



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 18, 2019

Ms. Hadassah Schloss
Director
Open Government
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2019-01710

Dear Ms. Schloss:

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# 744716 (GLO ID# 19-0099).

The Texas General Land Office (the "GLO") received a request for six categories of information pertaining to the Affordable Rental Program. The GLO states it will release some information to the requestor. Although the GLO takes no position as to whether the submitted information is excepted under the Act, the GLO states release of the submitted information may implicate the proprietary interests of forty-four third parties.¹ Accordingly, the GLO states, and provides documentation showing, it notified each third party of the request for information and of its 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 to raise and explain applicability of

¹We note MGroup Holdings contends the GLO failed to notify certain third parties of the request for information pursuant to section 552.305(d) of the Government Code. *See* Gov't Code § 552.305(d) (providing that "[i]f release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision."). However, the GLO does not inform us, nor can we discern, these third parties' proprietary interests would be implicated by the public release of the information at issue. Thus, we find this is not an instance where the district is required to notify these third parties pursuant to section 552.305 of the Government Code.

exception in the Act in certain circumstances). We have received comments from American Academy of Crisis Counseling (“AACC”); Arx Advantage, LLC (“Arx”); Development 2000, Inc. (“D2000”); Liberty Heights Community Center (“LHCC”); and MGroup Holdings (“MGroup”). We have considered the submitted arguments and reviewed the submitted information.

Initially, the GLO states some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2018-21425 (2018), 2018-26745 (2018), and 2019-00036 (2019). In Open Records Letter No. 2018-21425, we determined the GLO (1) must withhold some information under section 552.101 of the Government Code in conjunction with common-law privacy, (2) must withhold some information under section 552.110(b) of the Government Code, (3) must withhold some information under section 552.130 of the Government Code, (4) must withhold some information under section 552.136 of the Government Code, (5) may withhold some information under section 552.147 of the Government Code, and (6) must release the remaining information. In Open Records Letter No. 2018-26745, we determined the GLO (1) must withhold or release information in accordance with the previous determination issued in Open Records Letter No. 2018-26424 (2018), (2) must withhold some information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code, and (3) must release the remaining information. In Open Records Letter No. 2019-00036, we determined the GLO (1) must withhold some information under section 552.101 of the Government Code in conjunction with common-law privacy, (2) must withhold some information under section 552.110(b) of the Government Code, and (3) must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, the GLO must rely on Open Records Letter Nos. 2018-21425, 2018-26745, and 2019-00036 as previous determinations and withhold or release the information at issue in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note LHCC argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the department has submitted to us for our review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the GLO submitted as responsive to the request for information.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments

from Arx, D2000, LHCC, and MGroup explaining why their information should not be released. Although we received comments from AACC, AACC did not raise any exceptions to disclosure under the Act or assert it has a protected proprietary interest in the submitted information. Therefore, we have no basis to conclude AACC or any of the remaining third parties has a protected proprietary interest in the submitted information, and the GLO may not withhold any portion of it on that basis. *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.

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. 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 excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 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). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Additionally, we note an individual’s name, address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person’s name, address, or telephone number not an invasion of privacy). Further, we note 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 portions of the submitted information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the GLO must withhold

the types of information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the GLO may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

D2000 and MGroup state some of their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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 RESTATEMENT OF TORTS § 757 cmt. b. This

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];
- (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).

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, 232 (1979), 217 (1978).

Section 552.110(b) of the Government Code 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.

D2000 and MGroup argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find D2000 and MGroup have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the GLO must withhold the information we have marked and indicated under section 552.110(b) of the Government Code.³ However, we find D2000 and MGroup have failed to demonstrate the release of any of their remaining information would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661, 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). Accordingly, the GLO may not withhold any of D2000’s or MGroup’s remaining information under section 552.110(b) of the Government Code.

D2000 and MGroup assert portions of their remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude D2000 and MGroup 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 D2000 and MGroup have not demonstrated the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 402. Therefore, the GLO may not withhold any of D2000’s or MGroup’s remaining information under section 552.110(a) of the Government Code.

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

MGroup argues portions of its remaining information meets the definition of a trade secret found in section 134A.002(6) of the Texas Uniform Trade Secrets Act (the "TUTSA"), chapter 134A of the Civil Practice and Remedies Code, which was added by the Eighty-third Texas Legislature. Section 552.101 of the Government Code also encompasses information made confidential by section 134A.002, which provides, in relevant part, the following:

(6) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of the TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)'s definition of trade secret expressly applies to the TUTSA only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act); Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the GLO may not withhold any portion of MGroup's remaining information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of the TUTSA.

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. D2000 and MGroup contend their remaining information at issue relates to a competitive bidding situation. After review of the information at issue and consideration of the arguments, we find D2000 and MGroup have not established any portion of their remaining information at issue is protected by section 552.104. Thus, we conclude the GLO may not withhold any of D2000's or MGroup's remaining information under section 552.104(a) of the Government Code.

We note some of the remaining information is subject to section 552.130 of the Government Code.⁴ Section 552.130 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 GLO must withhold the motor vehicle record information we have marked under section 552.130 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). Section 552.137 is not applicable to an institutional e-mail address, the general e-mail address of a business, an Internet website address, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address that a governmental entity maintains for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b). Because we are unable to discern whether the e-mail addresses within the remaining information fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public, the GLO must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c), the e-mail addresses may not be withheld under section 552.137 of the Government Code.

Section 552.147(a) of the Government Code excepts the social security number of a living individual from public disclosure. *Id.* § 552.147(a). Accordingly, the GLO may withhold the social security numbers within the remaining information under section 552.147 of the Government Code.

In summary, the GLO must rely on Open Records Letter Nos. 2018-21425, 2018-26745, and 2019-00036 as previous determinations and withhold or release the information at issue in accordance with those rulings. The GLO must withhold the types of information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The GLO must withhold the information we have marked and indicated under section 552.110(b) of the Government Code. The GLO must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. To the extent the e-mail addresses in the remaining information belong to members of the public, the GLO must withhold such e-mail addresses under section 552.137, unless

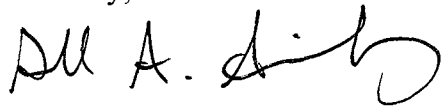
⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the individuals to whom the e-mail addresses belong affirmatively consent to their release. The GLO may withhold the social security numbers within the remaining information under section 552.147 of the Government Code. The GLO must release the remaining information.

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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/EB

Ref: ID# 744716

Enc. Submitted documents

c: Requestor
(w/o enclosures)

44 Third Parties
(w/o enclosures)