



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 27, 2013

Mr. Craig Purifoy
Open Records Coordinator
DFPS Records Management Group
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2013-11011

Dear Mr. Purifoy:

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# 491492 (DFPS Reference No. 040420130RW).

The Texas Department of Family and Protective Services (the "department") received a request for responses received by the department in reply to RFP numbers 530-13-0013 and RFP 530-13-0013A. You indicate the department is withholding the submitted social security numbers pursuant to section 552.147 of the Government Code.¹ You claim some of the requested information is excepted from disclosure under sections 552.101, 552.130, 552.136, and 552.137 of the Government Code.² In addition, you state, and provide documentation showing, the department notified the following third parties of the department's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released: Adoption Covenant; Behavioral Health Associates of Texas ("Behavioral Health"); Bracane Company ("Bracane"); Counseling Speciality Group ("CSG"); Lutheran Social Services of the South, Inc. ("Lutheran Services"); Mauney & Associates, LLC ("Mauney"); Pinnacle Social Services, LLC ("Pinnacle"); Rainbow of Love Adoption Agency, Inc. ("Rainbow");

¹Section 552.147 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 understand the department to raise sections 552.103, 552.130, and 551.37 of the Government Code based on its markings.

Restoring Peace Counseling Center, LLC ("RPCC"); San Antonio Family Endeavors, Inc. ("Family Endeavors"); Supportive Assistance for Family Enhancement Project, LLC ("SAFE"); and Timbercreek Family Social Service, LLC ("Timbercreek"). *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 correspondence from Adoption Covenant, Behavioral Health, Family Endeavors, Lutheran Services, and SAFE objecting to the release of some of the information at issue. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Family Endeavors has submitted information to this office it asserts is excepted from release under section 552.110 of the Government Code. However, the department did not submit this information for our review. This ruling does not address information beyond what the department has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information. *See id.*

We next note some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2013-09035 (2013) and 2013-09985 (2013). In Open Records Letter No. 2013-09985, we determined the department must withhold some of the information at issue, including information pertaining to Lutheran Services and Mauney, under sections 552.110(b) and 552.136 of the Government Code, but must release the remaining information. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2013-09985 was based have changed. Therefore, the department must rely on Open Records Letter No. 2013-09985 as a previous determination and withhold or release the information previously ruled upon in accordance with it. *See* Open Records Decision No. 673 (2001).

We note some of remaining submitted information, including information pertaining to Lutheran Services, was at issue in Open Records Letter No. 2013-09035. Although Lutheran Services was notified of the request for its information pursuant to section 552.305 of the Government Code in Open Records Letter No. 2013-09035, it did not submit comments in response to the request at issue in that previous ruling. In Open Records Letter No. 2013-09035, we concluded the department must withhold some of the requested information under section 552.110(a) of the Government Code, but must release the remaining information, including the information at issue pertaining to Lutheran Services. 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; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the

Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold the information that was previously released in accordance with Open Records Letter No. 2013-09035, unless its release is expressly prohibited by law or the information is confidential by law.

Lutheran Services now argues some of its information is excepted from release under sections 552.104 and 552.110 of the Government Code. Section 552.104 is a discretionary exception that protects a governmental body's interests and does not make information confidential under the Act. *See* Gov't Code § 552.104; Open Records Decision Nos. 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 could be waived). Thus, the department may not now withhold under section 552.104 any information that the department previously released. However, information subject to section 552.110 is deemed confidential by law. Therefore, because circumstances have changed with respect to Lutheran Service's information at issue in Open Records Letter No. 2013-09035, the department may not rely on that ruling as a previous determination for that information, and we will address Lutheran Service's arguments against its release under section 552.110. However, with respect to the remaining information that was previously ruled upon in Open Records Letter No. 2013-09035, there is no indication the law, facts, and circumstances on which the ruling was based have changed. Accordingly, the department must withhold or release the remaining information at issue in Open Records Letter No. 2013-09035 in accordance with that ruling. Lutheran Services has also submitted information not encompassed by a previous determination, and we will consider arguments against disclosure of that information as well.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Bracane, CSG, Mauney, Pinnacle, Rainbow, RPCC, and Timbercreek have not submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the submitted information constitutes proprietary information of these third parties, and the department may not withhold any portion of the submitted information on that basis. *See* 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, 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, including federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Attorney General Op. MW-372 (1981). Section 6103(b) defines the term "return information" as "a

taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we agree the tax return information you have marked in Pinnacle's documents, including 1065 and 4562 tax forms, constitutes tax return information that is confidential under section 6103(a) of title 26 of the United States Code. Therefore, the department must withhold this information under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 600 (1992), 545 (1990)*. However, the doctrine of common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. *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). Upon review we find none of the remaining information is highly intimate or embarrassing information pertaining to an individual and is not of legitimate concern to the public. Therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it from release under section 552.101 on that ground.

Family Endeavors raises section 552.101 of the Government Code. However, it does not cite to any specific law, and we are not aware of any, that makes any portion of the remaining information confidential under section 552.101. *See Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information*

confidential or stating information shall not be released to public). Therefore, we conclude Family Endeavors has not established any of its information is excepted from release pursuant to section 552.101 of the Government Code.

Adoption Covenant claims some of its information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) 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). Upon review, we find none of the submitted information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the submitted information may be withheld on that basis.

Lutheran Services argues some of the remaining information is excepted from disclosure under section 552.104 of the Government Code. However, as noted above, section 552.104 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. 592, 522 (1989) (discretionary exceptions in general). The department did not assert section 552.104. Therefore, the department may not withhold any of the remaining information at issue pursuant to that section. *See* ORD 592 (governmental body may waive section 552.104).

