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ATTORNEY GENERAL OF TEXAS

January 18, 2022

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

OR2022-01418

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# 923257 (PIR# R010623).

The Office of the Attorney General (the "OAG") received a request for information pertaining to a specified bidding opportunity. The OAG states it will release some of the requested information. Although the OAG takes no position as to whether the submitted information is excepted under the Act, the OAG states release of the submitted information may implicate the proprietary interests of MAXIMUS Human Services, Inc. ("Maximus"); Health Management Systems, Inc.; and Apexon. Accordingly, the OAG states, and provides documentation showing, it 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 considered comments from Maximus. We have considered the submitted arguments and reviewed the submitted information.

Initially, Maximus raises section 552.104 of the Government Code for some of its information that was not previously released. 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 Maximus's argument under section 552.104.

Next, we note the submitted information was the subject of a previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-15046 (2013) and 2019-09430 (2019). In Open Records Letter No. 2013-15046, we determined the OAG: (1) must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy, (2) must withhold certain information of under section 552.110 of the Government, and (3) must release the remaining information in accordance with copyright law. In Open Records Letter No. 2019-09430 we determined the OAG: (1) must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy, (2) must withhold certain information under section 552.110 of the Government Code, and (3) must release the remaining information in accordance with copyright law.

With respect to the information withheld in the previous rulings under section 552.110, the relevant laws have changed since the previous rulings were issued. Therefore, the OAG may not rely on Open Records Letter No. 2013-15046 or Open Records Letter No. 2019-09430 as previous determinations and withhold such information in accordance with these previous rulings. *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 Maximus's submitted arguments for the information at issue that was previously withheld. Additionally, in our previous rulings, we determined, among other things, the OAG must release some of Maximus' information. We understand the OAG did so. However, Maximus now argues portions of its released information are excepted from disclosure under sections 552.101, 552.110, and 552.139 of the Government Code. Because sections 552.101, 552.110, and 552.139 make information confidential by law, we will address these sections for Maximus's information at issue. Furthermore, as section 552.136 of the Government Code can make information confidential under the Act, we will consider the applicability of this exception to the submitted information.¹

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 the remaining third parties explaining why the submitted information should not be

¹ 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).

released. Therefore, we have no basis to conclude any of the remaining third parties 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 OAG may not withhold the remaining information based on any proprietary interest the notified third parties may have in the information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses the common-law right to privacy. Common-law privacy 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 and 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* Open Records Decision Nos. 545 (1990) (mortgage payments, assets, bills, and credit history). However, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S. W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). We also note an individual’s name, education, prior employment, and personal information are not ordinarily private information subject to common-law privacy. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the OAG must withhold the information we marked under section 552.101 in conjunction with common-law privacy.² However, we find no portion of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the OAG may not withhold the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find Maximus has not demonstrated the remaining information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the OAG may not withhold the remaining information under section 552.101 on the basis of constitutional privacy.

Maximus asserts some of the remaining information is excepted from disclosure under section 552.110 of the Government Code. 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) of the Government Code states:

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). Additionally, 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 Maximus demonstrated portions of its information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the OAG must withhold the information we marked under section 552.110(c).³ As mentioned above, Maximus’ information was subject to Open Records Letter Nos. 2013-15046 and 2019-09430. In the prior rulings, some of Maximus’ information was ruled to be released. Since the issuance of the previous rulings on August 28, 2013, and April 8, 2019, Maximus has not disputed this office’s conclusions regarding the release of the information at issue. In this regard, we find Maximus has not taken any measures to protect the information at issue in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Maximus substantial harm. Additionally, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be

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

withheld on the basis of section 552.110 of the Government Code. Further, we find Maximus has failed to provide specific factual evidence demonstrating the remaining information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the OAG may not withhold the remaining information under section 552.110.

Section 552.136 of the Government Code 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.” *Id.* § 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.

Maximus also raises section 552.139 of the Government Code for portions of the remaining information. Section 552.139 provides, in relevant part:

(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;

(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; [and]

...

(4) information directly arising from a governmental body’s routine efforts to prevent, detect, investigate, or mitigate a computer security incident, including information contained in or derived from an information security log.

Gov’t Code § 552.139(a), (b)(1)-(2), (4). 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 governmental entity;
- (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). Maximus asserts disclosure of the remaining information at issue would present a significant risk of compromise to Maximus' computer systems and make the systems vulnerable to unauthorized access and harm. However, Maximus has not demonstrated any of the information at issue relates to computer network security, to restricted information under 2059.055, or to the design, operation, or defense of a computer network as contemplated by section 552.139(a). Further, we find Maximus has failed to explain how the remaining information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the OAG may not withhold the remaining information under section 552.139.

We note that 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 withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The OAG must withhold the information we marked under section 552.110(c) of the Government Code. 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 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/jxd

Ref: ID# 923257

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)