



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 10, 2020

Mr. Reggie Hollins  
Legal Technology Specialist  
City of Plano  
P.O. Box 860358  
Plano, Texas 75086-0358

OR2020-28241

Dear Mr. Hollins:

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# 850517 (Ref. No. PUR-R003438).

The City of Plano (the "city") received a request for information pertaining to a specified city project. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> Additionally, you state release of the information at issue may implicate the proprietary interests of ACE Pipe Cleaning, Inc. ("ACE"); BCAC Underground, LLC; BELT Construction, Inc.; CSI Consolidated, LLC; and Hoffman Southwest Corp. d/b/a Profession Pipe Services ("Pro-Pipe"). Accordingly, you state, and provide documentation demonstrating, the city notified these interested 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 ACE and Pro-Pipe. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup> We note in a letter dated October 16, 2020, we asked the city to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the city on October 21, 2020, pursuant to that request.

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 any of the remaining third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude the remaining interested 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, the city may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in it.

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. This section encompasses information that is made confidential by other statutes, such as section 418.181 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.181 provides "[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism." *Id.* § 418.181. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive information falls within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the information you marked reveals the detailed locations of sanitary sewer transmission lines and manholes. You state, and we agree, the city's sanitary sewer system constitutes critical infrastructure for purposes of section 418.181. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). You assert release of the information at issue "would substantially increase the vulnerabilities of [the c]ity's critical infrastructure." You further assert release of the information at issue would allow criminal actors to tamper with the city's sanitary sewer system, which "would cause public safety and environmental concerns for citizens" of the city. Based on your representations and our review, we find you have demonstrated the release of the information at issue would identify the technical details of particular vulnerabilities of the city to an act of terrorism. Accordingly, the city must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

We note ACE generally asserts some of its information at issue is excepted from disclosure under section 552.101 of the Government Code. As previously noted, section 552.101

encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *Id.* § 552.101. However, ACE has not directed our attention to, and we are not aware of, any law under which any of the information at issue is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, we conclude the city may not withhold any portion of ACE's information at issue under section 552.101 of the Government Code on the basis of ACE's arguments.

ACE raises section 552.104 of the Government Code for some of its 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." 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 ACE's arguments under section 552.104 of the Government Code.

ACE raises section 552.110(b) of the Government Code for some of its information at issue.<sup>2</sup> Additionally, ACE and Pro-Pipe raise section 552.110(c) of the Government Code for some of their information at issue.<sup>3</sup> Section 552.110(b) 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

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<sup>2</sup> Although ACE raises former section 552.110(a) of the Government Code in its brief, we understand ACE to raise current section 552.110(b) based on the substance of its arguments.

<sup>3</sup> Although ACE raises former section 552.110(b) of the Government Code in its brief, we understand ACE to raise current section 552.110(c) based on the substance of its arguments.

whom the information was obtained[.]” *Id.* § 552.110(c). Upon review, we find ACE has demonstrated its customer reference information, which we marked, constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, to the extent it is not publicly available on ACE’s company website, the city must withhold the customer reference information we marked under section 552.110(c) of the Government Code.<sup>4</sup> However, to the extent the customer reference information we marked is publicly available on ACE’s company website, we find the city may not withhold such information under either section 552.110(b) or section 552.110(c). Additionally, we find ACE and Pro-Pipe have failed to provide specific factual evidence demonstrating any of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Further, we find ACE has failed to provide specific factual evidence demonstrating any of the remaining information at issue is a trade secret. Therefore, the city may not withhold any portion of the remaining information at issue under section 552.110 of the Government Code.

Section 552.101 of the Government Code also 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 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.). Accordingly, the city must withhold the date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining information appears to 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 city must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. To the extent it is not publicly available on ACE’s company website, the city must withhold the customer reference information we marked under section 552.110(c) of the Government Code. The city must withhold the date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

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<sup>4</sup> As our ruling is dispositive, we need not address ACE’s remaining argument against disclosure of this 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.

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,

Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/jxd

Ref: ID# 850517

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: 5 Third Parties  
(w/o enclosures)