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ATTORNEY GENERAL OF TEXAS

March 18, 2022

Ms. Patricia M. Borschow
Assistant General Counsel
El Paso Water Utilities – Public Service Board
P.O. Box 511
El Paso, Texas 79961-0511

OR2022-07928

Dear Ms. Borschow:

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# 936713.

The El Paso Water Utilities – Public Service Board (the “board”) received a request for all proposals submitted to the board in response to a specified request for proposals. You claim the submitted information is excepted from disclosure under sections 552.110 and 552.1101 of the Government Code. Additionally, you state release of the information at issue may implicate the proprietary interests of the following third parties: The Broker Company; Franklin Mountain Management (“Franklin”); Hunt Companies, Inc. (“Hunt”); Lane Stone 1; Mesa Franklin Venture, LLC; and Sotoak Realty, LLC (“Sotoak”). Accordingly, you state, and provide documentation demonstrating, the board 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 Franklin, Hunt, and Sotoak. 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 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 any of the remaining

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 board 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 552.110 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 you assert the information at issue is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. In addition, although you also raise section 552.1101 of the Government Code for the information at issue, this section 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). Thus, we do not address your arguments under section 552.110 of the Government Code or section 552.1101 of the Government Code.

Franklin and Hunt raise section 552.104 of the Government Code for a portion of their information. 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.” *Id.* § 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 the arguments of Franklin or Hunt under section 552.104 of the Government Code.

Sotoak asserts its information at issue is excepted under section 552.105 of the Government Code, which excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Id. § 552.105. However, section 552.105 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 564 at 2 (1990) (statutory predecessor to section 552.105 designed to protect governmental body’s planning and negotiating position with respect to particular transactions), 357 at 3 (1982), 310 at 2

(1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). As the board did not submit arguments against disclosure of the information at issue under section 552.105 of the Government Code, no portion of the Sotoak's information may be withheld on that basis.

Franklin and Sotoak raise section 552.110 of the Government Code for some of their information at issue.¹ Section 552.110(b) 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* Gov't Code § 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 states:

Except as provided by Section 552.0222, 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 is [excepted from required disclosure].

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). Upon review, we find Franklin and Sotoak have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the board must withhold the information we have marked under section 552.110(c) of the Government Code.² However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110 of the Government Code. Additionally, we find Franklin and Sotoak have failed to provide specific factual evidence demonstrating any portion of the rest 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 board may not withhold any portion of the remaining information at issue under section 552.110 of the Government Code.

¹ Although Franklin raises former subsections 552.110(a) and 552.110(b) of the Government Code in its brief, we understand Franklin to raise current subsections 552.110(b) and 552.110(c) based on the substance of its arguments.

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

Section 552.131 of the Government Code relates to economic development information and provides, in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Id. § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.* § 552.131(a). Sotoak generally raises 552.131 for its remaining information at issue. We note the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a)-(c). Because we have already disposed of Sotoak’s claims for the information at issue under section 552.110, the board may not withhold any portion of the remaining information under section 552.131(a) of the Government Code. Furthermore, we note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the board does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of the remaining information may be withheld under section 552.131(b) of the Government Code.

Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section 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. Further, 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.). However, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). We also note an individual's name, address, and telephone number are generally not highly intimate or embarrassing. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy).

Upon review, we conclude the board must withhold all dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find Hunt has failed to demonstrate any portion of its remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the board may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note Franklin generally asserts some of its information at issue is excepted from disclosure under section 552.101 of the Government Code. This section encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. However, Franklin 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 board may not withhold any portion of Franklin's information at issue under section 552.101 of the Government Code on the basis of its arguments.

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 board must withhold the information we have marked under section 552.110(c) of the Government Code. The board must withhold all dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The board 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jxd

Ref: ID# 936713

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 6 Third Parties
(w/o enclosures)