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ATTORNEY GENERAL OF TEXAS

April 8, 2019

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2019-09430

Dear Ms. Harden:

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# 757752 (PIR No. 19-51311).

The Office of the Attorney General (the "OAG") received a request for all contracts between the OAG and MAXIMUS, Inc. ("Maximus") or any of its subsidiaries from a specified time period. Although the OAG takes no position as to whether the submitted information is excepted under the Act, the OAG informs us release of this information may implicate the proprietary interests of Maximus. Accordingly, the OAG states it notified Maximus of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Maximus. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information was subject to previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-15046 (2013) and 2013-19986 (2013). In Open Records Letter No. 2013-15046, we determined the OAG: (1) must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy, (2) must withhold certain information under

section 552.110 of the Government Code, and (3) must release the remaining information in accordance with copyright law. In Open Records Letter No. 2013-19986, we determined the OAG: (1) must withhold certain information under section 552.110 of the Government Code and (2) must release the remaining information in accordance with copyright law. In our previous rulings, we determined, among other things, the OAG must release some of Maximus' information. We understand the OAG did so. However, Maximus now argues portions of its released information are excepted from disclosure under sections 552.101, 552.104, and 552.110, and 552.139 of the Government Code.¹ Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov't Code* § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, the OAG may not withhold the previously released information of Maximus under section 552.104. However, because sections 552.101, 552.110, and 552.139 make information confidential by law, we will address Maximus's argument under these sections for the submitted information, including the information that was previously released. Furthermore, as section 552.136 of the Government Code can make information confidential under the Act, we will consider the applicability of this exception for the submitted information.² We will also consider Maximus' argument under section 552.104 for the information that was not previously released.

Maximus raises section 552.101 in conjunction with the doctrines of common-law and constitutional privacy. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Gov't Code* § 552.101. This section encompasses the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and, (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally

¹Although Maximus does not raise section 552.104 in its briefing to our office, we understand Maximus to raise this exception based on its markings in the documents it submitted.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

intimate or embarrassing. *See* Open Records Decision Nos. 545 (1990) (mortgage payments, assets, bills, and credit history). However, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). We also note an individual's name, education, prior employment, and personal information are not ordinarily private information subject to common-law privacy. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the OAG must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.³ However, we find no portion of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the OAG may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find Maximus has not demonstrated any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the OAG may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Maximus asserts some of the remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. 1957); *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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial

⁴The 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).

competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* 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).

As mentioned above, Maximus’ information was subject to Open Records Letter Nos. 2013-15046 and 2013-19986. In the prior rulings, some of Maximus’ information was ruled to be released. Since the issuance of the previous rulings on August 28, 2013 and November 15, 2013, Maximus has not disputed this office’s conclusions regarding the release of the information at issue. Accordingly, we find Maximus has not taken any measures to protect the information at issue in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Maximus substantial harm. *See* Gov’t Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at T, 255 at 2. Additionally, with respect to the remaining information, we conclude Maximus has failed to demonstrate any portion of the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Further, we note pricing information pertaining to a particular proposal or 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the OAG may not withhold any the remaining information pursuant to section 552.110(a) of the Government Code.

Maximus also raises section 552.110(b) for portions of the remaining information. Upon review, we find Maximus has established that some of the information at issue constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the OAG must withhold the information we marked under section 552.110(b) of the Government Code.⁵ However, we find Maximus has failed to demonstrate release of any of the remaining information would cause the company substantial competitive injury. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3. Additionally, we note Maximus was the winning bidder in this

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

instance. The pricing information of a winning bidder 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 No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Consequently, the OAG may not withhold any the remaining information under section 552.110(b) of the Government Code.

Section 552.136 of the Government Code states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a)(defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the OAG must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

Maximus also raises section 552.139 of the Government Code for portions of the remaining information. Section 552.139 provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). Maximus asserts disclosure of the remaining information at issue would present a significant risk of compromise to Maximus' computer systems and make the systems vulnerable to unauthorized access and harm. However, Maximus has not demonstrated any of the information at issue relates to computer network security, to restricted information under 2059.055, or to the design, operation, or defense of a computer network as contemplated by section 552.139(a). Further, we find Maximus has failed to explain how any of the remaining information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the OAG may not withhold any of the remaining information under section 552.139 of the Government Code.

We note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, 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.

In summary, the OAG must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The OAG must withhold the information we marked under section 552.110(b) of the Government Code. The OAG must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The OAG must release the remaining information; however, any information subject to copyright may be released only in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/eb

Ref: ID# 757752

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)