



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 9, 2020

Ms. Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2020-22804

Dear Ms. Shafer:

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# 843601 (TDA-PIR-20-590).

The Texas Department of Agriculture (the “department”) received a request for information pertaining to a specified request for proposals.¹ You state the department will release some of the requested information. You state the department does not maintain information responsive to a portion of the request.² We understand the department will redact insurance policy numbers pursuant to section 552.136(c) of the Government Code.³ Although the department takes no position as to whether the submitted information is excepted under the

¹ We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov’t Code § 552.301(b), (e). Nonetheless, because the interests of third parties can provide a compelling reason to overcome the presumption of openness, we will consider whether any of the submitted information may be withheld under the Act. *See id.* §§ 552.007, .302, .352.

² The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

³ Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

Act, the department states release of the submitted information may implicate the proprietary interests of Aramark Educational Services, L.L.C.; Chartwells K12 (“Chartwells”); and Southwest Foodservice Excellence, L.L.C. (“SFE”). Accordingly, you state, and provide documentation showing, the department notified the 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 Chartwells and SFE. We have reviewed the submitted information and considered the submitted arguments.

Initially, 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 the remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third party has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest the remaining third party may have in the information.

Next, we note SFE argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the department has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information.

SFE raises section 552.104 of the Government Code for some of the information at issue. 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.” *Id.* § 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 SFE’s arguments under section 552.104 of the Government Code.

Section 552.110(b) of the Government Code 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 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 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). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Chartwells and SFE argue some of the information at issue consists of commercial or financial information subject to section 552.110(c). Upon review, we find Chartwells and SFE have demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, to the extent Chartwells’s customer information is not publicly available on its company’s website, the department must withhold Chartwells’s customer information under section 552.110(c) of the Government Code.⁴ However, to the extent it is publicly available on its company’s website, we find the department may not withhold Chartwells’s customer information under section 552.110(c) of the Government Code. Regardless, the department must withhold Chartwells’s and SFE’s information we have marked under section 552.110(c) of the Government Code.⁵ However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(c). Additionally, we find Chartwells and SFE 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.

⁴ In this instance, as our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Chartwells and SFE also argue some of the information at issue consists of trade secrets subject to section 552.110(b). Upon review, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b). Additionally, we find Chartwells and SFE have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

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 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.

Id. § 552.1101(a). Additionally, we note sections 552.0222(b) and 552.1101(b) list certain types of information to which section 552.1101(a) does not apply. *See id.* §§ 552.0222(b), .1101(b). Chartwells asserts disclosure of some of its information would reveal an individual approach to discounts and pricing methodology and give advantage to a competitor. Additionally, SFE asserts disclosure of some of its information would reveal an individual approach to processes and pricing methodology and give advantage to a competitor. Upon review, we find some of the remaining information at issue is subject to section 552.0222(b) or section 552.1101(b) and may not be withheld on the basis of section 552.1101(a). *See id.* (listing certain types of information not excepted under section 552.1101). Additionally, we find Chartwells and SFE have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue

is subject to section 552.1101(a). Therefore, the department may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁶ *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found.*, 540 S.W.2d at 685. 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. *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.). Thus, the department must withhold the public citizen’s date of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining information may be protected by copyright. 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, to the extent Chartwells’s customer information is not publicly available on its company’s website, the department must withhold Chartwells’s customer information under section 552.110(c) of the Government Code. The department must withhold Chartwells’s and SFE’s information we have marked under section 552.110(c) of the Government Code. The department must withhold the public citizen’s date of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information; however, any information that is subject to copyright may be released only 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

⁶ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

Alexandra C. Burks
Attorney
Open Records Division

ACB/gw

Ref: ID# 843601

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)