



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 8, 2017

Mr. David Wheelus
Public Information Coordinator
Open Records Office
General Counsel Division
Texas Department of Insurance
MC 110-1C
P.O. Box 149104
Austin, Texas 78714-9104

OR2017-17901

Dear Mr. Wheelus:

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# 669920 (TDI #181167).

The Texas Department of Insurance (the "department") received a request for information pertaining to six specified enforcement cases.¹ You state you have released some of the requested information. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of YourPeople, Inc., dba Zenefits FTW Insurance Services ("Zenefits"). Accordingly, you state, and provide documentation showing, you notified Zenefits of the request for information and of its right to submit arguments to this office as

¹We note you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the department received the required deposit on February 28, 2017. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

to why the submitted information should not be released.² *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 from Zenefits. We have considered the submitted arguments and reviewed the submitted information.

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

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (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. Zenefits states it has competitors. In addition, Zenefits states the release of its information at issue would “cause substantial competitive harm to Zenefits and would give unfair advantage to the [c]ompany’s competitors.” After review of the information at issue and consideration of the arguments, we find Zenefits has established the release of the information at issue, which we marked and indicated, would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we marked and indicated under section 552.104(a) of the Government Code.³

Zenefits also claims some of its remaining information is excepted under section 552.110(b) of the Government Code, which protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999).

²We note, and the department acknowledges, it did not comply with section 552.301 of the Government Code in requesting this decision. *See id.* § 552.301(b). Nonetheless, because third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352

³As our ruling is dispositive, we need not address Zenefits’ remaining arguments against disclosure of this information.

Zenefits argues some of the remaining information consists of commercial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Zenefits has demonstrated the information we marked constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold the information we marked under section 552.110(b) of the Government Code.⁴

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. However, we note the names of members of the public are generally not highly intimate or embarrassing. See Open Records Decision No. 551 at 3 (1990) (disclosure of person’s name, address, or telephone number not an invasion of privacy). Additionally, 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 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 Zenefits has failed to establish the information it seeks to withhold under common-law privacy is highly intimate or embarrassing and not of legitimate public interest and thus, none of this information may be withheld under section 552.101 of the Government Code on that basis.

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 Zenefits 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. Section 552.101 encompasses common-law privacy, 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

⁴As our ruling is dispositive, we need not address Zenefits’ remaining arguments against disclosure of this information.

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*, 354 S.W.3d 336. 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. Upon review, we find no portion of the submitted information is subject to section 552.102(a) of the Government Code, and the department may not withhold any of the submitted information on that basis.

We note some of the remaining information may be subject to section 552.117 of the Government Code.⁵ Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the department may not withhold the information under section 552.117(a)(1).

In summary, the department may withhold the information we marked and indicated under section 552.104(a) of the Government Code. The department must withhold the information we marked under section 552.110(b) of the Government Code. To the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code. The department 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.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision No. 481 (1987), 480 (1987), 470 (1987)*.

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,



Kaelan A. Henze
Attorney
Open Records Division

KAH/eb

Ref: ID# 669920

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)