ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2013

Mr. Craig Purifoy
Open Records Coordinator
Texas Department of Family and Protective Services
RMG Y937
P.O. Box 149030
Austin, Texas 78714-9030

OR2013-09985

Dear Mr. Purifoy:

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# 490073 (DFPS Reference No. 04022013WU6).

The Texas Department of Family and Protective Services (the "department") received a request for the proposals submitted by the selected agencies in Regions 3, 5, 6, and 7 for RFP Procurement No. 530-13-0013. You state you will redact some information pursuant to sections 552.136(c) and 552.147(b) of the Government Code.[1] Although you take no position as to whether the remaining requested information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Lutheran Social Services of the South, Inc. ("LSSS"); Covenant Kids, Inc. ("Covenant Kids"); and Mauney & Associates, LLC ("Mauney & Associates"). Accordingly, you state and provide documentation showing you notified LSSS, Covenant Kids, and Mauney & Associates of the request for information and of the right of each 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 comments from LSSS. We have reviewed the submitted information and the submitted arguments.

[1]Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). 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 id.* § 552.147(b).

Initially, we note the work plans submitted by LSSS and Covenant Kids were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-09035 (2013). We note that in Open Records Letter No. 2013-09035, the department notified LSSS and Covenant Kids pursuant to section 552.305 when the department received the previous request for information, and LSSS and Covenant Kids failed to submit any arguments objecting to the release of their work plans. Accordingly, we determined in our previous ruling that the department must release, among other things, the work plans submitted by LSSS and Covenant Kids. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. LSSS now claims portions of its work plan are excepted under sections 552.104 and 552.110 of the Government Code. Section 552.104 is a discretionary exception that protects a governmental body's interests and does not make information confidential under the Act. *See* Gov't Code § 552.104; Open Records Decision 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 could be waived). Thus, the department may not now withhold under section 552.104 any information that was previously released. However, because information subject to section 552.110 is deemed confidential by law, we will address LSSS's claim regarding its work plan under this exception. In addition, we will consider LSSS's arguments as applied to its remaining information.

Next, we note you have indicated that you will redact direct deposit authorization forms and email addresses within the submitted information pursuant to Open Records Decision No. 684 (2009). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *Id.* at 681–82. We note this office has determined personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure

under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, 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). Upon review, we find the direct deposit authorization forms you have marked do not constitute highly intimate or embarrassing information about an individual. Accordingly, this information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note section 552.137 does not apply to an e-mail address "contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]" *See id.* § 552.137(c)(3). The e-mail addresses you seek to withhold are subject to section 552.137(c)(3). Therefore, the department may not withhold this information under section 552.137. *See id.* § 552.137(a).

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 Covenant Kids or Mauney & Associates explaining why the submitted information should not be released. Therefore, we have no basis to conclude either Covenant Kids or Mauney & Associates 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 department may

not withhold the submitted information on the basis of any proprietary interest Covenant Kids or Mauney & Associates may have in the information.

LSSS claims some of its remaining information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies, such as the department, not the proprietary interests of private parties. In this instance, the department does not raise section 552.104 as an exception to disclosure. Therefore, the department may not withhold any of the submitted information under section 552.104.

LSSS submits arguments against disclosure of its information 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 that 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, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

As mentioned above, LSSS's work plan was subject to Open Records Letter No. 2013-09035. In the prior ruling, the department notified LSSS of the request for information pursuant to section 552.305 of the Government Code. LSSS failed to submit any arguments objecting to the release of its work plan. Since the issuance of the previous ruling on May 31, 2013, LSSS has not disputed this office's conclusion regarding the release of the information in its work plan, and we presume that, in accordance with that ruling, the department has released the work plan. In this regard, we find LSSS has not taken necessary measures to protect its work plan in order for this office to conclude that any portion of that information now qualifies as commercial or financial information, the release of which would cause LSSS substantial competitive harm. *See* Gov't Code § 552.110, RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the department may not withhold any information in LSSS's work plan under section 552.110 of the Government Code.

LSSS contends portions of its remaining information, including pricing information, are commercial or financial information, release of which would cause substantial competitive harm to LSSS. We note the pricing information of the winning bidder of a government contract, such as LSSS, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory

predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. We further note that LSSS has published some of the remaining information it seeks to withhold, including some financial information, information on its background check policy, and the names of certain employees, on its website, making this information publicly available. Because LSSS has published this information, it has failed to demonstrate how release of this information would cause it substantial competitive injury. Upon review, we conclude LSSS has established release of the information we have marked would cause it substantial competitive injury. Accordingly, the department must withhold the information we have marked under section 552.110(b). However, we find LSSS has not made the specific factual or evidentiary showing 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 that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3. Accordingly, we conclude the department may not withhold any of LSSS's remaining information under section 552.110(b).

The remaining information contains a bank account number, routing number, and insurance policy numbers. Section 552.136 of the Government Code states that "[n]otwithstanding 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. This office has determined an insurance policy number is an access device number for the purposes of section 552.136. The department must, therefore, withhold the bank account number, routing number, and insurance policy numbers we have marked under section 552.136.

In summary, the department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must withhold the bank account number, routing number, and insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 490073

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Lutheran Social Services of the South, Inc.
c/o Mr. Monte F. James
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Mr. William Lund
Covenant Kids, Inc.
P.O. Box 173038
Arlington, Texas 76003-3038
(w/o enclosures)

Ms. Melissa Mauney
Mauney & Associates, L.L.C.
P.O. Box 351
Evant, Texas 76525
(w/o enclosures)