



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 3, 1996

Mr. Michael D. McKinney
Commissioner
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR96-1072

Dear Mr. McKinney:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37983.

The Texas Health and Human Services Commission (the "commission") received a request for "a complete copy of the contract issued for the Integrated Enrollment System Planning Assistance project awarded to Deloitte & Touche." On behalf of the commission you contend that the requested information is excepted from public disclosure under section 552.104 of the Government Code. The contract incorporates by reference Deloitte & Touche's proposal and several items of correspondence. Therefore, you note that some of the requested information may implicate the proprietary interests of Deloitte & Touche.

Pursuant to section 552.305 of the Government Code, we notified Deloitte & Touche of the request for information and of its opportunity to claim that portions of the contract are excepted from public disclosure. Deloitte & Touche responded by claiming that sections 552.101, 552.104, and 552.110 of the Government Code except several sections of the contract from disclosure.¹

¹Information is not excepted from disclosure merely because it is furnished to a governmental body with the expectation that the governmental body will keep it confidential. Open Records Decision No. 180 (1977). Moreover, governmental bodies may not enter into agreements to keep information confidential unless specifically authorized to do so by statute. Open Records Decision Nos. 514 (1988), 444 (1986).

Deloitte & Touche argues that its employees' resumes and the names, addresses, and telephone numbers of clients used as references are excepted from disclosure by common-law privacy under section 552.101. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Common-law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person *and* the public has no legitimate interest in it. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Resumes, names, addresses, and telephone numbers are not the types of information that are protected by common-law privacy. *See e.g.*, Open Records Decision No. 600 (1992). Consequently, this information is not excepted from disclosure under section 552.101.

Both the commission and Deloitte & Touche assert that the requested information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Because section 552.104 does not protect the interests of private parties that submit information to a governmental body, *id.* at 8-9, we need not address Deloitte & Touche's claim that portions of the contract are excepted from public disclosure under section 552.104. Moreover, section 552.104 is generally inapplicable once bidding is complete and a governmental body has awarded the contract. *Id.* at 5. *See* Gov't Code § 552.022. Because the commission has awarded the contract at issue, section 552.104 is not applicable here.²

Deloitte & Touche claims that its corporate financial information, its pricing information, its staffing approach, and its employees' detailed resumes are excepted from public disclosure under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. 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 (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

²You argue that "because the contract may lead to the planning and development of another procurement," some of requested information may be excepted from disclosure under section 552.104. In Open Records Decision No. 541 (1990), we noted that section 552.104 may protect information submitted by a successful bidder if disclosure would allow competitors to accurately estimate and thereby undercut future bids. However, this principle applies only when the governmental body solicits bids for the same or similar goods or services on a recurring basis. Open Records Decision No. 541 (1990) at 5. You have not alleged that such a situation exists with respect to the contract at issue here.

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) (emphasis added).³ Deloitte & Touche has not demonstrated that any of the requested information constitutes trade secrets. Thus, none of the requested information is excepted from disclosure under the trade secret prong of section 552.110.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"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

³The 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

likely result from disclosure.” *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). Deloitte & Touche has not made this showing with regard to any of the information that it claims is excepted from disclosure under the second prong of section 552.110. As none of the information contained in the requested contract is excepted from required public disclosure under sections 552.101, 552.104, or 552.110, the commission must release the contract to the requestor in its entirety.

We are resolving this matter with an 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 should 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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 37983

Enclosures: Submitted documents

cc: Patrick R. Smith
Account Manager
Unisys Corporation
9050 Capital of Texas Hwy. N., Suite 290
Austin, Texas 78759-7268
(w/o enclosures)

Mr. Robert N. Campbell III
Principal
Deloitte & Touche LLP
700 Lavaca, Suite 1501
Austin, Texas 78701-3102
(w/o enclosures)