



ATTORNEY GENERAL OF TEXAS  
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OR2008-14910

Dear Mr. Mu and Mr. West:

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# 326445.

The Texas Department of Criminal Justice (the "department") received a request for all bids submitted in response to a specified request for proposals, the scoring and evaluation documents pertaining to the award, communication related to the determination of the award, the award letter, and the completed contract. The department's Office of the General Counsel (the "OGC") and its Office of the Inspector General (the "OIG") have released some of the requested information to the requestor, but the OGC and OIG have submitted separate sets of documents which they seek to withhold from disclosure. The OGC claims that a portion of the submitted information is excepted from disclosure under section 552.136 of the Government Code. The OGC and OIG both state release of the remaining submitted information may implicate the proprietary interests of third parties. Accordingly, the OGC and OIG inform us, and provide documentation showing, they have notified Unisys Corporation ("Unisys") and Embarq Payphone Services, Inc. ("Embarq") of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the*

applicability of exception to disclose under Act in certain circumstances). Representatives from Unisys and Embarq have submitted comments to our office, each claiming portions of their bid responses are excepted under section 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). 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. 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.<sup>1</sup> 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).

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<sup>1</sup>The 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).

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 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.* § 552.110(b); *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).

Unisys argues that the majority of Volume Two of its proposal is a trade secret under section 552.110(a). Unisys has not, however, provided any arguments that this information meets the definition of a trade secret. *See* ORD 552 at 5 (party must establish *prima facie* case that information is trade secret). Accordingly, the department may not withhold any of the information in Volume Two of Unisys’ proposal under section 552.110(a). Unisys also claims that release of portions of Volume Two would substantially harm its commercial or financial interests. However, the company has not provided any arguments to demonstrate how any harm would occur. *See* Open Records Decision No. 661 at 5-6 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Therefore, the department may not withhold any of Unisys’ information under section 552.110.

Embarq asserts that pages 19, 21, 41, 85-86, 105, and 108 of the presentation dated July 7, 2008, the contingency plan, Securus’ call platform document, pages 20-36, 146, and 148-151 of Volume II of its proposal, pages 38-42, 50, and 51 of the presentation dated June 12, 2008, telephone call scenario answer G, and the correspondence to F. Williams dated July 10, 2008 should be withheld under section 552.110. Embarq argues that this information is a trade secret under section 552.110(a). However, Embarq has not provided any arguments establishing that this information meets the definition of a trade secret. Furthermore, much of the information Embarq seeks to withhold as a trade secret is specific to the instant project with the department. Accordingly, Embarq has failed to demonstrate that any of this information must be withheld under section 552.110(a). *See* ORD 552 at 5 (party must establish *prima facie* case that information is trade secret). Embarq also claims that the release of this information would cause competitive harm to its interests. A portion of the information that Embarq seeks to withhold is pricing information. However, pricing information of a winning bidder, such as Embarq, 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* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, the department may

not withhold page 21 or page 108 of the presentation dated July 7, 2008 or page 146 of Volume II of the proposal. Embarq further argues that release of the Securus call platform document would cause substantial competitive harm to its interests. Embarq states that the document provides specific technical information about how calls are recorded, managed, and retrieved and that access to this information would allow competitors to reverse engineer Securus' system. Upon review, we agree that release of portions of the Securus call platform document would cause Embarq substantial competitive harm. Therefore, the department must withhold the marked portions of the Securus call platform document under section 552.110(b). Embarq also argues that pages 38 through 42 and pages 50-51 in the presentation dated June 12, 2008 should be withheld from disclosure. Embarq states that the data on these pages gives critical insight and knowledge into the methodology of JPay's solution. Upon review, we agree that the release of the screen shots on pages 41 and 42 would cause Embarq substantial competitive harm. Therefore, the department must withhold pages 41 and 42 in the June 12, 2008 presentation. However, upon review of Embarq's arguments for the remaining information it seeks to withhold under section 552.110(b), we find that Embarq failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the company. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, 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). Accordingly, this information may not be withheld under section 552.110(b).

The OGC asserts that the insurance policy numbers in the Embarq proposal should be withheld under section 552.136 of the Government Code. Section 552.136 states 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(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). This office has determined that insurance policy numbers are access device numbers for the purposes of section 552.136. The department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, we note some of the remaining information is 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. 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, the department must withhold the marked portions of the Securus call platform document and pages 41 and 42 of the presentation dated June 12, 2008 under section 552.110(b) of the Government Code. The department must withhold the insurance policy numbers under section 552.136. The remaining information must be released, but any copyrighted information may only be released in accordance with 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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 Office of the Attorney General 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,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 326445

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