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ATTORNEY GENERAL OF TEXAS

April 11, 2019

Mr. Joseph Benke
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2019-09835

Dear Mr. Behnke:

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# 756906 (OOG ID No. 011-19).

The Office of the Governor (the "governor's office") received a request for e-mail communications, notes, memos, messages, and text messages between Alliance Defending Freedom ("ADF") and the governor's office during a defined period of time.¹ You state you will redact information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code.² You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.1175, 552.136, and

¹We note the governor's office 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); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

552.137 of the Government Code. You also state release of this information may implicate the proprietary interests of ADF. Accordingly, you state, and provide documentation showing, you notified the interested third party of the request for information and of its right to submit arguments to this office as to why the information at issue 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 exception in the Act in certain circumstances).* We have received comments from ADF. We have considered the submitted arguments and reviewed the submitted information.

Initially, ADF argues some of the submitted information is not subject to the Act. The Act applies to “public information,” which is defined in section 552.002(a) of the Government Code as:

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Information is “in connection with the transaction of official business” if it is “created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body.” *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).* ADF argues some of the submitted information is not subject to the Act because the information “contains no public

information.” However, we note the information at issue was written, produced, collected, assembled, or maintained in connection with the transaction of official business of the governor’s office. Thus, we find the information at issue is subject to the Act and the governor’s office must release it unless the information falls within an exception to public disclosure under the Act. Gov’t Code §§ 552.006, .021, .301, .302. Accordingly, we will consider the remaining arguments against disclosure of the submitted 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.” *Id.* § 552.101. ADF argues most of the submitted information is excepted from disclosure under section 552.101 in conjunction with the holding of the Texas Supreme Court in *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998). In that decision, the Texas Supreme Court determined that the First Amendment right to freedom of association could protect an advocacy organization’s list of contributors from compelled disclosure through a discovery request in pending litigation. In reaching this conclusion, the court stated:

Freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Compelled disclosure of the identities of an organization’s members or contributors may have a chilling effect on the organization’s contributors as well as on the organization’s own activity. *See Buckley v. Valeo*, 424 U.S. 1, 66-68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). For this reason, the First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs. *Tilton*, 869 S.W.2d at 956 (citing *NAACP*, 357 U.S. at 462-63, 78 S.Ct. 1163). “[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *Id.*

Bay Area Citizens, 982 S.W.2d at 375-76 (footnote omitted). The court held that the party resisting disclosure bears the initial burden of making a *prima facie* showing that disclosure will burden First Amendment rights but noted that “the burden must be light.” *Id.* at 376. Quoting the United State Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), the Texas court determined that the party resisting disclosure must show “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Id.* Such proof may include “specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself.” *Id.*

Based upon the representations of ADF, we find the disclosure of the identities of ADF's contributors will burden First Amendment rights of freedom of association. We believe the term "contributor" encompasses both the identities of those individuals and corporations who make financial donations to ADF and volunteers who donate their time and services to ADF. However, we note that the term "contributor" does not encompass officials or employees of the governor's office. *See generally* Gov't Code § 552.022(a)(2). Accordingly, the governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the freedom of association pursuant to the holding in *Bay Area Citizens*.³ We emphasize the information must be withheld on this basis only to the extent reasonable and necessary to protect the identity of the contributor. Accordingly, we find ADF has failed to establish the release of the remaining information would burden the First Amendment rights as described in *Bay Area Citizens*. Thus, we conclude the governor's office may not withhold the remaining information under section 552.101 of the Government Code and the right of association.

ADF also argues some of the remaining information is excepted from disclosure under section 552.110(a) of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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

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

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, 232 (1979), 217 (1978).

Upon review, ADF has failed to establish a *prima facie* case the information at issue meets the definition of a trade secret. Moreover, we find ADF has not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. See ORD 402. Therefore, none of the information at issue may be withheld under section 552.110(a) of the Government Code.

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 excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992)

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).

(designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find portions of the remaining information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the governor's office must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136(b) 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the governor's office must withhold the information you have marked, and the additional information we have marked, under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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 does not apply to an institutional e-mail address, the general e-mail address of a business, 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 maintained by a governmental entity 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). In *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.), the court concluded section 552.137 does not except from disclosure the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *See Austin Bulldog*, 490 S.W.2d at 250. Accordingly, except for the e-mail addresses we have marked for release, the governor's office must withhold the personal e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. However, we find you have failed to demonstrate the remaining e-mail addresses we have marked for release are excepted under section 552.137 of the Government Code and they may not be withheld on that basis.

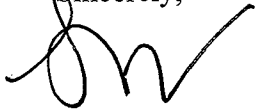
In summary, the governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the freedom of association pursuant to the holding in *Bay Area Citizens*. The governor's office must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. The governor's office must withhold the information you have marked, and the additional information we

have marked, under section 552.136 of the Government Code. Except for the e-mail addresses we have marked for release, the governor's office must withhold the personal e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The governor's office 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,



Jahna Ward
Assistant Attorney General
Open Records Division

JW/gw

Ref: ID# 756906

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Party
(w/o enclosures)