



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 3, 2016

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2016-22227

Dear Ms. Evans:

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# 628808 (GC# 23378).

The City of Houston (the "city") received a request for every statement of qualifications submitted for towing and emergency road services. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state 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.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 Allied, Apple, Car King, Humble, Miller, RD King, Unified, and Westside. We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor in two separate letters. *See*

¹The city submitted information to this office from the following third parties: Aburamadan Enterprises, Inc. ("Aburamadan"); Action Towing, Inc. ("Action"); Allied Collision Center, Inc. ("Allied"); Apple Towing Company ("Apple"); Bellaire Towing ("Bellaire"); Best Tow/Best Auto Storage ("Best"); Car King Towing ("Car King"); D.C. Wrecker Service ("DC"); Dealers Towing ("Dealers"); Elite Collision Center ("Elite"); Expro Auto Towing ("Expro"); Fast Tow ("Fast"); Fiesta Wrecker Service ("Fiesta"); Houston Auto Tech, Inc. ("Houston"); HP Auto Wrecker ("HP"); Humble Towing Service ("Humble"); Millers' Auto and Body Repair ("Miller"); North Houston Motors, Inc. ("North"); RD King Enterprises, Ltd. ("RD King"); Safetow; T&T Motors, Inc. ("T&T"); Unified Auto Works Paint and Body, Inc. ("Unified"); USA Auto Collision Center ("USA"); and Westside Wrecker Service, Inc. ("Westside").

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2016-12431 (2016) and 2016-09331 (2016). In Open Records Letter No. 2016-12431, we determined the city (1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (2) must withhold the information we marked, along with all public citizens' dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy; (3) must withhold the information we marked under section 552.130 of the Government Code; (4) must withhold the information we marked under section 552.136 of the Government Code; and (5) must release the remaining information. In Open Records Letter No. 2016-09331, we determined the city: (1) may withhold the information we marked under section 552.104(a) of the Government Code; (2) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (3) must withhold the motor vehicle record information we marked under section 552.130 of the Government Code; and (4) must release the remaining information. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the city must continue to rely on Open Records Letter Nos. 2016-12431 and 2016-09331 as previous determinations and withhold and release the information at issue in accordance with those rulings. *See* ORD 673 at 6-7 (discussing criteria for first type of previous determination).

Next, the requestor asserts, and you acknowledge, the city failed to comply with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason may exist to withhold information when the information is made confidential by another source of law or affects third-party interests. *See* Open Records Decision No. 150 at 2 (1977). Accordingly, because third-party interests are at issue and can provide compelling reasons to overcome the presumption of openness, we will consider whether the information may be withheld based on the interest of any third party. Further, because sections 552.101, 552.130, and 552.136 of the

Government Code make information confidential, we will address whether these exceptions to disclosure apply to the submitted information.²

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 Aburamadan, Action, Bellaire, Best, DC, Dealers, Elite, Expro, Fast, Fiesta, Houston, HP, North, Safetow, T&T, or USA explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these third parties 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 city may not withhold the submitted information on the basis of any proprietary interest Aburamadan, Action, Bellaire, Best, DC, Dealers, Elite, Expro, Fast, Fiesta, Houston, HP, North, Safetow, T&T, and USA 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. Section 552.101 of the Government Code encompasses section 6103(a) of title 26 of the United States Code. The submitted information contains corporate and personal tax return information. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, over assessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Upon review, we find the city must withhold the corporate and personal tax information, a representative sample of which we marked,

²The Office of the Attorney General will raise a mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.³

Section 552.101 of the Government Code also 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Furthermore, under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found.*, 540 S.W.2d at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁴ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we indicated, along with all public citizens' dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing or is not of legitimate public interest and it may not be withheld under section 552.101 on that basis.

Miller claims portions of its information are excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure

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

⁴Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

“information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). However, section 552.102 applies to information in the personnel file of a governmental employee. *See id.* None of Miller’s information consists of information in the personnel file of a governmental employee. Therefore, we find section 552.102 of the Government Code is not applicable, and the city may not withhold any of Miller’s information on that basis.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 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. Apple, Car King, Miller, and Unified state they have competitors. Apple and Miller state release of portions of their information would provide competitors with an undue and unfair competitive advantage. Car King and Unified state releasing their information would provide competitors with an undue and unfair competitive advantage. Apple, Car King, Miller, and Unified further state release of their information at issue would put it them at a disadvantage in future bidding situations. After review of the information at issue and consideration of the arguments, we find Apple, Car King, Miller, and Unified have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold their information at issue, which we marked, under section 552.104(a) of the Government Code.⁵

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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

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

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

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 Huffines*, 314 S.W.2d at 776. 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.⁶ 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. *See* 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 Record 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* ORD 661 at 5-6 (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).

Allied, Humble, Miller, RD King, and Westside contend portions of their information are commercial or financial information, the release of which would cause substantial

⁶The 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).

competitive harm to the companies. Upon review, we find Humble has not established any of its remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the city may not withhold any of Humble's information on this basis. Allied, Miller, RD King, and Westside contend their business financial information is commercial or financial information the release of which would cause the companies substantial competitive harm. Upon review, we find that Allied, Miller, RD King, and Westside have established that the business financial information at issue constitutes commercial or financial information the release of which would cause them substantial competitive harm. Thus, the city must withhold the business financial information at issue, which we marked, under section 552.110(b) of the Government Code. However, upon review, we find RD King and Westside have not demonstrated release of their remaining information at issue would cause them substantial competitive harm. *See* Open Records Decision Nos. 661, 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) (résumés cannot be said to fall within any exception to the Act). Accordingly, no portion of the remaining information at issue may be withheld under section 552.110(b).

Humble asserts its information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Humble has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find Humble has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of the submitted information may be withheld under section 552.110(a).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information, a representative sample of which we marked, under section 552.130 of the Government Code.

Humble also raises section 552.131 of the Government Code, which relates to economic development information. Section 552.131 provides, in part, the following:

- (a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks

to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.

Id. § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Humble has failed to explain any of the remaining information consists of economic development negotiations that relate to a trade secret or commercial or financial information involving it and the city. *See id.* § 552.131(a). Section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the city does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of the remaining information is excepted under section 552.131(b) of the Government Code. Accordingly, the city may not withhold any of the remaining information under section 552.131 of the Government Code.

Section 552.136 of the Government Code provides, “[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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). 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)*. Upon review, we find the city must withhold banking account and routing numbers, and the insurance policy numbers, a representative sample of which we marked, under section 552.136 of the Government Code.

In summary, the city must withhold the corporate and personal tax information, a representative sample of which we marked, under section 552.101 of the Government Code in conjunction with section 6103 of chapter 26 of the United States Code. The city must withhold the information we indicated, and all public citizens’ dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information we marked under section 552.104 of the Government Code.

The city must withhold the information we marked under section 552.110 of the Government Code. The city must withhold some of the remaining information, a representative sample of which we marked, under sections 552.130 and 552.136 of the Government Code. The city must release the remaining information.⁷

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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

Ref: ID# 628808

Enc. Submitted documents

c: Requestor
(w/o enclosures)

24 Third Parties
(w/o enclosures)

⁷We note the information being released contains partial and full social security numbers subject to section 552.147 of the Government Code. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this officer under the Act. Gov't Code § 552.147(b).