



August 2, 2001

Ms. Patricia Muniz-Chapa  
Public Information Coordinator  
University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2001-3361

Dear Ms. Muniz-Chapa:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150202.

The University of Texas System (the "university") received two requests for the responses to a specific request for a proposal ("RFP"). You take no position with regard to the public nature of the information. However, you indicate that the requests may implicate the proprietary rights of fifteen third parties, including the two requestors. Consequently, you notified the third parties pursuant to section 552.305 of the Government Code. The notified third parties include Antares Development Corporation, BCS Systems, Inc., Datamax Technologies, Critical Technologies, Inc., Advance Total Imaging, Lason Systems, Inc., Syscom, Inc., Unisys Corporation, Court Specialists, Inc., Mobius Management Systems, Inc., Telestar Corporation, The Collister Group, Automated Solutions Corporation, ACS Image Solutions, and Maxim Solutions. You further indicate that you will release the proposals of two other third parties, Imagine Solutions and Dyna Source, Inc., because they agreed to the release of their information.

Three of the interested third parties, the Collister Group, Syscom, and Mobius Management Systems have submitted arguments for withholding some or all of their proposals. Because the remainder of the interested third parties have not submitted arguments to this office, we have no basis to conclude that their proposals are excepted from disclosure. 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). Thus, the

university must release to the requestors the proposals from Antares Development Corporation, BCS Systems, Inc., Datamax Technologies, Critical Technologies, Inc., Advance Total Imaging, Lason Systems, Inc., Unisys Corporation, Court Specialists, Inc., Telestar Corporation, Automated Solutions Corporation, ACS Image Solutions, and Maxim Solutions.

The Collister Group contends that the pricing information contained in its proposal is excepted from disclosure under section 552.104 of the Government Code. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* Because the university does not raise section 552.104, this section is not applicable to the Collister Group's proposal. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the Collister Group's proposal may not be withheld under section 552.104, and must be released.

We next address Syscom's arguments for withholding some of the information in its submitted proposal. In correspondence with the university, Syscom indicated that it wished to claim certain information in its proposal to be "confidential for proprietary reasons." Section 552.110 protects the proprietary 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. With respect to the trade secret prong of section 552.110, we note that 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). 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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> 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).

With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

While Syscom indicates that certain information in its proposal is proprietary, Syscom does not make a specific factual demonstration that its information constitutes a trade secret or that the release of the information would cause it substantial competitive harm. Therefore, we find that the university must release Syscom's proposal.

Finally, we address Mobius' argument that its proposal is excepted from disclosure under section 552.110. Mobius contends that its proposal is excepted under section 552.110(a) and (b). According to Mobius, its proposal constitutes information compiled for the purpose of responding to the RFP. Mobius contends that the proposal as a whole is excepted under section 552.110(a) because it meets the six criteria for determining whether information consists of a trade secret. Mobius also contends that the pricing information contained in its proposal is excepted from disclosure under section 552.110(b) because, if released, the pricing information could substantially damage Mobius by eliminating its ability to assert a pricing advantage. Based on Mobius' arguments and our review of Mobius' proposal, we agree that the proposal is excepted in its entirety under section 552.110(a) and (b).

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<sup>1</sup>The 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).

In summary, the university must release all of the submitted proposals except for Mobius' proposal.

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).

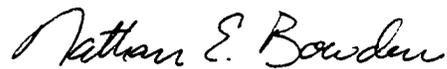
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 Schloss at the General Services Commission 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 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 150202

Enc: Submitted documents

c: Ms. Kimberly Billings  
Maxim Solution Group, Inc.  
1700 Coit Road, Suite 260  
Plano, Texas 75075  
(w/o enclosures)

Mr. Saul Delgado  
The Collister Group  
1000 N. Post Oak, Suite 270  
Houston, Texas 77055

Mr. Gene Rodriguez  
Antares Development Corporation  
301 S. Frio, Suite 240  
San Antonio, Texas 78207  
(w/o enclosures)

Mr. Kelly Kohlleffel  
Senoir Account Manager  
BCS Systems, Inc.  
1717 St. James Place, Suite 400  
Houston, Texas 77056  
(w/o enclosures)

Mr. Christopher Jones  
Regional Sales Manager  
Datamax Technologies  
6101 West Centinela Avenue, Suite 150  
Culver City, California 90230  
(w/o enclosures)

Mr. Joe Haynes  
ACS Image Systems  
c/o Patricia Muniz-Chapa  
University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902  
(w/o enclosures)

Mr. Eric Hastings  
Director of Sales  
Critical  
4950 Keller Springs, Suite 450  
Addison, Texas 75001  
(w/o enclosures)

Mr. Ed Callahan  
District Manager  
Advance Total Imaging  
361 Sinclair, Frontage Road  
Milpitas, California 95035  
(w/o enclosures)

Mr. Bob Bravo  
Senior Sales Engineer  
Lason  
3714 Blustein Drive, Suite 670  
Austin, Texas 78721  
(w/o enclosures)

Ms. Victoria Wysokinski  
Vice President  
Syscom, Inc.  
400 East Pratt Street  
Baltimore, Maryland 21202-6106  
(w/o enclosures)

Mr. Rob Thrash  
Customer Relations Executive  
Unisys Corporation  
4516 Seton Center Parkway, Suite 275  
Austin, Texas 78759  
(w/o enclosures)

Mr. Tommy White  
Account Manager  
Court Specialists, Inc.  
906 Anna Lane  
Friendswood, Texas 77546  
(w/o enclosures)

Mr. Aaron Speer  
Senior Account Manager  
Mobius Management Systems, Inc.  
5910 North Central Expressway, Suite 1650  
Dallas, Texas 75206  
(w/o enclosures)

Mr. James Yao  
Program Manager  
Telestar Corporation  
1461 S. Balboa Avenue  
Ontario, California 91761  
(w/o enclosures)

Automated Solutions Corporation  
1131 Rockingham, Suite 125  
Richardson, Texas 75080  
(w/o enclosures)