



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 12, 2019

Mr. Darin Darby
Counsel for the San Antonio Independent School District
Esamilla & Poneck, LLP
700 North Saint Mary's Street, Suite 850
San Antonio, Texas 78205

OR2019-09951

Dear Mr. Darby:

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# 758970.

The San Antonio Independent School District (the "district"), which you represent, received a request for seven categories of information pertaining to three employment positions. You state you are releasing some information to the requestor. You state you will redact information under sections 552.130(c) and 552.147(a-1) of the Government Code.¹ You also state you will redact information protected by section 552.117(a)(1) of the Government Code as permitted by section 552.024(c)(2) of the Government Code.² We understand you have redacted certain e-mail addresses subject to section 552.137 of the Government Code pursuant to the previous determination in Open Records Decision No. 684 (2009).³ You

¹We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). The social security number of an employee of a school district in the custody of the district is confidential and may be redacted without the necessity of requesting a decision from this office. *Id.* § 552.147(a-1), (b).

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).

³Open Records Decision No. 684 is a previous determination authorizing all governmental bodies to withhold certain categories of information, including e-mail addresses of members of the public subject to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.104, and 552.110 of the Government Code. Additionally, you state you have notified interested individuals of the request and of the individuals' opportunities to submit comments to this office as to why their information should not be released to the requestor.⁴ See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁵

Initially, we note you argue portions of the submitted proposal are excepted from disclosure under section 552.110 of the Government Code. We note, however, section 552.110 is designed to protect the interests of third parties not the interests of a governmental body. See *id.* § 552.110 (excepting from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “[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”). Thus, we will not consider the district's argument under section 552.110 of the Government.

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). 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 (Tex. 2015). The district states it has specific marketplace interests in the information at issue because the district is competing for employees in the marketplace. However, this office has consistently interpreted section 552.104 to apply in competitive bidding and procurement situations. See, e.g., Open Records Decision Nos. 604 at 1 (1992), 593 at 1 (1991) (statutory predecessor to section 552.104 “designed to protect interests in commercial transactions”), 592 at 5 (1991), 568 at 2 (1990), 541 at 3 (1990), 514 at 1 (1988) (statutory predecessor to section 552.104 protects purchasing interests), 463 at 1-2 (1987) (statutory predecessor to section 552.104 “has been construed to protect the sealed bid process”), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). In light of this office's prior interpretations of section 552.104, we are not persuaded that competitions among applicants for these positions of public employment are competitive situations contemplated by section 552.104. Cf. ORD 463 at 2 (stating, by analogy, that “competition” between two job applicants seeking one job offered by the state is not a process the statutory predecessor to section 552.104 was intended to protect). Therefore, we find you have failed to demonstrate the applicability of section

⁴As of the date of this letter, we have not received any comments from an individual explaining why any portion of the submitted information should not be released to the requestor.

⁵We assume the “representative sample” 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.

552.104 of the Government Code in this instance, and the district may not withhold the submitted information on that basis.

Section 552.102(a) of the Government Code 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 of the Government Code encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find the district must withhold the dates of birth of state employees under section 552.102(a) of the Government Code.⁶ However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of the remaining information on that basis.

As state above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which is subject to the two-part test discussed above. *Indus. Found.*, 540 S.W.2d at 685. 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. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.). We note an individual’s name, education, prior employment, and personal information are not ordinarily private information subject to common-law privacy. *See Open Records Decision Nos. 554 (1990), 448 (1986)*. Upon review, the district must withhold all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the district has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

interest. Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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).⁷ See Gov’t Code § 552.137(a)-(c). Accordingly, the district must withhold the personal e-mail addresses, which we marked, under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consents to their release. See *id.* § 552.137(b).

In summary, the district must withhold all state employees’ dates of birth under section 552.102(a) of the Government Code. The district must withhold all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the personal e-mail addresses, which we marked, under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consents to their release. The district 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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/gw

⁷The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 758970

Enc. Submitted documents

c: Requestor
(w/o enclosures)