



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 16, 2020

Ms. Stephanie Walker  
Legal Assistant  
Comal County  
150 North Seguin Avenue, Suite 307  
New Braunfels, Texas 78130-5161

OR2020-08257

Dear Ms. Walker:

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# 816663 (19OR-158).

The Comal County Purchasing Department (the "county") received a request for specified bid proposals. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code.<sup>1</sup> Additionally, the county states release of the submitted information may implicate the proprietary interests of Global Tel\*Link Corporation ("GTL"); ICSolutions ("ICS"); Securus Technologies ("Securus"); and Smart Communications ("Smart"). Accordingly, the county states, and provides documentation showing, it notified these third parties of the request for information and of their 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

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<sup>1</sup> We note the county raises section 552.1101 of the Government Code. The Eighty-sixth Legislature amended section 552 of the Government Code to include section 552.1101. Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 5. However, the amended law applies only to a request for information that the governmental body receives on or after January 1, 2020, the effective date of the amendment. *Id.* § 10. A request for information received before the effective date of the amendment is governed by the law in effect on the date the governmental body received the request. Here, the county received the request on December 20, 2019, so we do not address the county's argument under section 552.1101. Further, we note we asked the county to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c) (d) (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). Pursuant to that correspondence, the county has informed this office it does not wish to make any additional arguments against disclosure of the information at issue.

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 received comments from GTL, ICS, and Smart. We have reviewed the submitted arguments and the submitted information.

Initially, we note 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) 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 not received comments from Securus explaining why the submitted information should not be released. Therefore, we have no basis to conclude Securus has 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, that 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. Accordingly, the county may not withhold the submitted information on the basis of any proprietary interest Securus may have in the information.

Next, the county contends portions of the remaining information are 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). We note section 552.110 protects the interests of private parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See generally* Open Records Decision No. 592 (1991). Accordingly, we do not consider the county's arguments under section 552.110 of the Government Code.

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. GTL, ICS, and Smart state they have competitors. In addition, GTL, ICS, and Smart state release of the information at issue would cause harm. After review of the information at issue and consideration of the arguments, we find GTL, ICS, and Smart have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the county may withhold the marked information under section 552.104(a) of the Government Code.<sup>2</sup>

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

decision.”<sup>3</sup> Gov’t Code § 552.101. This section encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a “first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found that “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” ORD 185. Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 428 and 430. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The rights of those individuals to anonymity was found to outweigh the public’s interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Upon review, we find portions of the remaining information may impact individuals’ constitutional right to privacy. However, we are unable to determine whether the information at issue pertains to actual living individuals or fictitious individuals. Therefore, we must rule conditionally. To the extent the information at issue pertains to a real, living individual, the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. To the extent the information at issue does not pertain to a real, living individual, the county may not

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<sup>3</sup> The 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).

withhold this information under section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

Section 552.101 of the Government Code also 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.). We find the remaining information contains dates of birth. However, as noted above, we are unable to determine whether the information at issue pertains to actual living individuals or fictitious individuals. Furthermore, to the extent the information at issue pertains to actual living individuals, we note some of the information at issue pertains to individuals who will be de-identified under section 552.101 of the Government Code in conjunction with the constitutional right to privacy and whose privacy interest will, thus, be protected. Therefore, we must rule conditionally. To the extent any dates of birth in the remaining information pertain to a real, living, identifiable individual, the county must withhold those dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information at issue does not pertain to a real, living, identifiable individual, the county may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country. *See Gov't Code* § 552.130. However, as noted above, we are unable to determine whether the information at issue pertains to actual living individuals or fictitious individuals. Therefore, we must rule conditionally. To the extent the information at issue pertains to a real, living individual, the county must withhold the information we marked under section 552.130 of the Government Code. To the extent the information at issue does not pertain to a real, living individual, the county may not withhold this information under section 552.130 of the Government Code.

We note some of the materials 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.

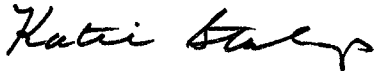
In summary, the county may withhold the marked information under section 552.104(a) of the Government Code. To the extent the information at issue pertains to a real, living, identifiable individual, the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. To the extent the information at issue pertains to a real, living individual, the county must withhold the information we marked under section 552.130 of the Government Code. The

county must release the remaining information; however, any information that is subject to copyright may be released only 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787

Sincerely,



Katie Stallcup  
Attorney  
Open Records Division

AKS/jxd

Ref: ID# 816663

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

4 Third Parties  
(w/o enclosures)