' competitors would be able to ascertain EDS' financial strengths, weaknesses, and capabilities, and use this information to undercut EDS in future competitive situations." We note, however, that the information revealing EDS' financial makeup is contained in its published 1998 Annual Report, which is freely released to EDS stockholders. We do not believe that such widely disseminated information merits protection under section 552.110(b), especially where there are no safeguards

²The 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).

restricting further dissemination. Accordingly, we conclude that the department must release the EDS proposals to the requestor in their entirety.

In summary, the department must release the Benova and EDS technical and cost proposals in their entirety. The department must withhold pursuant to section 552.110 only those portions of the MAXIMUS proposals that this office previously held to be excepted from public disclosure in Open Records Letter No. 2000-1865; the remaining portions of the MAXIMUS proposals 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 Department 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,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/RWP/er

Ref: ID# 137991

Encl. Submitted documents

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