



February 13, 2015

Mr. Chad J. Lersch
Assistant General Counsel
Texas Department of Information Resources
P.O. Box 13564
Austin, Texas 78711-3564

OR2015-02917

Dear Mr. Lersch:

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# 552201.

The Texas Department of Information Resources (the "department") received a request for four specified types of reports created during a specified time period.¹ You claim portions of the submitted information are excepted from disclosure under section 552.139 of the Government Code. You also state the release of the submitted information may implicate the proprietary interests of Texas NICUSA, LLC ("NIC"). Accordingly, you state, and provide documentation showing, you notified this third party of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and

¹You state the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

explain applicability of exceptions to disclosure under the Act in certain circumstances). We have received arguments from NIC. We have reviewed the submitted representative sample of information and the submitted arguments.²

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public.³ *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, we note the names of members of the public are generally not highly intimate or embarrassing. *See* Open Records Decision No. 551 at 3 (1990) (disclosure of person’s name, address, or telephone number not an invasion of privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁴ However, we find NIC has failed to establish any portion of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Thus, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You and NIC both claim portions of the remaining information are excepted from disclosure under section 552.139 of the Government Code. Section 552.139 provides, in part, the following:

²We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

³We understand NIC to raise section 552.101 of the Government Code in conjunction with common-law privacy based on the substance of its argument.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state portions of the remaining information, which you have indicated, reveal detailed network and infrastructure security issues that, if released to the public, would be detrimental to specific state agencies as well as the state's overall security posture. You claim, and provide a sworn affidavit affirming, release of this information would invite network attacks at the agency and state levels, which would result in compromised information technology security, which in turn would subject agencies' and the state's electronically stored information and critical infrastructure to alteration, damage, erasure, or theft. NIC claims, and provides a sworn affidavit affirming, portions of the

remaining information identify network security vulnerabilities that, if released, would adversely impact the information security posture of the department, state agencies, and the state generally. Based on these representations and our review, we find the department must withhold the information we have marked under section 552.139 of the Government Code.⁵ However, upon review, we find NIC has not demonstrated any portion of its remaining information relates to computer network security, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Further, we find NIC has failed to explain how any of its remaining information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the department may not withhold any portion of the remaining information under section 552.139 of the Government Code.

NIC claims portions of its remaining information are excepted from disclosure under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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

⁵As our ruling is dispositive, we need not address NIC's remaining arguments against disclosure of this information.

secret factors.⁶ RESTATEMENT OF TORTS § 757 cmt. b. 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. *See* Open Records Decision No. 402 (1983).

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.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

NIC claims portions of its remaining information constitute trade secrets. However, upon review, we find NIC has failed to demonstrate any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402, 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note information pertaining to a particular proposal or contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” *See* RESTATEMENT OF TORTS § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the department may not withhold any portion of NIC’s remaining information under section 552.110(a) of the Government Code.

NIC also claims portions of its remaining information constitute commercial or financial information, the disclosure of which would cause the company substantial competitive harm.

⁶The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

We note the remaining information consists of reports created by NIC pursuant to the contract it was awarded by the department. Upon review, we find NIC has demonstrated portions of its remaining information constitute commercial or financial information, the release of which would cause substantial competitive injury. Thus, the department must withhold the information we have marked under section 552.110(b) of the Government Code. However, having considered NIC's arguments under section 552.110(b) for the remaining information at issue, we find NIC has not demonstrated substantial competitive injury would result from the release of any of its remaining information at issue. *See* Open Records Decisions Nos. 661, 319 at 3, 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). We note this office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Therefore, the department may not withhold any portion of NIC's remaining information under section 552.110(b) of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental body for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Thus, to the extent the remaining information contains e-mail addresses that belong to members of the public who have not affirmatively consented to their release, the department must withhold those e-mail addresses under section 552.137 of the Government Code.⁷ However, the department may not withhold any e-mail addresses that are of the type listed in subsection 552.137(c) under section 552.137 of the Government Code.

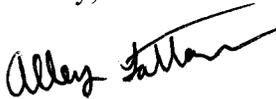
⁷We note Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to withhold the e-mail address of a member of the public under section 552.137 of the Government Code without requesting a decision from this office.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must also withhold the information we have marked under section 552.139 of the Government Code and section 552.110(b) of the Government Code. To the extent the remaining information contains e-mail addresses that are not subject to subsection 552.137(c) of the Government Code and belong to members of the public who have not affirmatively consented to their release, the department must withhold those e-mail addresses under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Alley Latham
Assistant Attorney General
Open Records Division

AKL/dls

Ref: ID# 552201

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Texas NICUSA, LLC
c/o Ms. Cheryl M. Burtzel
Duggins, Wren, Mann & Romero, L.L.P.
600 Congress, Suite 1900
Austin, Texas 78701
(w/o enclosures)