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides 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 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown 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). We also note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3.

Section 552.110(b) excepts from disclosure "[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." Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

As mentioned above, some of Lutheran Services's information was subject to a previous request for information, in response to which this office issued Open Records Letter No. 2013-09035. In that prior ruling, the department notified Lutheran Services pursuant to section 552.305, and Lutheran Services failed to submit any arguments that its information was excepted from disclosure under the Act. Since the issuance of the previous ruling on May 31, 2013, Lutheran Services has not disputed this office's conclusion regarding the release of the information at issue, and we presume, in accordance with that ruling, the department has released the proposal. In this regard, we find Lutheran Services has not taken necessary measures to protect the information at issue in order for this office to conclude any portion of that information now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause Lutheran Services 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 department may not withhold this information under section 552.110 of the Government Code. However, we find Lutheran

³The following are the six factors that the Restatement gives 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 others 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).

Services has established the release of some of the remaining information at issue would cause it substantial competitive injury. Therefore, the department must withhold this information, which we have marked, under section 552.110(b). We note the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. Upon review, Adoption Covenant, Behavioral Health, Family Endeavors, and Lutheran Services have made only conclusory allegations that release of the remaining information at issue would cause substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(b). In addition, we conclude Adoption Covenant, Behavioral Health, Family Endeavors, and SAFE have failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b; ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Thus, the department may not withhold any of the remaining information under section 552.110.

Section 552.130(a)(1) of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country[.]

Gov't Code § 552.130(a)(1). We note some of the information you seek to withhold under section 552.130 does not consist of motor vehicle information that is excepted from disclosure on that ground. Accordingly, the department may not withhold this information, which we have marked for release, under section 552.130. However, we agree the department must withhold the remaining motor vehicle record information you have marked, as well as the information we have marked, under section 552.130 of the Government Code.⁴

⁴We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Act of May 6, 2013, 83rd Leg., R.S., S.B. 458, § 1 (to be codified as an amendment to Gov't Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See* Gov't Code § 552.130(d), (e).

Section 552.136 of the Government Code provides in part the following:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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(a)-(b). We note this office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). We understand the department seeks to withhold the submitted direct deposit and insurance policy forms in their entirety pursuant to section 552.136. However, the department has failed to establish these documents are excepted from disclosure in their entirety on that ground. Nevertheless, we agree the department must withhold the bank account and insurance polices numbers you have marked, as well as the bank account, bank routing, and insurance policy numbers we have marked, under section 552.136 of the Government Code. However, you have failed to demonstrate the applicability of section 552.136 to any of the remaining information, and the department may not withhold it on that ground.

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). Gov’t Code § 552.137(a)-(c). However, section 552.137 does not except from release 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[.]” *See id.* § 552.137(c)(3). The e-mail addresses the department has marked are subject to section 552.137(c)(3). Therefore, the department may not withhold this information under section 552.137. *See id.* § 552.137(a).

Finally, we note some of the materials at issue 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.

To conclude, the department must rely on Open Records Letter No. 2013-09985 as a previous determination and withhold or release the submitted information at issue in that ruling in accordance with it. With the exception of Lutheran Service's information, the department must rely on Open Records Letter No. 2013-09035 as a previous determination and withhold or release the submitted information at issue in that ruling in accordance with that ruling. The department must withhold the tax return information you have marked in Pinnacle's documents under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The department must withhold the information we have marked under section 552.110 of the Government Code. With the exception of the information we have marked for release, the department must withhold the information marked under section 552.130 of the Government Code. The department must withhold the bank account, bank routing, and insurance policy numbers marked under section 552.136 of the Government Code. The department must release the remaining information, but may only release any copyrighted information 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 491492

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Erica D. Dolan
Behavioral Health Associates of
Texas
4444 Corona Drive, Suite 127
Corpus Christi, Texas 78411
(w/o enclosures)

Ms. Merinda K. Condra
Counsel for Adoption Covenant
The Condra Law Firm
P.O. Box 2468
Lubbock, Texas 79408
(w/o enclosures)

Ms. Myrei C. Edwards
Executive Director
Supportive Assistance for
Family Enhancement Project, LLC
14922 El Tesoro Drive
Houston, Texas 77083
(w/o enclosures)

Mr. Monte F. James
Counsel for Lutheran Social Services of
the South, Inc.
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Mr. Tim Daniels
Counsel for San Antonio Family
Endeavors, Inc.
Daniels & Daniels
11120 Wurzbach Road, Suite 301
San Antonio, Texas 78230
(w/o enclosures)

Ms. Stephanie Johnson
Restoring Peace Counseling
Center, LLC
Suite 200
18756 Stone Oak Parkway
San Antonio, Texas 78258
(w/o enclosures)

Ms. Georgina Espinoza
Counseling Speciality Group
4120 Rio Bravo
El Paso, Texas 79902
(w/o enclosures)

Ms. Pamela Nelson
Bracane Company
101 East Park Boulevard, Suite 702
Plano, Texas 75074
(w/o enclosures)

Ms. Melissa Mauney
Mauney & Associates, LLC
758 County Road 417
Evant, Texas 76525
(w/o enclosures)

Ms. Lucia S. Gadney
Pinnacle Social Services, LLC
1418 Montana Avenue
El Paso, Texas 79902
(w/o enclosures)

Ms. Debbie Richards
Rainbow of Love Adoption
Agency, Inc.
2700 Lake Olympia Parkway, 1A
Missouri City, Texas 77459
(w/o enclosures)