



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 3, 2019

Ms. Myrna S. Reingold  
Legal Department  
County of Galveston  
722 Moody Avenue, 5th Floor  
Galveston, Texas 77550

OR2019-11899

Dear Ms. Reingold:

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# 763738.

The Galveston County Purchasing Agent (the "county") received a request for specified submissions in response to request for qualifications B191022. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code. Additionally, you state release of the information at issue may implicate the proprietary interests of the following third parties: Arkitektura Development, Inc. ("Arkitektura"); Brizo Construction, LLC ("Brizo"); Byrdson Services, LLC d/b/a Excello Homes ("Byrdson"); DSW Homes, LLC ("DSW"); Ducky Johnson Home Elevation, LLC ("DJHE"); James W. Turner Construction, Ltd ("JWTC"); and Planet Three Consulting Corp. d/b/a Planet Three Elevation ("Planet Three"). Accordingly, you state, and provide documentation demonstrating, the county notified these interested third parties of the request for information and of their 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 exception in the Act in certain circumstances). We have received comments from Arkitektura, Brizo, Byrdson, DJHE, DSW, and JWTC. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the submitted information, which consists of information pertaining to Arkitektura, was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2019-11652 (2019). As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the county must continue to rely on Open Records Letter No. 2019-11652 as a previous determination and withhold or release the information pertaining to Arkitektura in accordance with that ruling.<sup>1</sup> *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). However, we will consider the submitted arguments for the submitted information not subject to the prior ruling.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Planet Three explaining why the information at issue should not be released. Therefore, we have no basis to conclude Planet Three has a protected proprietary interest in the information at issue. *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 county may not withhold any portion of the remaining information on the basis of any proprietary interest Planet Three may have in it.

Brizo, DJHE, DSW, and JWTC assert portions of the information at issue are excepted from disclosure under section 552.104(a) of the Government Code. Section 552.104(a) 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. Brizo, DJHE, DSW, and JWTC state they have competitors. In addition, Brizo, DJHE, DSW, and JWTC state the release of the information at issue would provide an unfair advantage to their competitors. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records

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<sup>1</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to the *Boeing* decision, section 552.104 is not limited to only ongoing competitive situations, and it need only be shown release of competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 841. After review of the information at issue and consideration of the arguments, we find Brizo, DJHE, DSW, and JWTC have established the release of the information at issue would give advantage to a competitor or bidder. Accordingly, we conclude the county may withhold the information we marked and indicated under section 552.104(a) of the Government Code.<sup>2</sup>

Byrdson claims portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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(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

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

list of six trade secret factors.<sup>3</sup> 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).

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.

Byrdson asserts portions of its information constitute trade secret information under section 552.110(a) of the Government Code. Upon review, we conclude Byrdson has failed to establish a *prima facie* case any portion of the information at issue meets the definition of a trade secret. We further find Byrdson has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Therefore, the county may not withhold any of Byrdson’s information under section 552.110(a) of the Government Code.

Byrdson also contends some of its remaining information consists of commercial or financial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. We note Byrdson was one of the companies awarded a contract, in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514 (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide

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<sup>3</sup>The 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).

to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3); ORD 541 at 8. Upon review, we find Byrdson has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information at issue would cause Byrdson substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, the county may not withhold the information at issue under section 552.110(b) of the Government Code.

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 government body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of this exception. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the county must withhold all insurance policy and bank account numbers within the remaining information under section 552.136 of the Government Code.<sup>4</sup>

Byrdson asserts some of its information at issue is protected by section 552.101 of the Government Code, which 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 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. However, 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). In addition, the Third 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,

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Accordingly, the county must withhold all public citizens' dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. However, upon review, we find no portion of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county 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). *See* Gov't Code § 552.137(a). The county seeks to withhold e-mail addresses within the remaining information under section 552.137. However, we note the e-mail addresses at issue are excluded by subsection 552.137(c). *See id.* § 552.137(c) (Subsection (a) does not apply to an e-mail address contained in a response to a request for bids or proposals or contained in a response to similar invitations soliciting offers). Therefore, the county may not withhold any e-mail addresses within the remaining information under section 552.137 of the Government Code.

We note some of the remaining information may be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the county must continue to rely on Open Records Letter No. 2019-11652 as a previous determination and withhold or release the information pertaining to Arkitektura in accordance with that ruling. The county may withhold the information we marked and indicated under section 552.104(a) of the Government Code. The county must withhold all insurance policy and bank account numbers within the remaining information under section 552.136 of the Government Code. The county must withhold all public citizens' dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The county must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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](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,



Blake Brennan  
Attorney  
Open Records Division

BB/gw

Ref: ID# 763738

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: 7 Third Parties  
(w/o enclosures)