



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 16, 2015

Ms. Stacie S. White
Counsel for the City of North Richland Hills
Taylor, Olson, Adkins, Sralla, Elam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2015-26500

Dear Ms. White:

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# 590900.

The City of North Richland Hills (the "city"), which you represent, received a request for all proposals submitted in response to a specified request for proposal, including cost information and functional requirements. You state you will redact social security numbers under section 552.147(b) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. Although you take no position as to whether the remaining submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Archonix Systems, Integrated Computer Systems, New World Systems, Spillman Technologies ("Spillman"), TriTech Software Systems ("TriTech"), and Tiburon, Inc.² Accordingly, you state, and provide documentation showing, you notified the third parties

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

²We note the city did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Nonetheless, because section 552.137 of the Government Code and third party interests can provide compelling reasons to overcome the presumption of openness, we will consider the public availability of the submitted information. *See id.* §§ 552.007, .302, .352.

of the request for information and of their right to submit arguments to this office as to why the information at issue 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 received arguments from Spillman and TriTech. We have reviewed the submitted arguments and the submitted information.

Initially, we note some of the submitted information pertaining to Spillman was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-17935 (2015). In Open Records Letter No. 2015-17395, we determined, in pertinent part, the city must release Spillman's responsive pricing information; however, any information subject to copyright may only be released in accordance with copyright law. We understand the city did so. However, Spillman now argues its information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Although, the city notified Spillman pursuant to section 552.305 of the Government Code when the city received the previous request for information, Spillman did not submit comments objecting to the release of its information in the previous ruling. Accordingly, in our previous ruling, we determined the city must release Spillman's responsive pricing information. Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, the city may not withhold Spillman's previously released pricing information under section 552.104. However, because information subject to section 552.110 is deemed confidential by law, we will address Spillman's claim under this exception for its previously released pricing information. We will also consider Spillman's arguments under sections 552.104, 552.110, and 552.139 of the Government Code for Spillman's submitted information that was not at issue in the previous ruling.

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) of the Government Code 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). As of the date of this letter, we have only received comments from Spillman and TriTech explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case

that information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interests the remaining notified third parties may have in the information.

Next, we note TriTech objects to the disclosure of information the city has not submitted to this office for review. This ruling does not address information that was not submitted by the city and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841-42 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Spillman and TriTech state they have competitors. Spillman contends release of its information at issue would provide its competitors with explanations regarding the company’s rate calculations and software functions. In addition, TriTech states release of the methodology and pricing information it marked would give advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find Spillman and TriTech have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Spillman’s submitted information that was not at issue in Open Records Letter No. 2015-17935 and the information we marked in TriTech’s information under section 552.104(a) of the Government Code on behalf of Spillman and TriTech.³

Spillman claims its remaining pricing information is excepted from disclosure under section 552.110 of the Government Code, which 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* Gov’t Code § 552.110(a), (b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957), *cert. denied*, 358 U.S. 898 (1958); *see also* ORD 552 at 2. Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving

³As our ruling is dispositive, we need not address Spillman’s or TriTech’s remaining arguments against disclosure.

materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6.

As mentioned above, Spillman’s remaining pricing information was subject to Open Records Letter No. 2015-17935. In the prior ruling, the city notified Spillman of the request for information pursuant to section 552.305 of the Government Code. Spillman did not object to the release of its pricing information. Since the issuance of the previous ruling on

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

August 27, 2015, Spillman has not disputed this office's conclusion regarding the release of the information. In this regard, we find Spillman has not taken any measures to protect its pricing information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Spillman substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the city may not withhold Spillman's pricing information that was at issue in Open Records Letter No. 2015-17935 under section 552.110 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁵ Gov't Code § 552.101. This section encompasses information protected by other statutes, such as laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center (the "NCIC") or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov't Code §§ 411.081-.1409. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter E-1 or F of the Government Code. *See* Gov't Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. We note Federal Bureau of Investigation ("FBI") numbers constitute CHRI generated by the FBI. Upon review, we find the information we have marked may constitute confidential CHRI. However, we are unable to determine whether this information pertains to an actual individual or a fictitious individual created as a sample for purposes of responding to the city's request for proposals. Therefore, we rule conditionally. To the extent the information we have marked pertains to an actual individual, the city must withhold the information we have marked under section 552.101 in conjunction with federal law and chapter 411 of the Government Code. To the extent the information we have marked does not pertain to an actual individual, it is not confidential and the city may not withhold it under section 552.101 on that basis.

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy 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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. 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. *Indus. Found.*, 540 S.W.2d at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *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.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁶ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3.

Upon review, we find the remaining information contains dates of birth and information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we are unable to determine whether this information pertains to actual living individuals or fictitious individuals created as a sample for purposes of responding to the city's request for proposals. Therefore, we rule conditionally. To the extent the dates of birth in the remaining information and information we have marked pertain to actual living individuals, the city must withhold the dates of birth and the information we have marked under section 552.101 in conjunction with common-law privacy. To the extent the dates of birth in the remaining information or the information we have marked does not pertain to actual living individuals, it is not private and the city may not withhold it under section 552.101 on that basis.

⁶Section 552.102(a) exempts 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).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a). The remaining information contains motor vehicle information, which we have marked. However, we are unable to determine whether the marked information constitutes actual motor vehicle record information for purposes of section 552.130, or whether it is fictitious motor vehicle record information created as a sample for purposes of responding to the city's request for proposals. Therefore, we rule conditionally. To the extent the information we have marked constitutes actual motor vehicle record information, the city must withhold the marked information under section 552.130. To the extent the information we have marked consists of fictitious motor vehicle record information, it may not be withheld under section 552.130.

Section 552.136 of the Government Code provides, "Notwithstanding 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." *Id.* § 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 (2009). Accordingly, to the extent the information at issue constitutes actual insurance policy numbers, the city must withhold the insurance policy numbers we have marked under section 552.136. However, to the extent the marked insurance policy numbers are fictitious, the city may not withhold them under section 552.136.

The city states it will redact e-mail addresses contained in the submitted records under section 552.137 of the Government Code pursuant to Open Records Decision No. 684.⁷ We note section 552.137(c) provides section 552.137(a) does not apply to an e-mail address provided to a governmental body by a vendor who seeks a contractual relationship with the governmental body or to an email address contained in a response to a request for bids or proposals. Gov't Code § 552.137(c)(2)-(3). Thus, the submitted e-mail addresses are not excepted from public disclosure under section 552.137 of the Government Code and the city may not withhold the e-mail addresses on that basis.

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

⁷Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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 may withhold Spillman's submitted information that was not at issue in Open Records Letter No. 2015-17935 and the information we marked in TriTech's information under section 552.104(a) of the Government Code on behalf of Spillman and TriTech. To the extent the information we have marked pertains to an actual individual, the city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. To the extent the dates of birth in the remaining information and information we have marked pertain to actual living individuals, the city must withhold the dates of birth and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we have marked constitutes actual motor vehicle record information, the city must withhold the marked information under section 552.130 of the Government Code. To the extent they constitute actual insurance policy numbers, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. As no other exceptions to disclosure have been raised, the remaining information must be released; 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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 590900

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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