



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 28, 2020

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

OR2020-14828

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# 829394 (Request# 66092336).

The Lower Colorado River Authority (the "authority") received a request for seven categories of information pertaining to the Arbuckle Reservoir. You state you do not have information responsive to a portion of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.111 of the Government Code. In addition, the authority states its release may implicate the proprietary interests of Jacobs Engineering Group ("Jacobs") and Nicholson Construction Company ("Nicholson"). Accordingly, the authority states, and provides documentation showing, it notified Jacobs and Nicholson of the request for information and of the right to submit arguments to this office. *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 arguments from Nicholson. We have considered

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<sup>1</sup> The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

the submitted arguments and reviewed the submitted representative samples of information.<sup>2</sup>

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 not received comments from Jacobs explaining why the submitted information should not be released. Therefore, we have no basis to conclude Jacobs 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 Jacobs may have in the information.

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. This section encompasses information protected by other statutes, such as section 418.181 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. 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 information may generally be related to a governmental body's security concerns or to a security system does not make the information *per se* confidential under section 418.181. *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 confidentiality provision, a governmental body asserting section 418.181 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You argue, and we agree, the authority's dams are critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001(2) (defining "critical infrastructure" to include

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<sup>2</sup> We assume that the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

“all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation”). You state release of the submitted information “would provide a potential terrorist with information that depicts vulnerabilities, potential vulnerabilities, data related to the potential impacts, and fatalities that could occur as a result of an act of terror on [the authority’s] dams.” Based on your representations and our review of the information at issue, we find the authority has demonstrated the release of some of the information at issue would identify the technical details of particular vulnerabilities of dams to an act of terrorism. Thus, the authority must withhold the information in Folders 1, 2, 3, and 5 and the information we marked in Folder 6 under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.<sup>3</sup> However, we find the authority has not demonstrated the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the authority may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. We understand the authority to claim the remaining information is confidential under section 673 of the Critical Infrastructure Information Act (“CIIA”), title 6, sections 671 through 674 of the United States Code. 6 U.S.C. §§ 671 - 674. Section 673 pertains to the protection of certain voluntarily shared critical infrastructure information. Subsections (a)(1)(A) through (D) of section 673 apply to a “covered [f]ederal agency,” defined in the CIIA to mean the Department of Homeland Security, and provide in relevant part the following:

(a) Protection

(1) In general

Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement specified in paragraph (2)—

(A) shall be exempt from disclosure under section 552 of Title 5 (commonly referred to as the Freedom of Information Act);

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(D) shall not, without the written consent of the person or entity submitting such information, be used or disclosed by any officer or employee of the United States for purposes other than the purposes of this part, except [in certain specified circumstances.]

6 U.S.C. § 673(a)(1)(A), (D). Thus, these provisions restrict the disclosure of critical infrastructure information voluntarily submitted to a covered federal agency for certain agency uses when the submission includes an express statement specified in section 673(a)(2).<sup>4</sup> *See id.* § 673(a)(1), (a)(2) (defining “express statement”); *see also id.* § 671 (defining “covered [f]ederal agency,” “critical infrastructure information,” and “voluntary”). Therefore, these provisions apply when a covered federal agency receives a request for the information; they do not apply when a state or local governmental body receives a request for the information. *See id.* § 673(a)(1); *see also* Attorney General Opinion MW-95 (1979) (neither Freedom of Information Act (“FOIA”) nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body).

In contrast, subsection (E) of section 673(a)(1) applies when a state or local government agency receives a request for the information. *See* 6 U.S.C. § 673(a)(1)(E). Under subsection (E), the information

shall not, *if provided to a State or local government or government agency—*

- (i) be made available pursuant to any State or local law requiring disclosure of information or records;
- (ii) otherwise be disclosed or distributed to any party by said State or local government or government agency without the written consent of the person or entity submitting such information; or
- (iii) be used other than for the purpose of protecting critical infrastructure or protected

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<sup>4</sup> In this analysis of the CIIA, we will refer to critical infrastructure information voluntarily submitted to a covered federal agency for the specified agency uses and with the accompanying express statement as “information.”

systems, or in furtherance of an investigation  
or the prosecution of a criminal act[.]

*Id.* § 673(a)(1)(E) (emphasis added). Thus, while subsection (E) applies to information maintained by any state or local government or government agency, the prohibitions on release apply only if a covered federal agency “provided [the information] to [the] local or state government or agency.” *See id.*

Although the authority claims the remaining information is confidential under section 673 of the United States Code, we find the authority does not represent the reports at issue were provided to the authority by a covered federal agency as contemplated by subsection (E). *See id.* § 673(a)(1)(3). Consequently, as a covered federal agency did not provide the documents at issue to the authority, we find that the authority has failed to demonstrate the applicability of the CIIA in this instance. Therefore, because you have failed to establish that the CIIA is applicable here, we need not determine whether the information at issue is “critical infrastructure information” for purposes of section 673 or whether the information is “substantially similar” to the express statement in section 673(a)(2). *See id.* §§ 671(3)(A), 673(a)(2)(A). Thus, we conclude that the remaining information is not confidential under section 673(a)(2), and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.104(a) of the Government Code exempts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a). 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.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). After review of the information at issue and consideration of the arguments, we find the authority has failed to demonstrate the applicability of section 552.104 to the information at issue. Thus, we conclude the authority may not withhold the remaining information in Folder 6 under section 552.104(a).

Section 552.110(c) of the Government Code states:

(c) Except as provided by Section 552.0222, commercial 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 is [excepted from required disclosure].

Gov’t Code § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Nicholson argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Nicholson has demonstrated portions of the

information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the authority must withhold the information we indicated under section 552.110(c) of the Government Code.<sup>5</sup> However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(c). Additionally, we find Nicholson has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Nicholson argues some of its remaining information consists of trade secrets subject to section 552.110(b). However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b). Additionally, we find Nicholson has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.1101 of the Government Code provides, in relevant part:

- (a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to

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

demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

*Id.* § 552.1101(a). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.0222(b). Nicholson asserts some of the remaining information would reveal an individual approach to work, organization structure, staffing, internal operations, internal processes, processes, discounts, pricing, and pricing methodology and give advantage to a competitor. Upon review, we find Nicholson has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the authority must withhold the information we indicated under section 552.1101 of the Government Code. However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.1101(a). *See id.* § 552.0222(b) (listing certain types of information not excepted under section 552.1101). Additionally, we find Nicholson has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is subject to section 552.1101(a). Therefore, the authority may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

In summary, the authority must withhold the information in Folders 1, 2, 3, and 5 and the information we marked in Folder 6 under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The authority must withhold the information we indicated under sections 552.110(c) and 552.1101 of the Government Code. The remaining 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Paige Lay  
Assistant Attorney General  
Open Records Division

PL/jxd

Ref: ID# 829394

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)