



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2014

Mr. Vic Ramirez
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P.O. Box 220
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OR2014-17187

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# 537413.

The Lower Colorado River Authority (the "authority") received two requests for information pertaining to request for proposals number 8945, including a specified contract requested by the first requestor.¹ You state the authority has released the requested contract with redactions agreed upon by the first requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Airgas Specialty Products, Inc.; Bates Chemicals, Inc.; Brenntag Southwest, Inc.; Buckman North America; ChemTreat, Inc. ("ChemTreat"); DPC Industries, Inc.; Fort Bend Services, Inc. ("Fort Bend"); FSTI, Inc.; Nalco Company; Shrieve Chemical; Skyhawk Chemicals, Inc.; and Univar USA, Inc. Accordingly, you state, and provide documentation showing, you notified these 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. *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*

¹We note the authority sought and received clarification of the information requested. *See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).*

to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from ChemTreat and Fort Bend. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 only received comments from ChemTreat and Fort Bend explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has 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 the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with sections 418.177, 418.178, and 418.181 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.177 provides that information is confidential if it:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. Section 418.178 provides:

(a) In this section, "explosive weapon" has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Id. § 418.178. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may be related to a governmental body's security concerns, biological toxins, or emergency preparedness does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You explain the submitted information pertains to substations, dams, power plants, and water and wastewater treatment plants owned and operated by the authority. You assert, and we agree, these facilities are critical infrastructure. *See id.* § 421.001 (defining "critical infrastructure" to include "all public or private assets, systems, and functions vital to the security, governance, public health, and safety, and functions vital to the state or the nation"). You contend some of the submitted information is confidential under section 418.181 because it "contains the specific location . . . of certain critical infrastructure and technical details of vulnerabilities to an act of terrorism." You explain the information at issue specifies the location of certain facilities that store and use dangerous chemicals and the specific chemicals that are stored at the respective facilities. Thus, you argue, release of the

information at issue would jeopardize these facilities and reveal vulnerabilities regarding the location and types of chemicals that could be used for an act of terrorism. Based on your representations and our review of the submitted information, we find the authority has shown that release of the information related to existing chemical storage tanks and systems of identified authority facilities, which we have marked, would identify the technical details of particular vulnerabilities of the facilities at issue to an act of terrorism. Thus, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.²

However, we find you have failed to demonstrate how any of the remaining information reveals technical details of particular vulnerabilities of the authority's critical infrastructure. Further, we find you have failed to establish the remaining information relates to an assessment of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity for purposes of section 418.177. Additionally, you have failed to demonstrate any of the remaining information would assist in the construction or assembly of an explosive weapon or a chemical weapon or indicates the specific location of a chemical that is more than likely to be used in the construction or assembly of such a weapon for purposes of section 418.178. Accordingly, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with section 418.177, section 418.178, or section 418.181 of the Government Code.

Next, ChemTreat and Fort Bend contend portions of their information are excepted from disclosure under section 552.110 of the Government Code.³ 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 id.* § 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

²As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

³Although ChemTreat also raises section 552.101 of the Government Code, ChemTreat makes no arguments to support this exception. Therefore, we assume ChemTreat to have withdrawn its claim this section applies to its information. *See Gov't Code* §§ 552.301, .302.

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." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 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* Open Records Decision No. 661 at 5 (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).

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).

ChemTreat and Fort Bend argue portions of their information consist of commercial information the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find ChemTreat and Fort Bend have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the authority must withhold this information, which we have marked, under section 552.110(b) of the Government Code; however, to the extent ChemTreat's customer information we have marked is publicly available on ChemTreat's website, it may not be withheld under section 552.110(b).⁵ We find ChemTreat and Fort Bend have failed to demonstrate that the release of any of their remaining information 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). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

ChemTreat and Fort Bend further assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude ChemTreat and Fort Bend have failed to establish a *prima facie* case that any portion of their remaining information meets the definition of a trade secret. We further find ChemTreat and Fort Bend have not demonstrated the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 402. Additionally, to the extent ChemTreat's customer information is publicly available on the company's website and not excepted under section 552.110(b), the authority may not withhold such information under section 552.110(a). Therefore, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Section 552.136(b) of the Government Code states "[n]otwithstanding any other provision of [the Act], 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 Code § 552.136(b). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). We note ChemTreat seeks to withhold the federal tax identification number it has marked under section 552.136. However, upon review, we find ChemTreat has failed to demonstrate how the marked federal tax identification number constitutes an access device number used to obtain money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. *See* Gov't Code §§ 552.136(a)

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

(defining “access” device”), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, the authority may not withhold the federal tax identification number at issue under section 552.136. However, we find the authority must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

ChemTreat seeks to withhold the e-mail addresses it has marked in the remaining information under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). However, we note the e-mail addresses at issue are contained in a response to a request for proposals and are therefore excluded by subsection (c)(3). *See id.* § 552.137(c)(3). Accordingly, the authority may not withhold the e-mail addresses at issue under section 552.137 of the Government Code.

We note some of the materials at issue may 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, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code and the information we have marked under section 552.110(b) of the Government Code; however, to the extent ChemTreat’s customer information is publicly available on ChemTreat’s website, it may not be withheld under section 552.110(b) of the Government Code. The authority must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The authority must release the remaining information; however, any information that is subject to copyright may be released only 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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Open Records Division

NAY/bhf

Ref: ID# 537413

Enc. Submitted documents

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