



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 9, 2020

Ms. Lindsey McPheeters
Interim General Counsel
Round Rock Independent School District
1 Chisholm Trail, Suite 400
Round Rock, Texas 78681

OR2020-28132

Dear Ms. McPheeters:

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# 852836 (ORR 2021-006, 2021-028, and 2021-142).

The Round Rock Independent School District (the "district") received three requests from different requestors for information pertaining to request for proposals number 20-071, Interactive Video Display Systems. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.110, 552.1101, and 552.153 of the Government Code.¹ You also state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Ace Audio Communication; Canam Wireless; CDWG; Clary Business Machines; Data Projections; Education 2000; ELB US Inc.; GTS Technology Solutions; Howard Technology Solutions; Netsync Network Solutions; Pathway Communication; Piraino Consulting Inc. ("Piraino"); Prime Systems; ProComputing; QA Systems; Southern Technology Group, LLC; Summit Integration Systems; Technology for Education, LLC; and Virtucom of the requests 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

¹ Although the district also raises sections 552.305 and 552.352 of the Government Code, these sections are not exceptions to public disclosure under the Act. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for information and section 552.352 imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.305, .352.

to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from CDWG and Piraino. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the remaining third parties. Thus, we have no basis to conclude any of the remaining third parties at issue have 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 district may not withhold any of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we address the arguments from Piraino and the district that the submitted information should be excepted from disclosure because the information was supplied to the district with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the district must release it, notwithstanding any expectations or agreement specifying otherwise.

CDWG and the district raise section 552.104 of the Government Code. 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). 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). In *Boeing Co. v. Paxton*, the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See id.* 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 § 52.104(a). Therefore, we do not address CDWG's arguments under section 552.104. Further, after review of the information at issue and consideration of the arguments, we find the district has failed to demonstrate the applicability of section 552.104

to the information at issue. Thus, we conclude the district may not withhold the submitted information under section 552.104(a).

Section 552.110 of the Government Code 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 id.* § 552.110(b)-(c). Although the district argues some of the submitted information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the district’s argument under section 552.110.

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). Piraino generally argues its information consists of trade secrets subject to section 552.110(b). Upon review, we find Piraino has failed to provide specific factual evidence demonstrating any portion of the information at issue is a trade secret. Therefore, the district may not withhold any of Piraino’s information under section 552.110(b) of the Government Code.

The district claims some of the submitted information is subject to section 552.1101 of the Government Code. However, section 552.1101 protects only the interests of a vendor, contractor, potential vendor, or potential contractor that has provided information to a governmental body, not those of the governmental body itself. *See id.* § 552.1101(c). Therefore, we do not consider the district’s argument under section 552.1101.

Section 552.153 of the Government Code reads, in relevant 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 Section 2267.001.
- (b) Information in the custody of a responsible governmental entity that relates to a proposal for a qualifying project authorized under Chapter 2267 is excepted from the requirements of Section 552.021 if:

...

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

(A) trade secrets of the proposer; [or]

(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[.]

Id. § 552.153(a), (b)(2)(A)–(B). Section 2267.001(10) of the Government Code defines a “qualifying project” as 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 care facility, recreational facility, public building, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and 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 unimproved real estate owned by a governmental entity.

Id. § 2267.001(10). Further, section 2267.001(11) defines a “responsible governmental entity” as “a governmental entity that has the power to develop or operate an applicable qualifying project.” *Id.* § 2267.001(11). You generally assert the district is a “responsible governmental entity” as defined by section 2267.001(11). We note the submitted information pertains to a proposal for interactive video display systems. You do not inform us the information at issue relates to a proposal for a qualifying project that is authorized under chapter 2267 of the Government Code. Therefore, we find the district has failed to demonstrate the applicability of section 552.153(b) to any portion of the submitted information. Accordingly, the district may not withhold any of the submitted 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.” *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. *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.). Accordingly, the district must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.² However, although the district generally raises section 552.101 for the remaining information, you have not pointed to any confidentiality provision, nor are we aware of any, that would make any of the remaining information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code.

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, the district must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The district must release the remaining information; however, any information subject to 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

MRG/be

² As our ruling is dispositive for this information, we need not address your remaining claimed exception to disclosure for this information.

Ref: ID# 852836

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

2 Third Parties
(w/o enclosures)