



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 8, 2020

Mr. Robert N. Jones, Jr.  
Assistant General Counsel  
Texas Workforce Commission  
101 East 15th Street, Room 266  
Austin, Texas 78778-0001

OR2020-17030

Dear Mr. Jones:

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# 835197 (TWC Tracking No. 200317-005).

The Texas Workforce Commission (the "commission") received a request for certain information pertaining to two specified requests for offers.<sup>1</sup> You state you will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.139 and 552.156 of the Government Code.<sup>2</sup> In addition, you state release of the submitted information may implicate the proprietary interests of Controltec, Inc. ("Controltec"). Accordingly, you state, and provide documentation demonstrating, the commission notified Controltec of the request for information and of the 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

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<sup>1</sup> You state the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You also state the commission sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the commission received the required payment on April 16, 2020. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

<sup>2</sup> Because sections 552.139 and 552.156 of the Government Code can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.301 of the Government Code, we need not address whether the commission violated section 552.301 in requesting a decision from this office. *See* Gov't Code §§ 552.301(b), (e), .302.

body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it was specifically excluded by the requestor. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the request and the commission is not required to release such information in response to this request.

Next, 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 Controltec explaining why the responsive submitted information should not be released. Therefore, we have no basis to conclude Controltec has a protected proprietary interest in the submitted information. *See, e.g., id. § 552.110* (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the commission may not withhold the responsive submitted information on the basis of any proprietary interest Controltec may have in the information.

Section 552.139 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

*See id. § 552.139(a), (b)(1)-(2)*. Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). You state the information you marked reveals detailed network security information. Based upon your arguments and our review of the information, we find the information at issue relates to computer network security. Accordingly, the commission must withhold the information you marked under section 552.139 of the Government Code.

Section 552.156 of the Government Code provides, in relevant part, as follows:

(a) Except as otherwise provided by this section, the following information is excepted from disclosure under this chapter:

- (1) a continuity of operations plan developed under Section 412.054, Labor Code; and
- (2) all records, written, produced, collected, assembled, or maintained as part of the development or review of a continuity of operations plan developed under Section 412.054, Labor Code.

(b) Forms, standards, and other instructional, information, or planning materials adopted by the office to provide guidance or assistance to a state agency in developing a continuity of operations plan under [s]ection 412.054, Labor Code, are public information subject to disclosure under this chapter.

*Id.* § 552.156(a)-(b). Section 412.054 of the Labor Code provides, in relevant part, as follows:

(a) Each state agency shall work with the [State Office of Risk Management] to develop an agency-level continuity of operations plan that outlines procedures to keep the agency operational in case of disruptions to production, finance, administration, or other essential operations. The plan must include detailed information regarding resumption of essential services after a catastrophe, including:

- (1) coordination with public authorities;
- (2) management of media:

- (3) customer service delivery;
- (4) assessing immediate financial and operational needs; and
- (5) other services as determined by the office.

...

(c) Except as otherwise provided by this section, the following information is confidential and is exempt from disclosure under [the Act]:

- (1) a continuity of operations plan developed under this section[.]

Labor Code § 412.054(a), (c)(1). You state the information you marked consists of the commission's continuity of operations plan. You inform us this information was created in accordance with section 412.054 of the Labor Code. You also inform us the information at issue is not subject to section 552.156(b). Thus, upon review, we find you have demonstrated the applicability of section 552.156 of the Government Code to the information you marked, and the commission must withhold it on this basis.

Section 552.101 of the Government Code exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>3</sup> 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 Third 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 responsive information contains dates of birth. 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 dates of birth in the remaining responsive information pertain to real, living individuals, the commission 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 real, living individuals, the commission may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining responsive information 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

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<sup>3</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 copyright law and the risk of a copyright infringement suit.

In summary, the commission must withhold the information you marked under section 552.139 of the Government Code. The commission must withhold the information you marked under section 552.156 of the Government Code. To the extent the dates of birth in the remaining responsive information pertain to real, living individuals, the commission must withhold those dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law.<sup>4</sup>

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,

Kimbell Kesling  
Assistant Attorney General  
Open Records Division

KK/be

Ref: ID# 835197

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

1 Third Party  
(w/o enclosures)

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<sup>4</sup> We note the information being released contains a social security number. 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. *See* Gov't Code § 552.147(b).