



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2013

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

OR2013-16243

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# 498232 (DFPS ORR No. 06202013U6R).

The Texas Department of Family and Protective Services (the "department") received a request for the scoring sheets and bid proposals submitted by Arrow Child & Family Ministries ("Arrow"), Lutheran Social Services of the South ("Lutheran"), Eckerd-New Horizons Ranch & Center, Inc. ("New Horizons"), and Providence Service Corporation of Texas ("Providence") in reference to procurement number 530-12-0003. 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 552.136 of the Government Code.² Additionally, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified Arrow, Lutheran, New Horizons, and Providence of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested

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. Gov't Code § 552.147(b). We note taxpayer identification numbers and employer identification numbers issued by the Internal Revenue Service are not subject to section 552.147 of the Government Code.

²Although you do not raise section 552.136 of the Government Code in your brief, we understand you to raise this exception based on your markings.

third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from Lutheran and New Horizons. Thus, we have considered the arguments and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2013-13962 (2013) and 2013-14602 (2013). In Open Records Letter Nos. 2013-13962 and 2013-14602, we ruled the submitted information must be released to the respective requestors. We have no indication that the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in the prior rulings, the department must continue to rely on those rulings as previous determinations and release the previously ruled upon information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information is not encompassed by Open Records Letter Nos. 2013-13962 and 2013-14602, we will address the arguments against its release.

Next, we must address the department's responsibilities under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Additionally, under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). You do not inform us of the date the department received the request for information. Because you do not inform us when the department received the request, we must assume the department received the request on the date it was dated, which is May 6, 2013. Thus, the department was required to request a decision from this office by May 20, 2013, and to submit the information required by section 552.301(e) by May 28, 2013. However, we did not receive your request for a decision or the information

required by section 552.301(e) until June 28, 2013. *See id.* § 552.301(b), (e). We note the envelope in which you sent the documents required by section 552.301 is not postmarked. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). You have also not otherwise provided sufficient evidence to establish the required documents were submitted to our office by the department's statutory deadlines. Therefore, we conclude the department failed to establish it complied with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because sections 552.101, 552.130, and 552.136 of the Government Code can provide compelling reasons to withhold information, we will address the applicability of these sections to the submitted information.³ Further, because third-party interests are at stake in this instance, we will consider whether the submitted information is excepted under the Act.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Arrow and Providence. Thus, Arrow and Providence have failed to demonstrate they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interests Arrow or Providence may have in the information.

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 that other statutes make confidential. Section 6103 of title 26 of the United States Code makes certain federal tax returns and tax return information confidential. *See* 26 U.S.C. § 6103(a); *see also id.* § 6103(b)(1)–(2)

³The 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).

(defining “return” and “return information”). However, section 6104 of title 26 provides for the disclosure of tax returns in certain situations:

(d) Public inspection of certain annual returns[.]--

(1) In general.--In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501(a) or an organization exempt from taxation under section 527(a) --

(A) a copy of --

(i) the annual return filed under section 6033 . . . by such organization,

...

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and . . .

(B) upon request of an individual made at such principal office . . ., a copy of such annual return . . . shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

...

(2) 3-year limitation on inspection of returns.--Paragraph (1) shall apply to an annual return filed under section 6011 or 6033 only during the 3-year period beginning on the last day prescribed for filing such return (determined with regard to any extension of time for filing).

Id. § 6104(d)(1)–(2); *see* 26 C.F.R. § 301.6104(d)-1(a). Thus, a section 501(c) or (d) tax-exempt organization must generally make its annual returns available for public inspection for a period of three years from the last day prescribed for filing.

