



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 24, 2015

Mr. W. Montgomery Meitler
Senior Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2015-19999

Dear Mr. Meitler:

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# 580499 (TEA PIR# 24863).

The Texas Education Agency (the "agency") received a request for the scoring sheets and pricing proposals related to a specified request for proposals. You state you will release some information to the requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Carahsoft, Catapult, DataBank,

¹The agency notified the following third parties: American Surveillance Company; Carahsoft Technology Corp. ("Carahsoft"); Catapult Systems ("Catapult"); Centauri DMS Inc.; DataBank IMX, LLC ("DataBank"); Gimmel LLC ("Gimmel"); ImageSoft, Inc.; Infolob Solutions, Inc.; IQ Business Group Inc.; McLane Advanced Technologies; Toshiba Business Solutions; and XEROX Corp.

and Gimmel.² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Carahsoft's information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-19234 (2015). In that ruling, we determined the agency must release the information at issue. We understand there has been no change in the law, facts, and circumstances on which this prior ruling was based. Accordingly, we conclude the agency must rely on Open Records Letter No. 2015-19234 as a previous determination and release the identical information in accordance with that ruling.³ *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).

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why their information should not be released. Therefore, we have no basis to conclude any of the remaining 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the agency may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we note Gimmel argues against the release of information that was not submitted by the agency. This ruling does not address information that was not submitted by the agency and is limited to the information the agency has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

²Although DataBank raises sections 552.113 and 552.131 of the Government Code, DataBank makes no arguments to support these exceptions. Therefore, we assume it has withdrawn its claim that these exceptions apply to its information. *See* Gov't Code § 552.305(b).

³As our ruling is dispositive for this information, we need not address Carahsoft's arguments against its disclosure.

DataBank contends its information is confidential because it “gave clear notice and marked in [its] submission that [the information] was confidential and proprietary.” Furthermore, Gimmel contends its information is confidential because “each page of the [p]roposal is clearly marked with the notation ‘Confidential between [the agency] and Gimmel LLC,’ indicating Gimmel’s intent that the information contained therein is confidential and is solely for the use of [the agency].” However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement specifying otherwise.

We understand DataBank to argue its information is subject to common-law privacy. 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 that (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. *Indus. Found.*, 540 S.W.2d at 685. 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. However, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find no portion of the submitted information to be highly intimate or embarrassing and not of legitimate public concern. Accordingly, the agency may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Catapult, DataBank, and Gimmel state their 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.⁴ 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 Open Records Decision No. 552 at 5* (1990). 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). We note pricing information pertaining to a particular 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."

⁴The 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).

RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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* ORD 661 at 5.

In advancing its arguments, we understand Gimmel to rely, in part, 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 that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the 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 the interests of Gimmel in the information at issue.

Catapult, DataBank, and Gimmel claim their information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Upon review, we find Gimmel has established its pricing information constitutes commercial or financial information, the release of which would cause Gimmel substantial competitive injury. Therefore, the agency must withhold the information at issue, which we have marked, under section 552.110(b) of the Government Code.⁵ However, having considered Catapult’s and DataBank’s arguments under section 552.110(b) for their information, as well as Gimmel’s arguments for its remaining information, we find these third parties have not demonstrated substantial competitive injury would result from the release of such information. *See* Open Record Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that

⁵As our ruling is dispositive for this information, we need not address Gimmel’s remaining argument against its disclosure.

release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Therefore, the agency may not withhold any of the remaining information under section 552.110(b) of the Government Code.

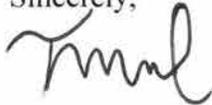
Catapult, DataBank, and Gimmel also claim their information constitutes trade secrets and is protected under section 552.110(a) of the Government Code. Upon review, we find these third parties have not demonstrated any of the remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for such information. *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). Consequently, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

In summary, the agency must rely on Open Records Letter No. 2015-19234 as a previous determination and release the identical information in accordance with that ruling. The agency must withhold the information we have marked under section 552.110(b) of the Government Code. The agency must release the remaining information.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 580499

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Martin C. Arambula
American Surveillance Company
55 Galonsky Street
Brownsville, Texas 78521
(w/o enclosures)

Mr. Scott Bade
ImageSoft, Inc.
25900 West 11 Mile Road
Southfield, Michigan 48034
(w/o enclosures)

Mr. Rich Savage
Team Manager
Carahsoft Technology Corp.
Suite 100
1860 Michael Faraday Drive
Reston, Virginia 20190
(w/o enclosures)

Mr. Michael D. Beck
IQ Business Group, Inc.
1410 Spring Hill Road, 4th Floor
McLean, Virginia 22102
(w/o enclosures)

Mr. Jim Booth
General Manager
Catapult Systems
Suite 350
1221 South MoPac Expressway
Austin, Texas 78746
(w/o enclosures)

Mr. Mark Feser
Infolob Solutions, Inc.
909 Lake Carolyn Parkway, Suite 120
Irving, Texas 75038
(w/o enclosures)

Mr. David Gutierrez
Centauri DMS Inc.
Suite 225
6565 North MacArthur Boulevard
Irving, Texas 75039
(w/o enclosures)

Mr. Chuck Bauer
Co-Founder & CEO
DataBank IMX, LLC
620 Freedom Business Center, Suite 120
King of Prussia, Pennsylvania 19406
(w/o enclosures)

Ms. Nancy Shelton Bratic
General Counsel
Gimmel LLC
24 Greenway Plaza, Suite 1000
Houston, Texas 77046
(w/o enclosures)

Mr. Brett Moore
McLane Advanced Technologies
701 Brazos Street, Suite 320
Austin, Texas 78701
(w/o enclosures)

Mr. Mark Downing
Toshiba Business Solutions
14607 San Pedro Avenue
San Antonio, Texas 78232
(w/o enclosures)

Ms. Britney McCurley
XEROX Corp.
Suite 300
6836 Austin Centre Boulevard
Austin, Texas 78731
(w/o enclosures)