



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2013

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
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OR2013-13046

Dear Mr. Ramirez:

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# 494645.

The Lower Colorado River Authority (the "authority") received a request for a list of all respondents, as well as the "short list" of selected qualified respondents, and information submitted by those respondents with respect to the Lower Basin Reservoir CMAR pre-qualification process.¹ You state you have released some information to the requestor. Although you take no position with respect to the public availability of the submitted information, you state release of the information may implicated the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, the authority has notified Archer Western Construction ("Archer Western"); Austin Industries; Barnard Construction Company ("Barnard"); Blattner Energy, Inc. ("Blattner"); Cajun Constructors, Inc. ("Cajun"); Garney Companies ("Garney"); Kiewit; McCarthy Construction ("McCarthy"); MWH Constructors ("MWH"); Philips & Jordan, Inc. ("P&J"); Spawglass Group ("Spawglass"); and Zachry Construction Corporation ("Zachry") of the request and of their right to submit arguments to this office explaining why this information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to

¹You inform us the requestor clarified her request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have received comments from Archer Western and Cajun. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note in a letter dated May 31, 2013, the authority states it wishes to withdraw its request for an open records decision with regard to Austin Industries, Blattner, McCarthy, MWH, P&J, and Spawglass because the requestor clarified she only seeks information submitted by respondents on the authority's "short list." Additionally, in a letter dated June 21, 2013, the authority states Kiewit contacted the authority and stated it had no objection to the release of its information. Accordingly, you state you will release the information pertaining to Kiewit to the requestor. Thus, this ruling does not address the public availability of any information pertaining to these companies.

We next note Archer Western seeks to withhold its financial statement, which the authority did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the authority. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Accordingly, we do not address Archer Western's argument for this information.

Next, we note 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 information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Barnard, Garney, or Zachry explaining why their submitted information should not be released. Therefore, we have no basis to conclude any of these third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the authority may not withhold any portion of the responsive information based upon the proprietary interests of Barnard, Garney, or Zachry.

We understand Archer Western to assert the submitted information pertaining to it is confidential pursuant to section 271.118(i) of the Local Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision[.]" and encompasses information protected by other statutes. Gov't Code § 552.101. We note section 271.118,

contained in subchapter H of chapter 271 of the Local Government Code, was repealed by the Eighty-second Texas Legislature effective September 1, 2011. Act of May 30, 2011, 82nd Leg., ch. 1129 § 5.01(3), 2011 Tex. Gen. Laws 2900, 2924. Subchapter H was continued in effect for a contract or construction project for which a governmental entity first advertised or requested bids or proposals prior to the effective date of House Bill 628. Act of May 30, 2011, 82nd Leg., R.S., ch. 1129, § 6.01, 2011 Tex. Gen. Laws 2900, 2924. We understand the project at issue was first advertised after September 1, 2011. Accordingly, section 271.118(i) is inapplicable to the information at issue and none of this information may be withheld under section 552.101 of the Government Code on that basis.

Cajun asserts some of its 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny 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) (citation omitted); *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.² See 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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 result from release of the information at issue. *Id.* § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Cajun seeks to withhold information pertaining to its past projects, including its customer list, and information pertaining to Cajun’s financial state and insurance coverage under section 552.110(a). We note Cajun has made its customer information publicly available on its website. Because Cajun has published this information, it has failed to demonstrate this information constitutes trade secrets. Upon review, we conclude Cajun has failed to demonstrate how any portion of the information at issue meets the definition of a trade secret, nor has Cajun demonstrated the necessary factors to establish a trade secret claim. See ORD 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). Therefore, the authority may not withhold any of the information at issue pursuant to section 552.110(a) of the Government Code.

²There are six factors the Restatement gives as indicia of 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 the 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; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Cajun also claims its information at issue is confidential based on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Cajun's interest in its information.

Cajun claims its information at issue constitutes commercial information that, if released, would cause it substantial competitive harm. Upon review, we find Cajun has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its information would cause it substantial competitive harm. 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 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 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Consequently, the authority may not withhold any of the information at issue under section 552.110(b) of the Government Code.

We note the responsive information includes insurance policy numbers. Section 552.136 of the Government Code states, “[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.”³ Gov't Code § 552.136(b); see also *id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for the purposes of section 552.136. Accordingly, the authority must withhold the insurance policy numbers we have marked under

³The 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).

section 552.136 of the Government Code. As no other exceptions to disclosure are raised, the remaining responsive 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 494645

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c: Requestor
(w/o enclosures)

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