



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 2, 2020

Mr. Tillman S. Roots  
Assistant District Attorney  
Comal County  
150 North Seguin Avenue, Suite 307  
New Braunfels, Texas 78130-5161

OR2020-10158

Dear Mr. Roots:

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# 817089 (Ref. No. 20OR-005).

Comal County (the "county") received a request for submitted proposals, evaluative materials, certain communications, and the executed contract pertaining to a specified request for proposals. You claim the submitted information is excepted from disclosure under sections 552.110 and 552.1101 of the Government Code.<sup>1</sup> Additionally, you state release of the information at issue may implicate the proprietary interests of the following third parties: Correct Solutions, LLC; ICSolutions ("ICS"); Securus Technologies; and Smart Communications ("Smart"). Accordingly, you state, and provide documentation demonstrating, the county notified these interested 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 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 ICS and Smart. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup> We note, in a letter dated March 4, 2020, 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 that 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). In response, the county informed us it would not submit additional comments.

Initially, we note the county has only submitted to this office for review the proposals submitted in response to the request for proposals specified in the present request for information. To the extent any additional information responsive to the request existed on the date the county received the present request, we assume the county has already released it. If the county has not released any such information, it must do so at this time. *See* Gov't Code §§ 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).

Next, we note some of the submitted information, which we indicated, was the subject of a previous request for ruling, in response to which this office issued Open Records Letter No. 2020-09953 (2020). In that ruling, we determined: (1) the county must withhold certain information under sections 552.110(b) and 552.110(c) of the Government Code; (2) the county must withhold certain information under section 552.136 of the Government Code; (3) to the extent the information at issue pertains to a real, living individual, the county must withhold certain information under section 552.101 of the Government Code in conjunction with the constitutional right to privacy, the dates of birth belonging to identifiable individuals under section 552.101 of the Government Code in conjunction with common-law privacy, certain information under section 552.130 of the Government Code, and certain information under section 552.136 of the Government Code; and (4) the county must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the county must continue to rely on Open Records Letter No. 2020-09953 as a previous determination and withhold or release the information we indicated in accordance with that ruling.<sup>2</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your submitted arguments against disclosure of the remaining information.

Next 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 either of the remaining third parties 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 information at issue. *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. Therefore, the county may not withhold any portion of the

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<sup>2</sup> As we are able to make this determination, we need not address the arguments against disclosure of this information.

remaining information on the basis of any proprietary interest the remaining third parties may have in it.

Next, we note you raise section 552.110 of the Government Code. Section 552.110 of the Government Code 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. *See* Gov't Code § 552.110(b)-(c). Although you assert the submitted information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. In addition, although you raise section 552.1101 of the Government Code, this section protects only the interests of a vendor, contractor, potential vendor, or potential contractor that has provided information to a governmental body, not those of the governmental body itself. *See id.* § 552.1101(c). Thus, we do not address your arguments under sections 552.110 or 552.1101 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”<sup>3</sup> *Id.* § 552.101. This section encompasses the constitutional right to privacy, which 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 Fadlo 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

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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).

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. Thus, we must rule conditionally. To the extent the information at issue pertains to a real, living individual, the county must withhold the types of information we marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. Conversely, to the extent the information at issue does not pertain to a real, living individual, the county may not withhold this information under section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

Section 552.136(b) of the Government Code states “[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”). Upon review, we find portions of the remaining information may be excepted under section 552.136 of the Government Code. However, we are unable to determine whether the information at issue consists of access device numbers belonging to actual living individuals or fictitious individuals. Thus, we must rule conditionally. To the extent the information at issue consists of access device numbers belonging to a real, living individual, the county must withhold the types of information we marked under section 552.136 of the Government Code. Conversely, to the extent the information at issue does not consist of access device numbers or does not pertain to a real, living individual, the county may not withhold this information under section 552.136 of the Government Code.

In summary, the county must continue to rely on Open Records Letter No. 2020-09953 as a previous determination and withhold or release the information we indicated in accordance with that ruling. To the extent the information at issue pertains to a real, living individual, the county must withhold the types of 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 consists of access device numbers belonging to a real, living individual, the county must withhold the types of information we marked under section 552.136 of the Government Code. The county 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 <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,

Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/eb

Ref: ID# 817089

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: 4 Third Parties  
(w/o enclosures)