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ATTORNEY GENERAL OF TEXAS

April 24, 2020

Ms. Michele Freeland
Office of the General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2020-11764

Dear Ms. Freeland:

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# 821062 (PIR # 20-0250).

The Department of Public Safety (the "department") received a request for information related to a specified solicitation. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you claim release of the remaining information may implicate the proprietary interests of CohnReznick, LLP ("CohnReznick"); Crowe Horwath, LLP; Ernst & Young ("E&Y"); Grant Thornton, LLP; and Weaver and Tidwell, LLP ("Weaver"). Accordingly, the department states, and provides documentation showing, it notified these 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 CohnReznick, E&Y, and Weaver. We have considered the submitted arguments and reviewed the submitted information.

Initially, we understand the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2018-11796 (2018). In Open Records Letter No. 2018-11796, we determined the department may withhold the submitted information under section 552.104(a) of the Government Code. We note since the previous ruling was issued the law regarding section 552.104 has changed. Therefore, because the law has changed with respect to the

information at issue, the department may not rely on Open Records Letter No. 2018-11796 as a previous determination and withhold any of the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (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 information is or is not excepted from disclosure). Accordingly, we will consider the submitted arguments against disclosure of the submitted information.

Next, we note you have redacted information from the submitted documents. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, you have been granted a previous determination to withhold such information without seeking a ruling from this office. *See id.* § 552.301(a); ORD 673. In this instance, we are able to discern the nature of some of the information that has been redacted; thus, being deprived of that information does not inhibit our ability to make a ruling. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"); .302. Thus, in the future, the department should refrain from redacting, without authorization, any information it submits to this office in seeking an open records ruling. However, we are unable to discern the nature of the remaining redacted information. Therefore, the department has failed to comply with section 552.301 of the Government Code as to this information, and this information is presumed public under section 552.302 of the Government Code. Accordingly, the department must release this redacted information, which we have indicated.

Further, 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) of the Government Code 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 not received comments from either of the remaining third parties explaining why the information at issue should not be released. Therefore, we have no basis to conclude either remaining third party 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 department may not withhold the remaining information on the basis of any proprietary interest either of the remaining third parties may have in the information.

Section 552.104(a) of the Government Code exempts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 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, 841 (Tex. 2015). After review of the information at issue and consideration of the arguments, we find the department has failed to demonstrate the applicability of section 552.104 to the information at issue. Thus, we conclude the department may not withhold the information at issue under section 552.104(a).

CohnReznick, E&Y, and Weaver assert some of their information is subject to section 552.110 of the Government Code.¹ CohnReznick and Weaver additionally assert some of their information is subject to section 552.1101 of the Government Code. Section 552.110(b) states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” See Gov’t Code § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Section 552.110(c) of the Government Code states:

- (c) Except as provided by Section 552.0222, 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 is [excepted from required disclosure].

Id. § 552.110(c). Section 552.1101 of the Government Code provides, in relevant part:

- (a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the

¹ Although E&Y cites to sections 552.110(a) and 552.110(b) of the Government Code, we note the Eighty-sixth Legislature amended section 552.110 effective January 1, 2020. See Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Accordingly, we understand E&Y to raise sections 552.110(b) and 552.110(c) for portions of its information.

information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

(b) The exception to disclosure provided by Subsection (a) does not apply to:

(1) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or

(2) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

Id. § 552.1101(a), (b). Additionally, we note section 552.0222(b) lists certain types of information to which sections 552.110 and 552.1101(a) do not apply. *See id.* § 552.0222(b). We note some of E&Y's and Weaver's information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110 or section 552.1101.

CohnReznick and Weaver assert disclosure of some of their information would reveal an individual approach to their work, organizational structure, staffing, internal operations, processes, and pricing that will be used in future solicitations or bid documents. Upon review, we find CohnReznick and Weaver have demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the department must withhold the information we have marked under section 552.1101 of the Government Code.² However, we find CohnReznick and Weaver have failed to provide the specific

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the department may not withhold it on that basis.

CohnReznick, E&Y, and Weaver argue some of their remaining information consists of trade secrets subject to section 552.110(b). Upon review, we find CohnReznick, E&Y, and Weaver have demonstrated their customer information constitutes trade secrets. Further, we find E&Y has demonstrated some of its remaining information constitutes trade secrets. Therefore, to the extent CohnReznick's, E&Y's, and Weaver's customer information is not publicly available on the companies' websites, the department must withhold CohnReznick's, E&Y's, and Weaver's customer information, as well as the additional information we have indicated, under section 552.110(b) of the Government Code.³ However, we find CohnReznick, E&Y, and Weaver have failed to provide specific factual evidence demonstrating any portion of their remaining information at issue is a trade secret.

CohnReznick, E&Y, and Weaver argue some of their remaining information consists of commercial or financial information subject to section 552.110(c). Upon review, we find CohnReznick, E&Y, and Weaver have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the department must withhold the information we have marked under section 552.110(c) of the Government Code. However, we find CohnReznick, E&Y, and Weaver have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the department may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁴ *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 682. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). Thus, the department must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code states "[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

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

⁴ The 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).

§ 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. Thus, the department must withhold the insurance policy, bank account, and bank routing numbers in the remaining information under section 552.136 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 department must withhold the information we have marked under section 552.1101 of the Government Code. To the extent CohnReznick’s, E&Y’s, and Weaver’s customer information is not publicly available on the companies’ websites, the department must withhold CohnReznick’s, E&Y’s, and Weaver’s customer information, as well as the additional information we have indicated, under section 552.110(b) of the Government Code. The department must withhold the information we have marked under section 552.110(c) of the Government Code. The department must withhold all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the insurance policy, bank account, and bank routing numbers in the remaining information under section 552.136 of the Government Code. The department 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/eb

Ref: ID# 821062

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)