We note the submitted information contains tax returns and return information. This information includes Form 990 and Form 990-EZ tax returns that were filed by section 501(c) tax-exempt organizations. We note the submitted information reflects some of these tax returns were filed less than three years prior to the date of the department’s receipt of the instant request for information. Therefore, those tax returns are generally

subject to public disclosure pursuant to section 6104 of title 26 of the United States Code. The remaining tax returns at issue, which we have indicated, reflect their filing dates were more than three years prior to the date the department received the request for information. Thus, the three-year inspection period has lapsed with regard to those returns, and the requestor does not have a right of inspection under section 6104. Accordingly, the department must withhold the Form 990 and Form 990-EZ tax returns we have indicated under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The submitted information also contains tax returns and return information that are not subject to section 6104(d). Thus, Forms 851, 1120, 1128, 4562, 7004, 8083, 8453-C, 8868, and 8879-EO, with respective attachments, are also confidential under section 6103(a) of title 26 of the United States Code, and the department must withhold this information pursuant to section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas 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. This office also has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities”), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Upon review, we find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address New Horizons’s and Lutheran’s arguments against disclosure. New Horizons raises section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code, which provides as follows:

- (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. 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 New Horizons's arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

Lutheran asserts its information is excepted from public disclosure under section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the department, not the proprietary interests of private parties such as Lutheran. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the department does not raise section 552.104 as an exception to disclosure. Therefore, the department may not withhold any of the remaining information under section 552.104 of the Government Code.

Lutheran and New Horizons state their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). We 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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 (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).

In advancing their arguments, we understand Lutheran and New Horizons to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C.

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).

Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interests of Lutheran and New Horizons in the remaining information.

Upon review, we find Lutheran and New Horizons have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret. We further find the companies have failed to demonstrate the necessary factors to establish a trade secret claim for their information. See ORD 402. Therefore, none of Lutheran's or New Horizons's remaining information may be withheld under section 552.110(a).

Upon review, we find Lutheran and New Horizons have made only conclusory allegations that the release of any of their information would result in substantial harm to their competitive position. See Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, none of Lutheran's or New Horizons's remaining information may be withheld under section 552.110(b).

We note some of the remaining information is subject to sections 552.130 and 552.136 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit, title, or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1)-(2).

Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.⁵

You state will you will redact some information pursuant to section 552.136(c) of the Government Code. Section 552.136(c) permits a governmental body to redact the information described in section 552.136(b) without the necessity of requesting a decision from this office. *See id.* § 552.136(c)-(e) (providing procedures for redaction of information). Section 552.136(b) 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.” *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. Open Records Decision No. 684 at 9 (2009). We note some of the information you have marked for redaction is not subject to section 552.136. That information, which we have indicated, may not be withheld under section 552.136. Further, we have marked additional information in the documents that is subject to section 552.136. Accordingly, with the exception of the information we have indicated, the department must withhold the information it has marked and the additional information we have marked, under section 552.136 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.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter Nos. 2013-13962 and 2013-14602, the department must continue to rely on those rulings as previous determinations and release the previously ruled upon information in accordance with those rulings. To the extent the submitted information is not encompassed by those prior rulings, the department must withhold (1) the Form 990 and Form 990-EZ tax returns we have indicated and Forms 851, 1120, 1128, 4562, 7004, 8083, 8453-C, 8868, and 8879-EO under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of

⁵We note section 552.130(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the motor vehicle record information described in subsections 552.130(a)(1) and (a)(3). *See* Gov’t Code § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body’s decision to withhold information under section 552.130(c) to attorney general and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor).

the United States Code; (2) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the motor vehicle record information we have marked under section 552.130 of the Government Code; and (4) with the exception of the information we have indicated, the information the department has marked and the additional information we have marked, under section 552.136 of the Government Code. The remaining information must be released; however, any information protected by 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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 498232

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Kevin Giddens
Counsel for New Horizons Ranch & Center, Inc.
Ladd & Thigpen, P.C.
235 South Broadway, Suite 200
Tyler, Texas 75702
(w/o enclosures)

Ms. Kimberly Gdula
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)

Providence Service Corporation of Texas
c/o Craig Purifoy
Open Records Coordinator
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030
(w/o enclosures)