



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 30, 2020

Ms. June B. Harden  
Assistant Attorney General  
Assistant Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2020-27337

Dear Ms. Harden:

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# 849515 (PIR# R005100).

The Office of the Attorney General (the "OAG") received a request for specified contracts and proposals pertaining to a specified request for offers. You state the OAG will release some of the requested information. Additionally, you state, although the OAG takes no position as to whether the submitted information is excepted from disclosure under the Act, the release of the submitted information may implicate the proprietary interests of Casepoint LLC aka @Legal Discovery LLC ("Casepoint"); Analytic Focus, LLC; CS Disco, Inc.; E-STET; Evolver Legal Services ("Evolver"); FTI Consulting Technology LLC ("FTI"); ProSearch Strategies, Inc. ("ProSearch"); and ZyLAB North America LLC ("ZyLAB"). Accordingly, you state, and provide documentation showing, you notified these third parties 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 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Casepoint, Evolver, FTI, and ZyLAB.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup> Although Casepoint raises section 552.305 of the Government Code, we note section 552.305 is not an exception to disclosure under the Act. Rather, section 552.305 provides the procedural requirements for

Initially, you note and we agree the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter No. 2017-04760 (2017). In Open Records Letter No. 2017-04760, we determined the OAG may withhold certain information under section 552.104 of the Government, must withhold certain information under section 552.110 of the Government, must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy, must withhold insurance policy numbers under section 552.136 of the Government, and must release the remaining information in accordance with copyright law. With respect to all of the information withheld in the previous ruling under section 552.104 and certain information pertaining to ZyLAB that was withheld in the previous ruling, the relevant laws have changed since the previous ruling was issued. Therefore, the OAG may not rely on Open Records Letter No. 2017-04760 as a previous determination and withhold that information in accordance with the previous ruling. *See* Open Records Decision No. 673 at 6-7 (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 information is or is not excepted from disclosure). However, we will consider the arguments submitted by Casepoint, FTI, Evolver, and ZyLAB under sections 552.104, 552.110, 552.1101, and 552.147 for the information at issue that was previously withheld. With respect to the remaining information at issue, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the OAG must rely on Open Records Letter No. 2017-04760 as a previous determination and withhold or release the information at issue in accordance with that ruling with respect to the information ordered released, the information we marked of ProSearch and ZyLAB withheld under section 552.110, the information withheld under section 552.101 in conjunction with common-law privacy, and the information withheld under section 552.136.<sup>2</sup> *See id.*

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) of the Government Code 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 any of the remaining third parties explaining why the information at issue should not be released. Therefore, we have no basis to conclude any remaining third party has a protected proprietary interest in the remaining 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

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notifying third parties that their interests may be affected by a request for information. *See* Gov't Code § 552.305.

<sup>2</sup> As we are able to make this determination, we need not consider ZyLAB's arguments against disclosure of this information.

OAG may not withhold the remaining information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Evolver and FTI raise section 552.104 of the Government Code for some of the submitted 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 Evolver’s or FTI’s arguments under section 552.104.

Evolver, FTI, and ZyLAB raise section 552.110 of the Government Code for some of their information. Section 552.110(b) states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). Section 552.110(c) states:

- (c) Except as provided by Section 552.0222, 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 is [excepted from required disclosure].

*Id.* § 552.110(c). We note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Upon review, we find Evolver, FTI, and ZyLAB have demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause the companies substantial competitive harm. Accordingly, the OAG must withhold the customer information of Evolver, FTI, and ZyLAB, and the information we marked under section 552.110(c); however, to the extent the customer information is publicly available the

companies' respective websites, it may not be withheld under section 552.110(c).<sup>3</sup> However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b) or section 552.110(c). Additionally, we find Evolver and FTI have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Further, we find Evolver and FTI have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the OAG may not withhold the remaining information at issue under section 552.110(b) or section 552.110(c).

Section 552.1101 of the Government Code provides, in relevant part:

(a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

*Id.* § 552.1101(a). Upon review, we find Casepoint has demonstrated the applicability of section 552.1101(a) the information at issue. Accordingly, the OAG must withhold Casepoint's customer information under section 552.1101(a) to the extent it is not publicly available on the company's website.

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<sup>3</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

We note portions of the remaining information are subject to section 552.101 of the Government Code.<sup>4</sup> Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the remaining information contains information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, we conclude the OAG must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy.<sup>5</sup>

We note portions of the remaining information are subject to section 552.136 of the Government Code. Section 552.136 states, “Notwithstanding any other provision of this chapter, 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 also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the OAG must withhold the insurance policy numbers in the remaining information under section 552.136.

We note some of the remaining 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 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 OAG must rely on Open Records Letter No. 2017-04760 as a previous determination and withhold or release the identical information at issue in accordance with that ruling with respect to: (1) the information ordered released, (2) the information we marked of ProSearch and ZyLAB withheld under section 552.110 of the Government Code,

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<sup>4</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).

<sup>5</sup> As our ruling is dispositive, we need not address Casepoint’s remaining argument against disclosure.

(3) the information withheld under section 552.101 of the Government Code in conjunction with common-law privacy, and (4) the information withheld under section 552.136 of the Government Code. The OAG must withhold the customer information of Evolver, FTI, and ZyLAB, and the information we marked under section 552.110(c) of the Government Code; however, to the extent the customer information is publicly available the companies' respective websites, it may not be withheld under section 552.110(c). The OAG must withhold Casepoint's customer information under section 552.1101(a) of the Government Code to the extent it is not publicly available on the company's website. The OAG must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The OAG must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The OAG 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,

Matthew Taylor  
Assistant Attorney General  
Open Records Division

MT/be

Ref: ID# 849515

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

8 Third Parties  
(w/o enclosures)