



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 21, 2015

Mr. Thomas R. Gonnella
General Counsel
Fort Worth Employees' Retirement Fund
3801 Hulen Street, Suite 101
Fort Worth, Texas 76107

OR2015-22073

Dear Mr. Gonnella:

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# 583895.

The Fort Worth Employees' Retirement Fund (the "fund") received multiple requests for information pertaining to a specified request for proposals, including the contract and information pertaining to evaluations of the proposals. You state you have released some information to some of the requestors. We understand you will redact certain information pursuant to section 552.136 of the Government Code.¹ Although you take no position as to whether the remaining information is excepted under the Act, you state release of this information may implicate the proprietary interests of Levi, Ray & Shoup, Inc. ("LRS"); LRWL; Morneau Shepell Limited ("Morneau"); Sagitec; Tegrit Software Ventures, Inc. ("Tegrit"); Vitech Systems Group, Inc. ("Vitech"); and Xerox State and Local Solutions, Inc. ("Xerox").² Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue should not be released. *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

¹Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See Gov't Code* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

²Although you also raise section 552.139 for the submitted information, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume you no longer assert this exception. *See Gov't Code* §§ 552.301, .302.

comments on behalf of LRS, Morneau, Vitech, and Xerox. We have considered the submitted arguments and reviewed the submitted information.

You state the fund sought clarification for parts of the requests for information. *See* Gov't Code § 552.222 (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). You state the fund received written clarification from one of the requestors but has not received a written response from the other requestor to whom you requested clarification. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as the fund has submitted information responsive to the requests and has made arguments against disclosure of this information, we will address the applicability of its arguments to the submitted information.

Next, we note you have not submitted the requested contract. To the extent any information responsive to this portion of the request existed on the date the fund received the request, we assume the fund has released it. If the fund has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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 LRWL, Sagitec, and Tegrit explaining why the submitted information should not be released. Therefore, we have no basis to conclude LRWL, Sagitec, and Tegrit have protected proprietary interests 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 fund may not withhold the submitted information on the basis of any proprietary interest LRWL, Sagitec, or Tegrit may have in the information.

Next, Xerox asserts some of its information is considered confidential by Xerox and the fund or marked "confidential and proprietary." We note information is not confidential under the Act simply because the party that submits the information anticipates or requests 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 overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[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 did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Xerox has not identified any law that authorizes the fund to enter into an agreement to keep any of the submitted information confidential. Therefore, the fund may not withhold Xerox’s information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. LRS and Xerox state they have competitors. In addition, LRS states release of its information at issue would give a competitive advantage to its competitors. Xerox states release of its information at issue would cause irreparable harm to the company by exposing Xerox’s methods and processes to its competitors. After review of the information at issue and consideration of the arguments, we find LRS and Xerox have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the fund may withhold the information we marked under section 552.104(a).³

Section 552.110 of the Government Code 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

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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* ORD 552 at 5. 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.*; *see also* ORD 661 at 5.

Morneau and Vitech argue some of their information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we conclude Vitech has established the release of its client references would cause the company substantial competitive injury. Accordingly, to the extent Vitech’s client reference information within the submitted information is not publicly available on the company’s website, the fund must withhold the client reference information at issue under section 552.110(b). Further, we find Morneau has demonstrated portions of its information consist of commercial or financial information, the release of which would cause substantial competitive harm. Therefore, the fund must also withhold the information we marked under section 552.110(b) of the

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).

Government Code.⁵ However, we find Morneau and Vitech have failed to demonstrate the release of the remaining information at issue would result in substantial harm to their competitive positions. *See* ORD 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); *see also* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Although Vitech seeks to withhold its pricing information under section 552.110(b), Vitech was the winning bidder with respect to the contract at issue. We note the pricing information of a winning bidder is generally not excepted under section 552.110(b). 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* 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). Accordingly, the fund may not withhold any of the remaining information under section 552.110(b).

Morneau and Vitech assert some of their remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Morneau and Vitech have failed to demonstrate any portion of the remaining information at issue meets the definition of a trade secret. *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). We further note pricing 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. Consequently, the fund may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Morneau argues its remaining information is protected by copyright law under section 552.101 of the Government Code. 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. Section 552.101 encompasses information protected by other statutes. We understand Morneau to claim its information is confidential under the Federal Copyright Act, title 17 of the United States Code. However, copyright law does not make information confidential for purposes of section 552.101. Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information

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

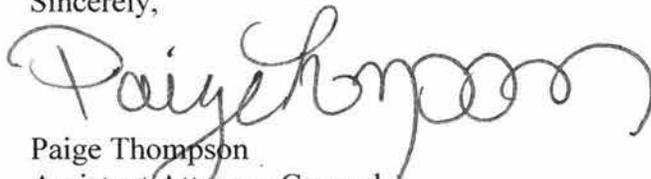
confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it.). Thus, the fund may not withhold any of Morneau's information under section 552.101 of the Government Code in conjunction with copyright law. However, some of the information at issue may be subject to copyright law. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the fund may withhold the information we marked under section 552.104(a) of the Government Code. To the extent Vitech's client reference information within the submitted information is not publicly available on the company's website, the fund must withhold the client reference information at issue under section 552.110(b). The fund must withhold the information we marked under section 552.110(b) of the Government Code. The remaining information must be released; however, any information 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.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,

A handwritten signature in cursive script, appearing to read "Paige Thompson". The signature is written in dark ink and is positioned above the typed name and title.

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 583895

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

Mr. Richard Schmitz
Senior Counsel
Levi, Ray & Shoup, Inc.
2401 West Monroe Street
Springfield, Illinois 62704
(w/o enclosures)

Mr. Leon Wechsler
LRWL
1430 Springhill Road, Suite 575
McLean, Virginia 22102
(w/o enclosures)

Ms. Susan Marsh
Vice President and Corporate Legal Counsel
Morneau Shepell Limited
895 Don Mills Road, Tower One, Suite 700
Toronto, Ontario, Canada
M3C 1W3
(w/o enclosures)

Mr. Paul Eberhart
Senior Director
Sagitec
422 County Road D East
Little Canada, Minnesota 55117
(w/o enclosures)

Mr. Jeff Adair
Chief Operating Officer
Tegrit Software Ventures, Inc.
17187 North Laurel Park Drive, Suite 250
Livonia, Michigan 48152
(w/o enclosures)

Mr. James Vitiello
Executive Vice President
Vitech Systems Group, Inc.
401 Park Avenue South, 12th Floor
New York, New York 10016-8808
(w/o enclosures)