



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 19, 2022

Mr. Vincent Harding
Assistant General Counsel
Aldine Independent School District
2520 W.W. Thorne Boulevard
Houston, Texas 77073

OR2022-21045

Dear Mr. Harding:

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# 958413.

The Aldine Independent School District (the "district") received a request for bid packets from two specified third parties related to a specified bid. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Fikes Wholesale Inc. ("Fikes") and Sun Coast Resources ("Sun Coast").¹ Accordingly, you state you 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. *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 Fikes. 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 Sun Coast explaining why the submitted information should not be released. Therefore, we have no basis to conclude Sun Coast has a protected proprietary

¹ We note you did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(e). Nonetheless, because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider the applicability of the third party arguments to the submitted information.

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 the submitted information on the basis of any proprietary interest Sun Coast may have in the information.

Fikes raises 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 Fikes’s arguments under section 552.104.

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.” 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 [s]ection 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). Fikes argues some of its information at issue consists of trade secrets subject to section 552.110(b) and commercial or financial information subject to section 552.110(c).² Upon review, we find

² Although Fikes cites to former sections 552.110(a) and 552.110(b) of the Government Code in its brief, we understand it to raise current sections 552.110(b) and 552.110(c) of the Government Code based on the substance of its arguments.

Fikes has demonstrated its customer information, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the district must withhold the information we have marked under section 552.110(c) of the Government Code; however, to the extent the information at issue is made available to the public by Fikes, including but not limited to on its website or social media accounts, it may not be withheld under 552.110(c) of the Government Code.³ However, to the extent Fikes's customer information is made available to the public by Fikes, including but not limited to on its website or social media accounts, it may not be withheld under 552.110 of the Government Code. Furthermore, we find some of the remaining information at issue is subject to section 552.0222(b) of the Government Code and may not be withheld on the basis of section 552.110 of the Government Code. In addition, we find Fikes has failed to provide specific factual evidence demonstrating any portion of the 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.

We understand Fikes to argue some of its remaining information at issue 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 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See id.* § 552.101. This section encompasses information made confidential by other statutes. Section 134A.002(6) provides:

"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 supplies, 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 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

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

Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134.002(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 § 134.002(6); *see also id.* § 134.007(d) (TUTSA does not affect disclosure of public information by governmental bodies under the Act). *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1978), 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 Fikes's remaining information under section 552.101 of the Government Code in conjunction with section 134.002(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. 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. *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 under section 552.101 of the Government Code in conjunction with common-law privacy.

Fikes argues portions of the remaining information is excepted from disclosure under section 552.136 of the Government Code. 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.” 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 the insurance policy numbers within the remaining information under section 552.136 of the Government Code. However, we find no portion of the remaining information consists of an access device number for purposes of section 552.136. Therefore, the district may not withhold any portion of the remaining information under section 552.136 of the Government Code.

Fikes raises section 552.137 of the Government Code for some of the remaining information. 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). *See* Gov’t Code § 552.137(a)-(c). We note section 552.137(c)(3) states section 552.137(a) does not apply to an e-mail address “contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract.” *Id.* § 552.137(c)(3). Upon review, we find the e-mail addresses included in the remaining information are a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the district 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 materials 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: (1) withhold the information we have marked under section 552.110(c) of the Government Code; however, to the extent the information at issue is made available to the public by Fikes, including but not limited to on its website or social media accounts, it may not be withheld under 552.110(c) of the Government Code; (2) withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; (3) withhold the insurance policy numbers under section 552.136 of the Government Code; and (4) release the remaining information; however, any information that is subject to copyright may be released only 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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/be

Ref: ID# 958413

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)