



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2014

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2014-00329

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# 510124.

Lower Colorado River Authority ("LCRA") received a request for (1) any bid tabulations, score sheets, or other evaluation notes from request for proposal number 8458 ("RFP"), and (2) the proposals submitted for the RFP, excluding the proposal submitted by the company the requestor represents. Although you take no position with respect to the public availability of the requested information, you state the proprietary interests of certain third parties might be implicated.¹ Accordingly, you notified the third parties of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining 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 arguments from Protiviti and PWC. Thus, we have considered their arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to

¹The third parties are as follows: Baker Tilly Virchow Krause, LLP ("Baker"); CliftonLarsonAllen, LLP ("CLA"); PricewaterhouseCoopers, LLP ("PWC"); Protiviti, Inc. ("Protiviti"); and Sandersen Knox & Co., LLP ("Sandersen").

that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Baker, CLA, or Sandersen. Thus, these third parties have failed to demonstrate that they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); 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, LCRA may not withhold the submitted information on the basis of any proprietary interests Baker, CLA, or Sandersen may have in the information.

Next, we understand Protiviti and PWC to assert their information should be withheld because they expected confidentiality when the information was submitted to LCRA. Information is not confidential under the Act simply because the party that submits the information 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 overrule or repeal provisions of the Act through an 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 does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

We understand Protiviti to argue that information related to employees and clients of Protiviti contained in its proposal are excepted from disclosure under the doctrine of common-law privacy. Section 552.101 of the Government Code excepts “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 is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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. We note that education, prior employment, and personal information are not ordinarily private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986). In addition, 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 Protiviti has failed to demonstrate any of the information in its proposal is intimate or embarrassing information pertaining to an

individual that is of no legitimate public interest. Accordingly, LCRA may not withhold the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Protiviti raises section 552.104 of the Government Code for its information. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body’s interest in competitive bidding situation). As LCRA does not argue section 552.104 is applicable, we will not consider Protiviti’s claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, LCRA may not withhold any of the submitted information under section 552.104 of the Government Code.

Protiviti and PWC raise section 552.110 of the Government Code for portions of their information. 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.² This office must accept a claim that information subject to

²The 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];

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 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 result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

In advancing its arguments, we understand PWC 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 third-party interests in the submitted information.

Upon review, we find Protiviti has demonstrated some of its information, which we have marked, consists of commercial or financial information, the release of which would cause

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- (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.

the company substantial competitive harm. Therefore, LCRA must withhold the information we have marked under section 552.110(b) of the Government Code.³ However, we find Protiviti and PWC have made only conclusory allegations the release of the remaining information at issue would result in substantial harm to their competitive positions. *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 (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). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (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, none of the remaining information at issue may be withheld under section 552.110(b) of the Government Code.

Upon further review, we find Protiviti and PWC have failed to demonstrate how any of the remaining information at issue meets the definition of a trade secret, nor have the companies demonstrated the necessary factors to establish a trade secret claim. *See* ORDs 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. 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." RESTATEMENT OF TORTS § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, LCRA may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Protiviti also raises section 552.133 of the Government Code, which excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." *See* Gov't Code § 552.133(b). Section 552.133 only protects the competitive interest of a public power utility. This exception does not protect the interests of third parties, such as Protiviti. *See* Open Records Decision No. 666 at 2 (2000) (statutory predecessor to section 552.133 enacted to protect municipally owned utilities from public disclosure of competitive matters). We note LCRA has not raised section 552.133 of the Government Code. Thus, we find Protiviti has failed to demonstrate the applicability of section 552.133 to its information, and LCRA may not withhold the remaining information on that basis.

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

We note some of the remaining information appears to be 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. Open Records Decision No. 180 at 3 (1977). 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, LCRA must withhold the information we have 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,



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Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 510124

Enc. Submitted documents

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