



January 29, 2001

Mr. James G. Nolan
Supervising Attorney
Legal Department - Information Release
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2001-0336

Dear Mr. Nolan:

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# 143666.

The Texas Workforce Commission ("TWC") received two separate requests for information related to its Request for Offer (RFO) 2000-2876. The first request was made on November 3, 2000, and asks for "a copy of the winning proposal, proposal scoring matrix, and awarded contract relating to the Texas Workforce Commission Request for Offer #2000-2876 dated March 6, 2000 for Information Technology Services." The second request was made on December 1, 2000, and asks for "a copy of the best and final offers, including any and all itemized pricing, submitted by EDS, IBM, and Unisys to TWC during final negotiations for [RFO.2000-2876]." Although you do not raise an exception to disclosure on behalf of TWC, you advise this office that the requested information may involve the proprietary or property interests of private third parties, which may be protected from disclosure under sections 552.101 and 552.110 of the Government Code. You have submitted copies of the letters notifying the private third parties about the request as required by section 552.305(d). See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

With regard to the first request, you did not submit to this office a copy of the written request for information within fifteen business days of receiving the request.¹ Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the written request for information. Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). In this case, we believe that the interests of third parties present a compelling reason to overcome the presumption of openness.

Unisys Corporation ("Unisys") submitted written comments to this office explaining why the requested information should be withheld. See Gov't Code 552.305(b) (persons whose privacy or property interests may be involved may submit in writing to the attorney general the person's reasons why the information should be withheld). Unisys claims that portions of the requested information are excepted from disclosure under sections 552.102, 552.104, and 552.110 of the Government Code. We have considered these exceptions and reviewed the submitted information.

Unisys claims that its "proposal and proposal and BAFO pricing and cost information" should be withheld under section 552.104. 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.* As TWC does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, none of the requested information may be withheld under section 552.104.

Unisys claims that "any resumes included in the Unisys proposal and Statement of Work" should not be disclosed under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, section 552.102 protects information in a personnel file of a governmental body, not a private third party. Therefore, you may not withhold any of the resumes under section 552.102.

¹You received the written request for information on November 3, 2000. Thus, the fifteen-business-day deadline was November 28, 2000. However, you did not submit to this office a copy of the written request until December 14, 2000.

Unisys claims that four types of information should be withheld under section 552.110: (1) its “proposal and proposal and BAFO pricing and cost information;” (2) “any resumes included in the Unisys proposal and Statement of Work;” (3) “the proposal and contract sections that refer to service level agreements and penalties;” and (4) “the portions of the Unisys proposal and Statement of Work which are marked ‘Confidential’ or ‘Proprietary’.” Section 552.110 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.

An interested third party claiming that some or all of the requested information is a trade secret, and therefore protected from disclosure by section 552.110(a), must establish a *prima facie* case for a trade secret as defined in section 757 of the Restatement of Torts. Open Records Decision No. 552 at 5 (1990); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958) (adopting definition of trade secret from the Restatement). 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).² Because Unisys makes no arguments regarding the six factors listed in the

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]

Restatement, Unisys has not made a *prima facie* case that any of the requested information is a trade secret. Therefore, we need only consider whether it is confidential commercial or financial information that is protected under section 552.110(b).

Section 552.110(b) of the Act provides:

(b) 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 is excepted from the requirements of Section 552.021.

An interested third party claiming that some or all of the requested information is confidential commercial or financial information under section 552.110(b) must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Open Records Decision No. 661 at (1999); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Based on Unisys' arguments and our review of the submitted documents, we do not find any information that pertains to Unisys that is confidential commercial or financial information under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (contract between governmental body and private corporation not protected commercial or financial information), 319 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing generally not excepted under statutory predecessor to section 552.110). Therefore, you must release all of the information responsive to both requests that pertains to Unisys.

Next, we address the second request for information, which was made on December 1, 2000, as it pertains to EDS and IBM. Neither EDS nor IBM submitted any comment to this office. *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). As no exception to disclosure has been demonstrated to apply to the information pertaining to EDS or IBM, their information must also be released.

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).

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).

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,



Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 143666

Encl. Submitted documents

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