



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 31, 1994

Ms. Judith Monaco Porras  
General Counsel  
General Services Commission  
P.O. Box 13047  
Austin, Texas 78711-3047

OR94-025

Dear Ms. Porras:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.<sup>1</sup> We assigned your request ID# 22573.

The General Services Commission (the "commission") has received a request for two proposals submitted to the commission in response to RFP Number 313-3-310-J. Specifically, the requestor seeks "the final proposals submitted by Comdisco Disaster Services and Sungard Recovery Services" for the contingency planning services RFP.<sup>2</sup> You seek to withhold the Sungard Recovery Services proposal under section 552.110 of the act.

Pursuant to section 552.305 of the Government Code, we have notified the party whose proprietary interests are implicated by this request. In response, we have received a response from the attorneys representing Sungard Recovery Services ("Sungard"). Sungard claims that sections 552.101, 552.104, and 552.110 except the requested information from required public disclosure.<sup>3</sup> Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of

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<sup>1</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

<sup>2</sup>You advise us that the commission is not in possession of the requested Comdisco Disaster Services proposal. The act does not require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990); 518 (1989); 499 (1988).

<sup>3</sup>Section 552.104 is designed to protect only a governmental body's interests. *See* Open Records Decision No. 541 (1990) at 4-5. Thus, the respondent has no standing to assert section 552.104.

information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The respondent claims that the information submitted to us for review constitutes "trade secrets." Accordingly, we need only address the "trade secrets" branch of section 552.110.

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. 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, . . . [but] 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. [Emphasis added.]*

RESTATEMENT OF TORTS § 757, cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>4</sup>

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<sup>4</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, 306 at 2 (1982); 255 (1980) at 2.

We have examined the information submitted to us for review. We conclude that Sungard has made a *prima facie* case that the requested information constitutes trade secrets. Accordingly, we conclude that the requested information may be withheld from required public disclosure under the trade secrets branch of section 552.110 of the act.<sup>5</sup> As we resolve this matter under section 552.110, we need not address the other asserted exceptions at this time.<sup>6</sup>

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Open Government Section

SLG/GCK/rho

Ref.: ID# 22573  
ID# 23180  
ID# 23220

Enclosures: Submitted documents  
cc: Mr. Michael Nemiroff  
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(w/o enclosures)

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<sup>5</sup>Internal operating or business information, as well as technological processes or ideas, may constitute a trade secret. See R. Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* §§ 14.06, 14.09; "What is a 'trade secret' so as to render actionable under state law its use or disclosure by former employee," 59 ALR4th 641; see, e.g. *Gonzales v. Samora*, 791 S.W.2d 258 (Tex. App.--Corpus Christi 1990, no writ) (evidence supported status of business procedures and forms as trade secrets).

<sup>6</sup>You have also submitted for our review an agreement between Sungard and the Department of Information Resources titled "Agreement for Contingency Planning Services." We do not understand this agreement to be subject to the request for information. However, if it is subject to the request, it may not be withheld under any of the asserted exceptions and must be released. See generally *Open Records Decision No. 514 (1988)* (addressing applicability of section 552.110 to contract for publishing services).

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