



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 14, 2016

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

OR2015-25606A

Dear Ms. Harden:

This office issued Open Records Letter No. 2015-25606 (2015) on December 7, 2015. We have examined this ruling and determined that we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on December 7, 2015. Your request was assigned ID# 600578 (OAG PIR Nos. 15-42290, 15-42405, 15-42460).

The Office of the Attorney General (the "OAG") received two requests from different requestors for seven categories of information regarding request for proposals number 367711. The OAG received a third request from a different requestor for pricing information submitted by the winning bidder for the same request for proposals. You state the OAG will release most of the information responsive to the first two requests to the first two requestors. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified ABC Legal Services, Inc.; EZ Messenger; Professional Civil Process of Texas, Inc.; and Texas Easy-Serve, L.L.C. 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 id.* § 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 an individual who represents

EZ Messenger. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 id.* § 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 released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted 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 OAG may not withhold any of the information at issue on the basis of any proprietary interest the remaining third parties may have in it.

EZ Messenger asserts portions of its proposal are excepted from disclosure under section 552.110 of the Government Code. Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

EZ Messenger contends the personally identifiable information of its process servers, requested references, and clients it has indicated is excepted from disclosure under section 552.110(b) of the Government Code. EZ Messenger also asserts release of the financial and software information it has indicated would cause the company competitive harm. Upon review of EZ Messenger's arguments, we conclude EZ Messenger has established the release of its reference and client information located in Forms C, D, E, and K of its proposal would cause it substantial competitive injury. Thus, the OAG must withhold EZ Messenger's reference and client information located in Forms C, D, E, and K of its proposal under section 552.110(b); however, to the extent the reference and client information is publicly available on the company's website, the OAG may not withhold such information under section 552.110(b) of the Government Code. We further find EZ Messenger has established Exhibits I and J of its proposal, as well as the information we have marked in Section B of its proposal, consists of commercial or financial information,

the release of which would cause the company substantial competitive harm. Thus, the OAG must withhold Exhibits I and J of EZ Messenger's proposal, as well as the information we have marked in Section B of its proposal under section 552.110(b). However, EZ Messenger has not made the specific factual or evidentiary showings required by section 552.110(b) that release of any of its remaining information would cause the company substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Next, we understand EZ Messenger to assert some of its remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses 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. *See id.* at 681–82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We 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 no portion of EZ Messenger's remaining information constitutes highly intimate or embarrassing information of no legitimate public concern. Accordingly, the OAG may not withhold any portion of the information at issue under section 552.101 in conjunction with common-law privacy.

We also understand EZ Messenger to contend some of the remaining information at issue is excepted from required disclosure under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119.

EZ Messenger asserts release of the remaining information at issue would “likely cause someone to face ‘an imminent threat of physical danger.’” However, upon review, we find EZ Messenger has failed to demonstrate how release of any portion of the information at issue would create a substantial threat of physical harm to any individual. Accordingly, the OAG may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

We note the remaining information contains insurance policy numbers subject to section 552.136 of the Government Code. Section 552.136 provides, “[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.”¹ 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 the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Upon review, we find the OAG must withhold the insurance policy numbers within the remaining submitted information under section 552.136 of the Government Code.

In summary, the OAG must withhold EZ Messenger’s reference and client information located in Forms C, D, E, and K of its proposal under section 552.110(b); however, to the extent the reference and client information is publicly available on the company’s website, the OAG may not withhold such information under section 552.110(b) of the Government Code. The OAG also must withhold Exhibits I and J of EZ Messenger’s proposal, as well as the information we have marked in Section B of its proposal under section 552.110(b) of the Government Code. The OAG must withhold the insurance policy numbers within the remaining submitted information under section 552.136 of the Government Code. As no further exceptions to disclosure have been raised, the OAG must release the remaining information.²

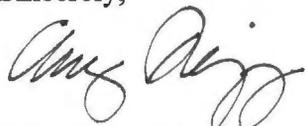
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

¹The 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).

²We 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 an attorney general decision under the Act. Gov’t Code § 552.147(b).

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/akg

Ref: ID# 587781

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

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