



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 16, 2016

Mr. Javier Saenz  
Assistant County Attorney  
University Medical Center of El Paso  
4815 Alameda Avenue, Eighth Floor, Suite B  
El Paso, Texas 79905

OR2016-18551

Dear Mr. Saenz:

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# 622657 (HM-16-126 and HM-16-128).

The El County Hospital District d/b/a University Medical Center of El Paso (the "district") received two requests from the same requestor for information pertaining to individuals who applied for the district's chief executive officer ("CEO") position during a specified time period and a specified contract. You state the district does not have information responsive to some portions of the requests.<sup>1</sup> Although the district takes no position regarding whether the submitted information is excepted from disclosure, you state its release may implicate the proprietary interests of Witt/Kieffer, Inc. ("Witt/Kieffer"). Accordingly, you state, and provide documentation showing, you notified Witt/Kieffer of the requests 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). You also state release of some of the submitted information may implicate the interests of the individuals who applied for the CEO position at issue (the "applicants"), whom you state the district notified. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

comments from Witt/Kieffer, some of the applicants, and representatives for other applicants.<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.<sup>3</sup>

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (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. Witt/Kieffer states it has competitors. In addition, Witt/Kieffer states release of its contract would enable its competitors to undercut Witt/Kieffer’s pricing and to offer more favorable terms in bidding for government entity work. We note the information Witt/Kieffer seeks to withhold consists of an executed contract between the district and Witt/Kieffer. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find Witt/Kieffer has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the submitted contract under section 552.104(a) of the Government Code.

One of the applicants generally asserts his information is subject to section 552.104 of the Government Code. However, this applicant has not provided arguments to explain why this exception applies. Accordingly, none of the remaining information may be withheld under section 552.104 of the Government Code.

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<sup>2</sup>We note we have not received comments from the remaining individuals who applied for the CEO position at issue.

<sup>3</sup>Although some of the applicants assert section 552.101 of the Government Code, they make no arguments to support this exception. Therefore, we presume these applicants have withdrawn this argument for the information at issue. Further, although some of the applicants raise section 552.305 of the Government Code, we note this is not an exception to public disclosure under the Act. *See* Gov’t Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *Id.*

Section 552.110(b) of the Government Code 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 Open Records No. 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).

Five of the applicants assert their information is subject to section 552.110(b). Four of the applicants argue release of their information would cause them to suffer substantial damage and competitive harm to their personal and professional reputation and may result in their current employers terminating their employment. Upon review of these arguments, we find the applicants failed to make the specific factual or evidentiary showing that release of their information would result in substantial damage to their competitive positions. See Open Records Decision Nos. 319 at 3 (1982) (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) (résumés cannot be said to fall within any exception to the Act).

In addition, upon review of Witt/Kieffer’s arguments and the information at issue, we find Witt/Kieffer has failed to make the specific factual or evidentiary showing that release of the remaining information the company seeks to withhold would result in substantial damage to its competitive position. Thus, Witt/Kieffer has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. See Open Records Decision Nos. 661, 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). Accordingly, the district may not withhold any of the remaining information at issue under section 552.110(b) on the basis of the interests of the applicants or Witt/Kieffer.

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. Section 552.101 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.

Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note an individual’s name, address, and telephone number are generally not private information under common-law privacy. See Open Records Decision No. 554 at 3 (1990) (disclosure of person’s name, address, or

telephone number not invasion of privacy). 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.<sup>4</sup> *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.

Thus, the district must withhold the public citizen's date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Although Witt/Kieffer and some of the applicants assert the remaining information at issue is subject to common-law privacy, we find Witt/Kieffer and the applicants failed to demonstrate the information at issue is highly intimate or embarrassing and not of legitimate public interest. Therefore, the district may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find Witt/Kieffer and the applicants failed to demonstrate any of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the district may not withhold the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

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<sup>4</sup>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).

Witt/Kieffer contends the remaining information is confidential under section 552.123 of the Government Code. Section 552.123 of the Government Code excepts from required public disclosure:

The name of an applicant for the position of chief executive officer of an institution of higher education, and other information that would tend to identify the applicant, . . . except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person.

Gov't Code § 552.123. Section 552.123 permits the withholding of *any* identifying information about the candidates, not just their names. Open Records Decision No. 540 (1990) (construing statutory predecessor to section 552.123). Examples of information identifying individuals might include, but are not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant. *Id.* at 4. In addition, the exception protects the identities of all persons being considered for the position of university chief executive officer, whether they are nominated or apply on their own initiative. *Id.* at 5.

Witt/Kieffer asserts the district is an “institution of higher education” as defined by section 61.003(8) of the Education Code. *See* Educ. Code § 61.003 (8). However, section 552.123 does not reference section 61.003(8), which defines “institution of higher education” only for purposes of chapter 61 of the Education Code. Thus, we find Witt/Kieffer failed to show the district is an institution of higher education for purposes of section 552.123. Accordingly, the district may not withhold the remaining information under section 552.123.

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code.<sup>5</sup> Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). To the extent the e-mail addresses at issue are not of a type specifically excluded by section 552.137(c), the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. However, to the extent the e-mail addresses at issue are excluded by section 552.137(c), or the owners affirmatively consent to their release, the district may not withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

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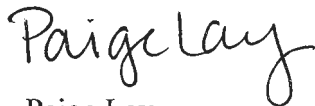
<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district may withhold the submitted contract under section 552.104(a) of the Government Code. The district must withhold the public citizen's date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Provided the e-mail addresses at issue are not of a type specifically excluded by section 552.137(c), the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The district must release the remaining 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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/akg

Ref: ID# 622657

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

6 Third Parties  
(w/o enclosures)