



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2015

Ms. Ginger K. Treadwell
Assistant County Attorney
Tom Green County
122 West Harris
San Angelo, Texas 76903

OR2015-23089

Dear Ms. Treadwell:

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# 583887.

The Tom Green County Purchasing Department (the "department") received two requests for the proposals submitted in response to two specified requests for proposals ("RFPs") and information related to the specified RFPs. 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 Global Tel*Link Corporation ; ICSolutions Advanced Technology ("ICS"); Legacy Inmate Communications; Securus Technologies, Inc.; and Synergy Telecom Service Company, Inc. Accordingly, you state, and provide documentation showing, you 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 received comments from ICS. We have considered the submitted arguments and reviewed the submitted information.¹

Initially, we note the department has submitted only the requested proposals. To the extent information responsive to the remainder of the request existed on the date the department received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from ICS. Thus, we have no basis to conclude any of the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 department may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

ICS raises section 552.104 of the Government Code for a portion of its information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. ICS states it has competitors. In addition, ICS asserts its competitive position will be harmed if a competitor gains access to its financial statements. After review of the information at issue and

¹Pursuant to section 552.303(c) of the Government Code, this office sent correspondence to the department on October 15, 2015 requesting that you provide additional information necessary for this office to render a decision. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). Because the department did not respond to our request for additional information, we find the department failed to comply with section 552.303(d). However, because sections 552.101 and 552.136 of Government Code, as well as third party interests, can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.303(d), we will consider the applicability of these sections and the submitted arguments, notwithstanding the department's violation of section 552.303(d). *See id.* § 552.303(e); *see also* Open Records Decision No. 150 at 2 (1977).

consideration of ICS's arguments, we find ICS has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold ICS's financial statements under section 552.104(a) of the Government Code.²

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."³ Gov't Code § 552.101. This section encompasses the constitutional right to privacy. Constitutional privacy 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 and education, that have been recognized by the United States Supreme Court. See *Fadjo 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 "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 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

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

³The 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).

released. ORDs 428, 430. Further, we recognized inmates had a constitutional right to visit with outsiders that 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).

We note the remaining information may include identifying information of individuals who communicated with inmates. However, we are unable to determine whether this information pertains to actual living individuals or fictitious individuals created as samples for purposes of responding to the department's request for the proposals at issue. Therefore, we must rule conditionally. To the extent the information we have indicated pertains to living individuals, the department must withhold this information pursuant to section 552.101 of the Government Code in conjunction with constitutional privacy. To the extent the information we have indicated does not pertain to living individuals, that information may not be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 also 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 and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *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.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁴ *Tex. Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. In addition, in Open Records Decision No. 396 (1983) we considered whether certain types of information pertaining to inmate trust accounts were protected by common-law privacy. ORD 396. We found information regarding balances held in inmate accounts is highly intimate or embarrassing. *Id.* at 1. Furthermore, we concluded there is not a legitimate

⁴Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

public interest in inmate account balances because “the total amount an inmate has on deposit at any particular time[] does not . . . relate to the receipt or expenditure of public funds.” *Id.* Accordingly, we determined that information regarding inmate account balances is protected under common-law privacy. *Id.*

Upon review, we find the information we indicated satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, to the extent the information we have indicated pertains to living individuals, the department must withhold the information we indicated under section 552.101 of the Government Code in conjunction with common-law privacy. Moreover, to the extent the dates of birth in the remaining information pertain to living individuals, the department must withhold the dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code provides, “Notwithstanding 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 insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the department must withhold the insurance policy numbers in the remaining information under section 552.136. Additionally, we note the remaining information contains PIN and inmate account numbers. Thus, to the extent the PIN and inmate account numbers within the remaining information constitute actual access numbers, the department must withhold them under section 552.136. To the extent these account numbers are fictitious, the department may not withhold the information at issue 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.

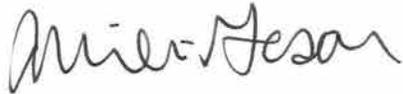
In summary, the department may withhold ICS’s financial statements under section 552.104(a) of the Government Code. To the extent the information we have indicated pertains to living individuals, the department must withhold this information pursuant to section 552.101 of the Government Code in conjunction with constitutional privacy. To the extent the information pertains to living individuals, the department must withhold the information we indicated under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the dates of birth in the remaining information pertain to living individuals, the department must withhold them under

section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. To the extent the PIN and inmate account numbers within the remaining information constitute actual access numbers, the department must withhold them under section 552.136 of the Government Code. The department 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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 583887

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