



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 1, 2022

Mr. Trey Qualls
Assistant City Attorney
City of Fort Worth
200 Texas Street, 3rd Floor
Fort Worth, Texas 76102-6311

OR2022-02938

Dear Mr. Qualls:

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# 927469 (Ref. No. R000398-102621).

The City of Fort Worth (the "city") received a request for information pertaining to specified requests for proposals. You state you have released some information to the requestor. Although you take no position regarding whether the submitted information is excepted from disclosure under the Act, you inform us its release may implicate the proprietary interests of 31 interested third parties. Accordingly, you state, and provide documentation showing, you notified these interested third parties of the request for information and of the right to submit arguments to this office. *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 Cannon Cochran Management Services, Inc. ("CCMSI"); Claims Administration Services ("CAS"); Empyrean Benefit Solutions, Inc. ("Empyrean"); Forest T. Jones and Company ("FTJ"); Matrix Healthcare Services ("Matrix"); Morneau Shepell Limited ("LifeWorks"); PlanSource Benefits Administration, Inc. ("PlanSource"); UMR, Inc. ("UMR"); and United HealthCare Services, Inc. ("United"). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Matrix argues its information at issue is not responsive to the present request for information. However, we also note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990),

555 at 1-2 (1990), 534 at 2-3 (1989). Because the city has submitted the information at issue for our review, we find the city has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

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* 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 notified third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude any of the remaining notified 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 any of the remaining interested third parties may have in it.

FTJ asserts section 552.101 of the Government Code for its information. Section 552.101 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 is considered to be confidential under other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, FTJ has failed to direct our attention to any law, nor are we aware of any law, under which any of the information at issue is considered to be confidential for purposes of section 552.101. Therefore, none of the information at issue may be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code encompasses section 252.049 of the Local Government Code. PlanSource argues some of its information is excepted from disclosure pursuant to section 552.101 in conjunction with section 252.049 of the Local Government Code. Section 252.049 provides:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049(a), (b). This provision merely duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. Therefore, we will address PlanSource's arguments with respect to section 252.049 of the Local Government Code 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 doctrine of common-law 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 city must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

LifeWorks raises section 552.102(a) of the Government Code for portions of its information. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov't Code § 552.102(a). We understand LifeWorks asserts the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, 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. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d 336. The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Section 552.102(a) protects information relating to public officials and employees. *See Open Records Decision No. 345* (1982). In this instance, the information at issue is related to private entities. Therefore, the city may not withhold any portion of the remaining information under section 552.102(a) of the Government Code.

Empyrean raises section 552.104 of the Government Code for 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 Empyrean's argument 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.” *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). 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). CAS, CCMSI, Empyrean, FTJ, LifeWorks, Matrix, PlanSource, UMR, and United argue some of their information is subject to section 552.110 of the Government Code. Upon review, we find CAS, CCMSI, Matrix, UMR, and United have demonstrated some of their information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must generally withhold the information we marked and indicated and CCMSI’s customer information under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by CAS, CCMSI, Matrix, or UMR, including but not limited to on their websites or social media accounts, it may not be withheld under section 552.110.¹ In addition, we find CAS, CCMSI, Empyrean, FTJ, LifeWorks, PlanSource, and UMR have failed to provide specific factual evidence demonstrating any of their 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 city may not withhold any of the remaining information at issue under section 552.110 of the Government Code.

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;

¹ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(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). Empyrean, PlanSource, and UMR assert disclosure of some of the information at issue would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, or pricing information and give advantage to a competitor. Upon review, however, we find Empyrean, PlanSource, and UMR 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 city may not withhold any of the remaining information at issue under section 552.1101(a).

Section 552.136(b) 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.”² *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Empyrean asserts some of the e-mail addresses in the remaining information are subject to section 552.137 of the Government Code. Upon review, however, we find the e-mail addresses at issue are a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the city may not withhold any of the e-mail addresses at issue under section 552.137 of the Government Code.

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.

² 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, the city must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The city must generally withhold the information we marked and indicated and CCMSI's customer information under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by CAS, CCMSI, Matrix, or UMR, including but not limited to on their websites or social media accounts, it may not be withheld. The city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The city 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,

Meredith Coffman
Assistant Attorney General
Open Records Division

MLC/jm

Ref: ID# 927469

Enc. Submitted documents

c: Requestor
(w/o enclosures)

9 Third Parties
(w/o enclosures)