



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

May 11, 2020

Ms. Clara H. Saafir  
Assistant District Attorney  
Dallas County District Attorney's Office  
411 Elm Street, 5th Floor  
Dallas, Texas 75202-3317

OR2020-13322

Dear Ms. Saafir:

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# 827528.

Dallas County (the "county") received a request for the following types of information pertaining to a specified request for proposals: submitted proposals, evaluative materials, the executed contract, and communications pertaining to the awarded contract. Although you take no position regarding whether the submitted information is excepted from disclosure, you state release of the information at issue may implicate the proprietary interests of Inmate Calling Solutions, LLC d/b/a ICSolutions ("ICS"). Accordingly, you state, and provide documentation demonstrating, the county notified ICS of the request for information and of its 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. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the county has only submitted ICS's proposal in response to 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).

ICS raises section 552.104 of the Government Code for a portion of its information at issue. 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 ICS’s arguments under section 552.104.

ICS also raises section 552.110 of the Government Code for portions of its information at issue.<sup>1</sup> 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). ICS argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find ICS has demonstrated the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the county must withhold the information we marked under section 552.110(c) of the Government Code.<sup>2</sup>

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

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<sup>1</sup> Although ICS cites to former sections 552.110(a) and 552.110(b) of the Government Code in its brief, we understand it to raise current sections 552.110(b) and 552.110(c) of the Government Code based on the substance of its arguments.

<sup>2</sup> As our ruling is dispositive, we need not address ICS’s remaining argument against disclosure of this information.

<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).

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. 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 and indicated 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 552.101 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. *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.). Upon review, we find the remaining information contains dates of birth. However, we note some of the dates of birth within the information at issue relate to individuals who may be de-identified by our markings and whose privacy interests are, thus, protected. Additionally, we are unable to determine whether the dates of birth at issue pertain to actual living individuals or fictitious individuals. Thus, we must rule conditionally. To the extent the dates of birth within the remaining information pertain to real, living individuals who have not been de-identified, the county must withhold such dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. Conversely, to the extent a date of birth within the remaining information does not pertain to a real, living individual who has not been de-identified, the county may not withhold such dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1175 of the Government Code may be applicable to some of the remaining information. Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. Gov't Code § 552.1175. We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). However, we also note section 552.1175 does not apply to an individual's work telephone number. Some of the remaining information pertains to individuals who may be subject to section 552.1175. Accordingly, to the extent the cellular telephone numbers at issue, a representative sample of which we marked, are personal cellular telephone numbers for which a governmental body does not pay the cellular telephone service and that pertain to an individual who is subject to section 552.1175(a) and elects to restrict access to the information in accordance with section 552.1175(b), the county must withhold such information under section 552.1175 of the Government Code. Conversely, if the individuals whose information is at issue are not individuals who are subject to section 552.1175(a) or do not elect to restrict access to this information in accordance with section 552.1175(b), such information may not be withheld under section 552.1175.

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”). This office has determined an insurance policy number is an access device number for purposes of this exception. *See* Open Records Decision No. 684 at 9 (2009). 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 some of 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. Nevertheless, the county must withhold all insurance policy numbers within the remaining information under section 552.136 of the Government Code.

We note some of the remaining information 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, the county must withhold the information we marked under section 552.110(c) of the Government Code. To the extent the information at issue pertains to a real, living individual, the county must withhold the types of information we marked and indicated under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. To the extent the dates of birth within the remaining information pertain to real, living individuals who have not been de-identified, the county must withhold such dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the representative sample of cellular telephone numbers we marked are personal cellular telephone numbers for which a governmental body does not pay the cellular telephone service and that pertain to an individual who is subject to section 552.1175(a) and elects to restrict access to the information in accordance with section 552.1175(b), the county must withhold such information under section 552.1175 of the Government Code. 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 withhold all insurance policy numbers within the remaining information under section 552.136 of the Government Code. The county must release the remaining information; however, any information subject to copyright may only be released 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,

Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/jxd

Ref: ID# 827528

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Party  
(w/o enclosures)