



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 24, 2022

Mr. Cody Wilbanks
Associate General Counsel & Director of Legal Services
Fort Bend Independent School District
16431 Lexington Boulevard
Sugar Land, Texas 77479

OR2022-01832

Dear Mr. Wilbanks:

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# 928255 (TPIA #37811).

The Fort Bend Independent School District (the "district") received a request for information pertaining to a specified request for proposals. The district claims the submitted information is excepted from disclosure under sections 552.104 and 552.1101 of the Government Code. Additionally, the district states release of the submitted information may implicate the proprietary interests of numerous third parties. Accordingly, the district 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 as to why the submitted information should not be released.¹ *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 Get Hire and UltraStaff. We have reviewed the submitted information and considered the submitted arguments.

¹ The district notified: 22nd Century Technologies; Adroit Partners, L.L.C.; Arch Staffing & Consulting, L.L.C.; Argus Talent, L.L.C.; AtWork Personnel Services; Burnett Specialists; BuzzClan, L.L.C.; Cambay Consulting, L.L.C.; ChaseSource, L.P.; Cogent Infotech Corporation; Diskriter, Inc.; EDUStaff, L.L.C.; Elegant Enterprise-Wide Solutions, Inc.; Employment & Training Centers, Inc.; ExecuTeam Staffing; Get Hire Staffing ("Get Hire"); HJ Staffing; Infojini, Inc.; JWS Health Consultants, Inc. d/b/a UltraStaff ("UltraStaff"); Kelly Education; LanceSoft, Inc.; LMG Technology Services, L.L.C.; MSys, Inc.; ObjectWin Technology, Inc.; Perfection Staffing; Premier Employment Agency, L.L.C.; Smarter HR Solutions; StaffEZ of Texas; TMC Workforce Solutions, Inc.; and Tryfacta, Inc.

Initially, we note, and the district acknowledges, the district failed to comply with section 552.301 of the Government Code. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The district claims sections 552.104 and 552.1101 of the Government Code for the submitted information. However, we find the district has failed to establish a compelling reason to address its claim under section 552.104. We note section 552.1101 of the Government Code 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* Gov't Code § 552.1101(c). Thus, we do not address the district's arguments under section 552.1101 of the Government Code. Nevertheless, because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider whether the submitted information may be withheld on behalf of the notified third parties. *See id.* §§ 552.007, .302, .352.

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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). We note that although Get Hire submitted correspondence to our office generally objecting to the release of its information, Get Hire has not provided arguments explaining why any of the exceptions under the Act are applicable to the information at issue. Furthermore, as of the date of this letter, we have not received comments from any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude Get Hire or any of the remaining third parties have protected proprietary interests 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 the submitted information on the basis of any proprietary interest Get Hire or any of the remaining third parties may have in the information.

UltraStaff generally argues some of its information was supplied with the expectation of confidentiality. We note information is not confidential under the Act simply because the party submitting the information to a governmental body 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 overrule or repeal provisions of the Act through an agreement or contract. 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 section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, the district must release it, notwithstanding any expectation or agreement specifying otherwise.

Section 552.1101 of the Government Code provides, in relevant part:

(a) . . . [I]nformation 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.

Gov't Code § 552.1101(a). UltraStaff asserts disclosure of some of its information would reveal an individual approach to organizational structure, staffing, internal operations, processes, or other pricing information and give advantage to a competitor. Upon review, we find UltraStaff has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, to the extent UltraStaff's customer information is not made available to the public by UltraStaff, including but not limited to on its website or social medial accounts, the district must withhold UltraStaff's customer information under section 552.1101 of the Government Code.² However, to the extent UltraStaff's customer information is made available to the public by UltraStaff, including but not limited to on its website or social media accounts, it may not be withheld under 552.1101. Regardless, the district must withhold the information we have marked under section 552.1101 of the Government Code.³ However, we find UltraStaff has failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the district may not withhold it on that basis.

² In this instance, as our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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). UltraStaff argues some of its remaining information consists of trade secrets subject to section 552.110(b) and commercial or financial information subject to section 552.110(c). Upon review, we find UltraStaff has 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, the district may not withhold any of the remaining information at issue under section 552.110 of the Government Code.

UltraStaff also argues some of its remaining information fits the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the “TUTSA”). 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 exception encompasses information that another statute makes confidential. Section 134A.002(6) provides, in relevant part, the following:

“Trade secret” means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

- (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (B) 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.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of the TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)'s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act). *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the district may not withhold any of UltraStaff's information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of the Civil Practice and Remedies Code.

Section 552.101 of the Government Code also 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 district must withhold all public citizens' dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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.”⁴ Gov't Code § 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 at 9 (2009). Accordingly, the district must withhold all routing, bank account, and insurance policy numbers within the remaining information under section 552.136 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.

⁴ 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).

In summary, to the extent UltraStaff's customer information is not made available to the public by UltraStaff, including but not limited to on its website or social medial accounts, the district must withhold UltraStaff's customer information under section 552.1101 of the Government Code. The district must withhold the information we have marked under section 552.1101 of the Government Code. The district must withhold all public citizens' dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold all routing, bank account, and insurance policy numbers within the remaining information under section 552.136 of the Government Code. The district must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.⁵

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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/ba

Ref: ID# 928255

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)

⁵ We note the remaining information includes partial social security numbers. Section 552.147(b) of the Government Code authorizes a government body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).