



ATTORNEY GENERAL OF TEXAS  
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OR2008-15551A

Dear Ms. Fleming and Mr. West:

This office issued Open Records Letter No. 2008-15551 (2008) on November 12, 2008. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on November 12, 2008.

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 338463 (the original request was assigned ID# 327514).

The Texas Department of Criminal Justice (the "department") received a request from a representative of Embarq for all proposing companies' responses to RFP 696-IT-8-P022, scoring and evaluation sheets, and all documents or communications recommending or protesting the award to Embarq. 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 briefs, as well as separate sets of documents they seek to withhold from disclosure. The OGC claims 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 ("Unisys") and Global Tel\*Link ("GTL") 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 GTL 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.

Initially, we must address the OGC's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) states, within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). The OGC timely submitted an initial brief and set of documents for our review on September 17, 2008. Subsequently, the OGC found additional responsive documents and submitted them and an accompanying brief on September 24, 2008, beyond the fifteen-day deadline for submitting this information. Consequently, we conclude the OGC failed to comply with the requirements of section 552.301 of the Government Code with respect to the second set of responsive documents.

When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Generally, a compelling reason exists when some other source of law makes the information confidential or third party interests are at stake. *See* Open Records Decision No. 630 at 3 (1994). Accordingly, we will determine whether any of the submitted information must be withheld to protect third party interests, as well as address the OGC's claim under section 552.136, which can provide a compelling reason for non-disclosure.

Next, we note the requestor, in communication with the department, agreed to allow the department to redact all information in the RFP responses that was marked confidential by

the third party respondent.<sup>1</sup> Thus, any information in their proposals marked as confidential by Unisys or GTL is not responsive to this request for information. We also note the requestor excluded from her request Embarq's own response to the RFP. Thus, Embarq's proposal is also not responsive to this request. This decision does not address the public availability of nonresponsive information, and it need not be released to the requestor.

We also note some of the submitted information was the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2008-14910 (2008). The submitted information includes, among other things, Unisys's RFP response. This information was previously requested and ruled upon in Open Records Letter No. 2008-14910, in which this office determined the department may not withhold any of Unisys's information under section 552.110 of the Government Code. Thus, the department must comply with Open Records Letter No. 2008-14910 for the information that was at issue in that ruling, to the extent that information is responsive to Embarq's request. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as a previous determination when (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). Accordingly, we do not address Unisys's section 552.110 argument against disclosure of its information.

Next, we address GTL's contention that a portion of its responsive information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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* Gov't Code § 552.110(a), (b).

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. *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

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<sup>1</sup>*See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

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>2</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).

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

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<sup>2</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).

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).

GTL contends that portions of its proposal are trade secrets excepted under section 552.110(a). Having considered GTL's arguments, we conclude that GTL has established a *prima facie* case that the customer information we have marked in its proposal constitutes a trade secret. Therefore, the department must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that GTL has made some of its customer information publicly available on its website. Because GTL has published this information, it has failed to demonstrate that this information is a trade secret. Further, GTL has failed to demonstrate that any of the remaining information it seeks to withhold fits within the definition of a trade secret. Thus, none of the remaining responsive information in GTL's proposal may be withheld under section 552.110(a) of the Government Code.

GTL also contends that portions of its proposal are excepted under section 552.110(b). Upon review of the submitted arguments and information at issue, we find that GTL has made only conclusory allegations that the release of the remaining information in its proposal would result in substantial damage to its competitive position. Thus, GTL has not demonstrated that substantial competitive injury would result from the release of any of its remaining information at issue. *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), 319 at 3 (1982) (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). Accordingly, none of GTL's remaining responsive information may be withheld under section 552.110(b).

Next, we address the OGC's argument under section 552.136 of the Government Code for a portion of the remaining submitted information. 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 insurance policy numbers are access device numbers for the purposes of section 552.136. Thus, 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, information marked confidential by Unisys or GTL in their proposals and Embarq's proposal are not responsive to the instant request, and the department need not release that information. The department must comply with Open Records Letter No. 2008-14910 for Unisys's information at issue in the prior ruling, to the extent that information is responsive to this request. The department must withhold the information we have marked in GTL's responsive information under section 552.110(a) of the Government Code. The department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining responsive information must be released, but any information protected by copyright must be released in accordance with copyright law.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 338463

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)