



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 21, 2020

Mr. Anthony Paul  
Assistant District Attorney  
Denton County  
P.O. Box 2344  
Denton, Texas 76202

OR2020-23759

Dear Mr. Paul:

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# 845508 (PIR# 20-203).

The Denton County Purchasing Department (the "department") received a request for certain information pertaining to a specified request for proposals. You state the department has released some information to the requestor. Although the department takes no position as to whether the submitted information is excepted from disclosure under the Act, the department states, and provides documentation showing, it notified The Master's Touch, LLC ("TMT") of the request for information and of the 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 TMT.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

Section 552.110(c) of the Government Code states:

Except as provided by Section 552.0222, commercial or financial information for which it is demonstrated based on specific factual evidence

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<sup>1</sup> Although TMT also raises sections 552.101 and 552.111 of the Government Code, it makes no arguments to support these exceptions. Therefore, we assume TMT has withdrawn its claim that these exceptions apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

that disclosure would cause substantial competitive harm to the person from whom the information was obtained is [excepted from required disclosure].

Gov't Code § 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). TMT states some of the submitted information consists of commercial or financial information subject to section 552.110(c). Upon review, we find TMT has 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 marked under section 552.110(c) of the Government Code; however, to the extent TMT's customer information is publicly available on its website, it may not be withheld under section 552.110(c). However, we find some of the remaining information is subject to section 552.0222(b), and may not be withheld on the basis of section 552.110(c). In addition, we find TMT has failed to provide specific factual evidence demonstrating the rest of the remaining information 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 under section 552.110(c) 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). As noted above, section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). TMT argues some of its remaining information consists of trade secrets subject to section 552.110(b). However, we find some of the remaining information is subject to section 552.0222(b), and may not be withheld on the basis of section 552.110(b). In addition, we find TMT has failed to provide specific factual evidence demonstrating any portion of the remaining information is a trade secret. Therefore, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.153 of the Government Code protects proprietary records and trade secrets involved in certain partnerships under chapter 2267 of the Government Code and provides, in part, as follows:

- (a) In this section, “affected jurisdiction,” “comprehensive agreement,” “contracting person,” “interim agreement,” “qualifying project,” and

“responsible governmental entity” have the meanings assigned those terms by [s]ection 2267.001.

(b) Information in the custody of a responsible governmental entity that relates to a proposal for a qualifying project authorized under [c]hapter 2267 is excepted from the requirements of [the Act] if:

(1) the information consists of memoranda, staff evaluations, or other records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under [c]hapter 2267 for which:

(A) disclosure to the public before or after the execution of an interim or comprehensive agreement would adversely affect the financial interest or bargaining position of the responsible governmental entity; and

(B) the basis of the determination under Paragraph (A) is documented in writing by the responsible governmental entity; or

(2) the records are provided by a proposer to a responsible governmental entity or affected jurisdiction under [c]hapter 2267 and contain:

(A) trade secrets of the proposer;

(B) financial records of the proposer, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or other means; or

(C) work product related to a competitive bid or proposal submitted by the proposer that, if made public before the execution of an interim or comprehensive agreement, would provide a competing proposer an unjust advantage or adversely affect the financial interest or bargaining position of the responsible government entity or the proposer.

*Id.* § 552.153(a)-(b). Section 2267.001(10) of the Government Code provides “qualifying project” means the following:

(A) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing car facility, recreational facility, public building, technological facility, or other similar facility currently available or to be

made available to a governmental entity for public use, including any structure, parking area, appurtenance, or other property required to operate the structure or facility and any technology infrastructure installed in the structure or facility that is essential to the project's purpose; or

(B) any improvements necessary or desirable to real property owned by a governmental entity.

*Id.* § 2267.001(10). Further, section 2267.001(11) provides “responsible governmental entity” means “a governmental entity that has the power to develop or operate an applicable qualifying project.” *Id.* § 2267.001(11). Although TMT raises section 552.153 for portions of its information at issue, the department does not inform us, nor has TMT established, either that the department is a responsible governmental entity as defined by section 2267.001(11) of the Government Code, or that the information at issue relates to a proposal for a qualifying project that is authorized under chapter 2267 of the Government Code. Therefore, the department may not withhold any of TMT's information under section 552.153 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.”<sup>2</sup> *See 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department must withhold the information we marked under section 552.110(c) of the Government Code; however, to the extent TMT's customer information is publicly available on its website, it may not be withheld under section 552.110(c) of the Government Code. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department 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.

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<sup>2</sup> 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).

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,

Kimbell Kesling  
Assistant Attorney General  
Open Records Division

KK/mo

Ref: ID# 845508

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)