



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2020

Mr. Albert Tovar
Office of General Counsel
VIA Metropolitan Transit
123 North Medina Street
San Antonio, Texas 78207

OR2020-20748

Dear Mr. Tovar:

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# 840289.

VIA Metropolitan Authority ("VIA") received a request for five categories of information related to contract 18-177 and its procurement process. VIA states it has released or will release some of the responsive information to the requestor. VIA claims some of the submitted information excepted from disclosure under sections 552.111, 552.130, and 552.136 of the Government Code. Additionally, VIA states release of the submitted information may implicate the proprietary interests of First Transit, Inc. ("First Transit"); Greater San Antonio Transportation Company Yellow Cab; MV Transportation, Inc.; RATP Dev USA; Star Shuttle, Inc. ("Star Shuttle"); and Transdev Services, Inc. ("Transdev"). Accordingly, VIA 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. *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 First Transit, Star Shuttle, and Transdev. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note First Transit seeks to withhold information that VIA did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as

responsive by VIA. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we note some of the submitted information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2019-01963 (2019) and 2019-12940 (2019). In Open Records Letter No. 2019-01963, we determined VIA may withhold certain information under section 552.111 of the Government Code, must withhold certain information under section 552.130 of the Government Code, and must release the remaining information. We note VIA notified First Transit pursuant to section 552.305 of the Government Code when it received the request for information at issue in Open Records Letter No. 2019-01963. However, First Transit did not submit comments objecting to the release of its information in that ruling and, as a result, we concluded VIA must release First Transit's information. First Transit now argues its information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code.

Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, with respect to the information released pursuant to Open Records Letter No. 2019-01963, VIA may not now withhold the previously released information under section 552.104. However, because information subject to section 552.110 is deemed confidential by law, we will consider First Transit's arguments under this exception for its previously released information. Nevertheless, as we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based with respect to the information withheld under sections 552.111 and 552.130, VIA must rely on Open Records Letter No. 2019-01963 as a previous determination with respect to that information and withhold the identical information in accordance with that ruling.¹ *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).

In Open Records Letter No. 2019-12940, we determined VIA may withhold the information we marked and indicated under section 552.104(a) of the Government Code and must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law. We note, since the previous ruling was issued, the law regarding section 552.104 has changed. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Therefore, because the law has changed with respect to the

¹ As we are able to make this determination, we need not consider the arguments against disclosure of this information.

information at issue in this ruling, VIA may not rely on Open Records Letter No. 2019-12940 as a previous determination for it and we will consider the arguments against its disclosure. *See* ORD 673.

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) 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* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from the remaining third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in the information at issue. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Therefore, VIA may not withhold the information at issue on the basis of any proprietary interest the remaining third parties may have in the 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. 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. 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, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). 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). Therefore, VIA 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 none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, VIA may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.130 of the Government Code 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, VIA must withhold discernible license plates in the video file in Exhibit H under section 552.130 of the Government Code.

Section 552.136 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, VIA must withhold the account number and insurance policy numbers under section 552.136 of the Government Code.²

Transdev raises section 552.104 of the Government Code for a portion of the remaining information. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information 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) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code § 552.104(a). Therefore, we do not address Transdev’s argument under section 552.104.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 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 excepts from disclosure “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[.]” *Id.* § 552.110(c). First Transit, Star Shuttle, and Transdev argue some of the remaining information at issue consists of trade secrets subject to section 552.110(b) and commercial or financial information subject to section

² As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

552.110(c). As mentioned above, First Transit's information at issue was the subject of a previous ruling and First Transit did not object to release of its information. Since the issuance of Open Records Letter No. 2019-01963 on January 23, 2019, First Transit has not disputed this office's conclusion regarding the release of the information at issue. In this regard, we find First Transit has not taken any measures to protect its information at issue in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause First Transit substantial harm. Further, upon review, we find Star Shuttle and Transdev have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, VIA may not withhold any of the remaining information at issue under section 552.110(b) or section 552.110(c) of the Government Code.

Star Shuttle generally raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources. *See id.* § 552.113. *See generally* Open Records Decision No. 627 (1994). Star Shuttle has not demonstrated this exception is applicable to any of its information. Accordingly, VIA may not withhold any of the information at issue under section 552.113 of the Government Code.

Star Shuttle also argues its information is protected by copyright law. Upon review, we find some of the remaining information may be subject to copyright law. However, we note copyright law does not make information confidential under the Act. *See generally* Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it). Nevertheless, 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, with respect to the information withheld under sections 552.111 and 552.130 of the Government Code, VIA must rely on Open Records Letter No. 2019-01963 as a previous determination and withhold the identical information in accordance with that ruling. VIA must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. VIA must withhold discernible license plates in the video file in Exhibit H under section 552.130 of the Government Code. VIA must withhold the account number and insurance policy numbers under section 552.136 of the Government Code. VIA 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,

Michelle Garza
Assistant Attorney General
Open Records Division

MG/mo

Ref: ID# 840289

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties