



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2010

Mr. Robert N. Jones, Jr.
Assistant General Counsel
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2010-03320

Dear Mr. Jones:

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# 372335 (TWC Tracking No. 091216-028).

The Texas Workforce Commission (the "commission") received a request for the contract awarded to Unisys Corporation ("Unisys"), including all amendments or changes, as well as the cost and technical proposals submitted by Unisys. Although you take no position on the public availability of the submitted information, you state that the information at issue may implicate the interests of a third party. Accordingly, you submit documentation showing that you notified Unisys of the request for information and of Unisys's 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); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Unisys. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the contract at issue was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-12134 (2007). In Open Records Letter No. 2007-12134, we determined that the commission must withhold the account number marked under section 552.136 of the Government Code, and release the remaining information. We conclude that, as we have no indication the law, facts, and circumstances on which this prior ruling was based have changed, the commission must continue to rely on this ruling as a previous determination and withhold this information in accordance with Open Records Letter No. 2007-12134. *See* Open Records Decision No. 673

(2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, the present request seeks information regarding amendments or changes to the contract, as well as the cost and technical proposals submitted by Unisys that was not addressed in Open Records Letter No. 2007-12134; therefore, we will consider your arguments against disclosure of this information.

Unisys raises section 552.101 of the Government Code for a portion of its information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Unisys has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the submitted information confidential under section 552.101. Therefore, the commission may not withhold any portion of the submitted information under section 552.101.

Next, Unisys asserts that portions of its information are excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). This exception protects the competitive interests of governmental bodies such as the commission, not the proprietary interests of private parties such as Unisys. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the commission did not raise section 552.104 as an exception to disclosure. Therefore, the commission may not withhold any of the submitted information under section 552.104 of the Government Code.

Finally, Unisys asserts that portions of its information are excepted 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it

relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). 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. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *see also* Open Records Decision No. 661 (1999).

Unisys argues that portions of its information constitute protected trade secrets. Upon review we find Unisys has established that some of its customer information constitutes a trade secret. The commission must withhold this information, which we have marked, under section 552.110(a) of the Government Code. However, we note that Unisys has published the identity of one of its customers on its website, making this information publicly available. Thus, Unisys has failed to demonstrate that the information it has published on its website is a trade secret. Moreover, we find Unisys has failed to demonstrate how any portion of the remaining information at issue meets the definition of a trade secret, nor has Unisys demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, the commission may not withhold any of the remaining information pursuant to section 552.110(a) of the Government Code.

Unisys also seeks to withhold portions of its submitted information under section 552.110(b). Upon review, we find that Unisys has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information at issue would cause the company substantial competitive harm. *See* ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). We note that Unisys was the winning bidder in this instance. 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 under section 552.110(b). *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). We therefore conclude the commission may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

We note a portion of the remaining information is subject to section 552.136 of the Government Code.¹ Section 552.136 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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code § 552.136. Accordingly, the commission must withhold the bank account and routing numbers we have marked pursuant to section 552.136 of the Government Code.²

We note that portions of the submitted information are 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 commission must continue to rely on Open Records Letter No. 2007-12134 as a previous determination and withhold or release the contract that was previously ruled on in accordance with the prior ruling. The commission must withhold the information we have marked under sections 552.110(a) and 552.136 of the Government Code. The commission must release the remaining information, but any information that is protected by copyright may only 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, 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136, without the necessity of requesting an attorney general decision.

Ref: ID# 372335

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)