



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 5, 2019

Mr. Gary A. Scott
Assistant City Attorney
City of Conroe
P.O. Box 3066
Conroe, Texas 77305

OR2019-14856

Dear Mr. Scott:

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# 769137.

The City of Conroe (the "city") received a request for information pertaining to a specified request for proposals, including vendor responses and evaluation documents. The city claims the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, the city states release of the information at issue may implicate the proprietary interests of several third parties.¹ Accordingly, the city states, and provides documentation showing, it notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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

¹The city informs us it notified the following interested third parties of the request for information: Aetna Life Insurance Company ("Aetna"); Blue Cross Blue Shield of Texas; CIGNA; ConnectYourCare, LLC ("CYC"); Dearborn National ("Dearborn"); Deer Oaks EAP Services, LLC; Discovery Benefits, Inc. ("DBI"); Flores & Associates, LLC; HSA Bank; Interface EAP; Meritain Health, Inc. ("Meritain"); Ochs, Inc.; Premier Pension Solutions, LLC; SA Benefit Service, LLC; Standard Insurance Company; Stealth Partner Group; Symetra; TML Multistate Intergovernmental Employee Benefits Pool d/b/a TML Health Benefits Pool ("TML"); United Healthcare Services; Wage Works; WellDyneRx; and Workers Assistance Program d/b/a Alliance Work Partners.

in certain circumstances). We have received comments from Aetna, CYC, DBI, Dearborn, Meritain, and TML. We have considered the submitted arguments and reviewed the submitted information, some of which constitutes a representative sample of information.²

Initially, we note you have only submitted vendor responses pertaining to the specified request for proposals. Although you state you have submitted a representative sample of the requested information, we find the submitted information is not representative of all the types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of information you have submitted for our review. This ruling does not authorize the city to withhold any information that is substantially different from the type of information you submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with the requirements of Gov't Code § 552.301, information at issue is presumed to be public). Therefore, to the extent any additional information responsive to the request existed on the date the city received the request for, we assume the city has released it to the requestor. If the city has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Aetna, CYC, DBI, Dearborn, Meritain, and TML explaining why the information at issue should not be released. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; 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. Therefore, the city may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

CYC and DBI assert all of their submitted information is excepted from public disclosure under section 552.104 of the Government Code. Additionally, Aetna, Dearborn, Meritain, and TML assert portions of their submitted information are excepted from public disclosure under section 552.104. Section 552.104(a) excepts from disclosure "information that, if

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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. Aetna, CYC, DBI, Dearborn, Meritain, and TML state they have competitors. In addition, these third parties explain release of their information at issue would give their competitors an advantage. After review of the information at issue and consideration of the arguments, we find Aetna, CYC, DBI, Dearborn, Meritain, and TML have established the release of their information at issue would give an advantage to a competitor or bidder. Accordingly, we conclude the city may withhold all of CYC’s and DBI’s submitted information and the information we marked and indicated under section 552.104(a) of the Government Code.³ However, although the city states release of the remaining information may give an advantage to competitors of the third parties at issue, such an interest in protecting the information belongs to the third parties and not the city. Therefore, the city may not withhold any of the remaining information under section 552.104(a) of the Government Code.

TML claims some of its remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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(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[.]” *Id.* § 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 5-6. TML states the information it indicated consists of “sensitive commercial or financial information . . . not known outside of TML, and . . . would cause TML . . . substantial harm if obtained by competitors.” Upon review, we find TML has established the release of the information at issue, which we marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury to TML. Accordingly, the city must withhold the information we marked under section 552.110(b) of the Government Code.⁴

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

⁴As our ruling is dispositive, we need not consider TML’s remaining argument against disclosure of this information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁵ Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 682. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.). Accordingly, the city must withhold all public citizens’ dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See Open Records Decision No. 684 at 9 (2009)*. Accordingly, the city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code.

We note some of the remaining information 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.

In summary, the city may withhold all of CYC’s and DBI’s submitted information and the information we marked and indicated under section 552.104(a) of the Government Code. The city must withhold the information we marked under section 552.110(b) of the Government Code. The city must withhold all public citizens’ dates of birth within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code. The city must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

⁵The 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)*.

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 M. Graham
Assistant Attorney General
Open Records Division

JMG/mo

Ref: ID# 769137

Enc. Submitted documents

c: Requestor
(w/o enclosures)