



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 15, 2020

Mr. James Powell
Assistant General Counsel
North Central Texas Council of Governments
P.O. Box 5888
Arlington, Texas 76005-5888

OR2020-11060

Dear Mr. Powell:

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# 819778.

The North Central Texas Council of Governments ("NCTCOG") received a request for information pertaining to a specified request for proposals. 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 Aetna; BlueCross and BlueShield of Texas ("BCBSTX"); Cigna Health and Life Insurance Company ("Cigna"); CVS Health ("CVS"); and United Healthcare Services, Inc. ("United"). Accordingly, you state, and provide documentation showing, NCTCOG 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 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 Aetna, BCBSTX, Cigna, CVS, and United. We have considered the submitted arguments and reviewed the submitted information.

Cigna and CVS argue section 552.104 of the Government Code for portions of their information. Section 552.104 excepts from disclosure information "if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a

particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code 552.104(a). Therefore, we do not address these third parties’ arguments under section 552.104.

Section 552.110(c) of the Government Code excepts from disclosure “commercial 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(c). Aetna, BCBSTX, Cigna, CVS, and United assert some of their information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Aetna, BCBSTX, CVS, and United have demonstrated the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, NCTCOG must withhold the information Aetna and United indicated and the information pertaining to BCBSTX and CVS we indicated under section 552.110(c) of the Government Code.¹ Upon review, however, we find Cigna has failed to provide specific factual evidence demonstrating its information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, NCTCOG may not withhold any of the information Cigna seeks to withhold under section 552.110(c) 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.”² *Id.* § 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 Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). Thus, NCTCOG must withhold all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

¹ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

² The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.136(b) 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 also concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Upon review, we find NCTCOG must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

BCBSTX and CVS assert some of the remaining information is subject to section 552.137 of the Government Code. 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). *Id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the information at issue consists of e-mail addresses that are specifically excluded by section 552.137(c). *See id.* Thus, NCTCOG may not withhold any of the remaining information at issue under section 552.137 of the Government Code.

We note some of the remaining information at issue appears to 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, NCTCOG must withhold the information Aetna and United indicated and the information pertaining to BCBSTX and CVS we indicated under section 552.110(c) of the Government Code. NCTCOG must withhold all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. NCTCOG must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. NCTCOG must release the remaining information; however, NCTCOG may only release any information subject to copyright in accordance with copyright law.³

³ We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

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,

Kieran Hillis
Assistant Attorney General
Open Records Division

KH/eb

Ref: ID# 819778

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 5 Third Parties
(w/o enclosures)