



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Mr. Jonathan Miles  
Open Government Attorney  
Texas Department of Family and Protective Services  
Department Mail Code E611  
P.O. Box 149030  
Austin, Texas 78714-9030

Mr. Craig Purifoy  
Open Records Coordinator  
Texas Department of Family and Protective Services  
Mail Code 937  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2014-18208

Dear Mr. Miles and 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# 538856 (DFPS Ref. Nos. 07222014A1G, 07242014TPV).

The Texas Department of Family and Protective Services (the "department") received two requests for new applications for licenses to operate residential facilities for unaccompanied minors. You state the department has released some responsive information with redactions pursuant to sections 552.130(c), 552.136(c), and 552.147(b) of the Government Code and

Open Records Letter No. 684 (2009).<sup>1</sup> Although you take no position as to whether the remaining information is excepted under the Act, you state release of the information at issue may implicate the proprietary interests of an interested third party, Refugee and Immigrant Services and Watford Ranch (collectively, "RISE").<sup>2</sup> Accordingly, you state, and provide documentation showing, you notified RISE of the request for information and of its 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 submitted on behalf of RISE. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted e-mails are not responsive to the first request for information, as they were created after the date the department received the first request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to the first request.

RISE raises section 552.101 of the Government Code in conjunction with the Fourth Amendment to the United States Constitution (the "Fourth Amendment"). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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<sup>1</sup>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 id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Section 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 id.* § 552.147(b). Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

<sup>2</sup>We note the department did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(e). Nevertheless, because third-party interests can provide a compelling reason for non-disclosure, we consider whether any of the information at issue may be withheld on behalf of a third party. *See id.* §§ 552.007, .302, .352.

U.S. Const. amend. IV. RISE seeks to withhold the director's "personal . . . information such as employee history and student records[.]" We note the information at issue was provided to the department by RISE as part of its licensing application.<sup>3</sup> RISE has provided no arguments to explain how the Fourth Amendment prohibits the department from compiling responsive information from its files and then releasing the responsive information under the Act. *See U.S. v. Simmons*, 206 F. 3d 392 (4th Cir. 2000) (public employer's remote, warrantless search of employee's office computer did not violate his Fourth Amendment rights because, in view of employer's internet policy, employee lacked legitimate expectation of privacy); *see also* Open Records Decision No. 467 (1987) (rejecting argument that "search" of personnel file by school district to extract certain information to respond to records request was prohibited by Fourth Amendment where "search" in question is of government file, not of personal file). Therefore, the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with the Fourth Amendment.

RISE next claims some of the submitted information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, and under section 552.114 of the Government Code. *See* Gov't Code § 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 of Government Code and FERPA). FERPA governs the disclosure of education records maintained by educational institutions or agencies that receive federal funds and is applicable only to education records than an educational institution either maintains or has directly transferred to a third party. *See* 34 C.F.R. § 99.33(a)(2). We note the department is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not "educational agency" for purposes of FERPA). Further, the department does not indicate any of the submitted information was received from an educational institution. Therefore, FERPA and section 552.114 are not applicable in this instance.

We understand RISE to claim some of the information at issue is protected by common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

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<sup>3</sup>The specific parts of the application RISE seeks to withhold are Application Form 2960, Personal History Form 2982, transcripts, and a resume.

Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). We also note an individual's name, education, prior employment, and personal information are not ordinarily private information subject to common-law privacy. *See* Open Records Decision Nos. 554 (1990), 448 (1986).

Upon review, we find RISE has failed to demonstrate any portion of the submitted information is highly intimate or embarrassing and of no legitimate public interest. Thus, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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). We understand RISE to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with Hubert's interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Having carefully reviewed the information at issue, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the department may not withhold any of the remaining information on that basis.

RISE next claims its information is excepted from public disclosure under sections 552.104 and 552.105 of the Government Code, which except, respectively, “information that, if released, would give advantage to a competitor or bidder[.]” and information relating to “appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.” Gov't Code §§ 552.104(a), .105(2). These exceptions protect the competitive interests of governmental bodies such as the department, not the proprietary interests of private parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor to section 552.104), 564 at 2 (1990) (statutory

predecessor to section 552.105 designed to protect governmental body's planning and negotiating position with respect to particular transactions), 310 at 2 (1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose). In this instance, the department does not seek to withhold any information under section 552.104 or 552.105. Therefore, the department may not withhold any of RISE's information under section 552.104 or 552.105 of the Government Code.

RISE next raises section 552.110 of the Government Code for its information. 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. Gov't Code § 552.110.

Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *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.<sup>4</sup> See 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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. 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.*; Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

RISE asserts its information is subject to section 552.110(a) of the Government Code. Upon review, we find RISE has failed to demonstrate any of its information meets the definition of a trade secret, nor has RISE demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the department may not withhold any of the submitted information under section 552.110(a) of the Government Code.

RISE argues release of its information would cause the company substantial competitive harm. Upon review, we find RISE has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause RISE substantial competitive harm. 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

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<sup>4</sup>There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (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).

release of particular information at issue), 509 at 5 (1988) (because 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. Accordingly, none of RISE's information may be withheld under section 552.110(b) of the Government Code. Therefore, the department must release the responsive information.

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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 538856

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Sergio Medina  
President and CEO  
Refugee and Immigrant Services  
537 Lisbon Street  
San Francisco, California 94112  
(w/o enclosures)