



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 15, 2005

Ms. Michele Austin  
Assistant City Attorney  
City of Houston  
P. O. Box 1562  
Houston, Texas 77251-1562

OR2005-06282

Dear Ms. Austin:

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# 227997.

The City of Houston (the "city") received three requests for information related to the city's "Request for Proposal (RFP) for Software Upgrade, Replacement of the ERP System (RFP #T20224)." You state that some responsive information will be made available to the requestors, but take no position as to whether the remaining responsive information is excepted from disclosure. In accordance with section 552.305 of the Government Code, the city notified eight interested third parties of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the public.<sup>1</sup> 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 to disclosure in certain circumstances). We have received and considered comments from CIBER and CGI-AMS.

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<sup>1</sup>The following third parties were notified pursuant to section 552.305: Oracle State and Local Consulting ("Oracle"); CGI-AMS, Inc., f/k/a American Management Systems, Inc. ("CGI-AMS"); PeopleSoft USA, Inc. ("PeopleSoft"); Tyler Technologies, Inc., MUNIS Division ("MUNIS"); Lawson Software ("Lawson"); GHG Corporation ("GHG"); SAP Public Services Inc. ("SAP"); and CIBER, Inc. ("CIBER").

Initially, we note, and you acknowledge, that the department has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *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 section 552.302 of the Government Code); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to withhold information, we will consider whether any of the information at issue must be withheld to protect third party interests.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Oracle, PeopleSoft, MUNIS, Lawson, GHG, and SAP failed to submit any comments to this office explaining how release of the requested information would affect each company's proprietary interests. Therefore, each of these companies has failed to provide us with any basis to conclude that it has a protected proprietary interest in any of the submitted information, and none of the information may be withheld on that basis. *See, e.g., id.* § 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).

CGI-AMS contends that its information is excepted from disclosure under section 552.104 of the Government Code. This exception protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to Gov't Code § 552.104 is designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the city does not raise section 552.104, this section is not applicable to the information at issue. *See* Open Records Decision No. 592 (1991) (stating that governmental body may waive Gov't Code § 552.104). Therefore, the city may not withhold CGI-AMS's information under section 552.104.

CIBER claims that its customer information, methodologies, and pricing compilations are excepted under section 552.110(a) of the Government Code.<sup>2</sup> CGI-AMS contends that certain portions of its information are excepted from public disclosure under section 552.110(a) and (b). 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. *See* Gov't Code § 552.110(a), (b).

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.); *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.<sup>3</sup> *Id.* 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

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<sup>2</sup>CIBER does not object to release of the total proposal price.

<sup>3</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).

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). However, we cannot conclude that section 552.110(a) applies 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. See Open Records Decision No. 402 (1983).

Section 552.110(b) 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. See 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).

Having considered the company's arguments, we find that CIBER has shown that its customer information and pricing compilations qualify as a trade secret under section 552.110(a). We have received no arguments that rebut this claim as a matter of law. We therefore conclude that CIBER'S customer information and pricing compilations are excepted from disclosure under section 552.110(a). However, CIBER has failed to show that any of the remaining information that it seeks to withhold is protected as a trade secret under section 552.110(a). Having considered CGI-AMS's arguments and reviewed the information at issue, we conclude that CGI-AMS has failed to show that its information meets the definition of a trade secret. See Restatement of Torts § 757 cmt. b (1939) (defining trade secret); see also Huffines, 314 S.W.2d at 776 (defining trade secret). Thus, none of CGI-AMS's submitted information may be withheld under section 552.110(a).

We also conclude that CGI-AMS has shown that its "Fees and Costs" information is excepted from disclosure under section 552.110(b), but find that CGI-AMS has not made the specific factual or evidentiary demonstration required by section 552.110(b) that the release of any of the company's remaining information would be likely to cause CGI-AMS any substantial competitive harm. We therefore conclude that none of the company's remaining information is excepted from disclosure under section 552.110(b). Accordingly, we have marked the information that the city must withhold under section 552.110 of the Government Code.

We note that the remaining records contain insurance policy numbers that are subject to section 552.136 of the Government Code. This section provides that "[n]otwithstanding 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. Thus, the city must withhold the insurance policy numbers that we have marked pursuant to section 552.136 of the Government Code.<sup>4</sup>

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<sup>4</sup>We note that the requestors each have a special right of access to their own company's account numbers under section 552.023 of the Government Code. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself).

Lastly, we note that portions of the submitted information not otherwise excepted from disclosure may be protected by copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the information that the city must withhold under section 552.110 of the Government Code. The marked insurance policy numbers must be withheld under section 552.136 of the Government Code. The remaining information must be released to the requestor; however, in releasing information that is protected by copyright, the city must comply with applicable copyright law.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/krl

Ref: ID# 227997

Enc. Submitted documents

c: Ms. Kindra Norton  
Deloitte Consulting L.L.P.  
400 West 15<sup>th</sup> Street, Suite 1700  
Austin, Texas 78701  
(w/o enclosures)

Mr. Wayne Usry  
Vice President, Applications Delivery  
Oracle State and Local Consulting  
222 West Las Collinas Boulevard  
Irving, Texas 75039  
(w/o enclosures)

Mr. Ed Nadworny  
Mr. Gregory Becker  
CGI-AMES Inc.  
4050 Legato Road  
Fairfax, Virginia 22033  
(w/o enclosures)

Mr. William J. Sullivan  
PeopleSoft USA, Inc.  
1250 Capitol of Texas Hwy S. #300  
Austin, Texas 78746  
(w/o enclosures)

Mr. David R. Carll  
Tyler Technologies, Inc.  
MUNIS Division  
370 US Route One  
Fairmouth, Maine 04105  
(w/o enclosures)

Mr. Issac Galvan  
GHG Corporation  
1100 Hercules, Suite 290  
Houston, Texas 77058  
(w/o enclosures)

Ms. Janice D'Aloia  
Ms. Lila Seal  
CIBER, Inc.  
5251 DTC Parkway, Suite 1400  
Greenwood Village, CO 80111  
(w/o enclosures)

Mr. Bob North  
Lawson Software  
2250 Corporate Park Drive, Ste. 400  
Herndon, Virginia 20171  
(w/o enclosures)

Mr. Christopher M. Pfendner  
SAP Public Services Inc.  
1300 Pennsylvania Avenue NW, #600  
Washington, DC 20004  
(w/o enclosures)