KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2013

Mr. David F. Brown
Counsel for the Texas Windstorm Insurance Association
Ewell, Bickham, & Brown, LLP
111 Congress Avenue, 28th Floor
Austin, Texas 78701

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2013-17486

Dear Mr. Brown:

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# 501566 (TWIA ID# 000123).

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for all invoices received from Alvarez & Marsal Insurance Advisory Services, LLC ("AMIAS") during a specified time period and all payments made by the association to AMIAS or any of three named former employees of the association during specified time periods. You state the association is releasing some information. You also state the association will redact the home addresses of certain former association employees pursuant to section 552.024 of the Government Code.[1] You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. You also inform us the release of the submitted information may implicate the proprietary interests of AMIAS. Accordingly, you notified AMIAS of the request and of its right to submit comments to this office as to why its information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from counsel for AMIAS. We have considered the submitted arguments and reviewed the submitted information.

[1]Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former employee's home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. *See* Gov't Code §§ 552.024(a)-(c), .117(a)(1).

Intially, we note AMIAS seeks to withhold information the association did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the association. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, the association states some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-04259 (2013) and 2013-11102 (2013). In response to Open Records Letter No. 2013-04259, the association has filed a lawsuit against our office. *See Texas Windstorm Ins. Ass'n v. Abbott*, No. D-1-GN-13-000988 (353rd Dist. Ct., Travis County, Tex.). In response to Open Records Letter No. 2013-11102, AMIAS has filed a lawsuit against our office. *See Alvarez & Marsal Ins. Advisory Servs., L.L.C. v. Abbott*, No. D-1-GN-13-002445 (53rd Dist. Ct., Travis County, Tex.). Accordingly, because some of the requested information is at issue in the pending litigation, we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public.

Next, you state some of the remaining requested information was the subject of previous requests for information. As a result of these requests, this office issued Open Records Letter Nos. 2013-01240 (2013), 2013-07199 (2013), and 2013-09215 (2013). In Open Records Letter Nos. 2013-01240 and 2013-07199, we determined the association must withhold the information we marked under sections 552.110(b) and 552.136 of the Government Code and must release the remaining information. In Open Records Letter No. 2013-09215, we declined to render a decision regarding information at issue in the pending litigation styled *Texas Windstorm Ins. Ass'n v. Abbott*, No. D-1-GN-13-000988 (353rd Dist. Ct., Travis County, Tex.), and we determined the association must withhold and release certain information in accordance with Open Records Letter No. 2013-07199, must withhold the information we marked under sections 552.110(b) and 552.136 of the Government Code, and must release the remaining information. As we have no indication that the law, facts, and circumstances on which these prior rulings were based have changed, the association must continue to rely on these prior rulings as previous determinations and withhold or release the information we have previously ruled on in accordance with Open Records Letter Nos. 2013-01240, 2013-07199, and 2013-09215. *See* Open Records Decision No. 673 (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 that information is or is not excepted from disclosure). However, because the submitted information is not encompassed by the previous determinations, we will address the submitted arguments against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't

Code § 552.101. This section encompasses the common-law right of privacy, which protects information if it (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 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 generally* Open Records Decision Nos. 600 at 9-10 (1992) (employee's withholding allowance certificate, designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). The common-law right to privacy, however, is a personal right that "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.— Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, we conclude the association must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information you have marked either pertains solely to an individual you state is deceased or is information pertaining to a living individual that is not highly intimate or embarrassing and not of legitimate public concern. Therefore, the association may not withhold the remaining information you marked under section 552.101 on this basis.

AMIAS asserts portions of its information consist of commercial or financial information, the release of which would cause the company substantial competitive harm.

Section 552.110(b) of the Government Code 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.*; *see also* Open Records Decision No. 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).

AMIAS argues release of the hourly rates and the amount of time spent by its employees listed in the submitted invoices would cause the company substantial competitive harm. Upon review, we conclude AMIAS has established the release of some of its information, which we have marked, would cause the company substantial competitive injury. Therefore, the association must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find AMIAS 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 No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the association may not withhold any of the remaining information at issue under section 552.110(b).

The association and AMIAS raise section 552.136 for portions of the remaining information. Section 552.136 of the Government Code states "[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(b); *see also id.* § 552.136(a) ("defining access device"). This office has determined bank account and routing numbers are access device numbers for purposes of section 552.136. Accordingly, the association must withhold the information we have marked under section 552.136 of the Government Code.[2]

In summary, to the extent any of the requested information is at issue in the pending litigation, we decline to render a decision regarding the specific portions of the information at issue in the pending lawsuits and will allow the trial court to determine the public availability of that information. The association must continue to rely on Open Records Letter Nos. 2013-01240, 2013-07199, and 2013-09215 as previous determinations and

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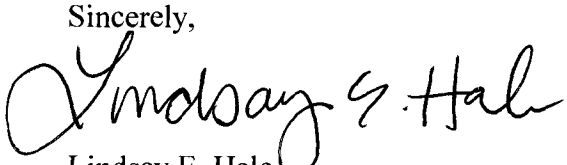
[2]Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor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

withhold or release the information we have previously ruled on in accordance with these prior rulings. The association must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, the information we have marked under section 552.110(b) of the Government Code, and the information we have marked under section 552.136 of the Government Code. The association must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 501566

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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CAUSE NO. D-1-GN-13-003669

ALVAREZ & MARSAL INSURANCE AND RISK ADVISORY SERVICES, LLC, *Plaintiff,*	§	IN THE DISTRICT COURT OF
v.	§	
THE HONORABLE KEN PAXTON, Attorney General of Texas, JOHN POLAK, in his official capacity as General Manager of the Texas Windstorm Insurance Association, and the TEXAS WINDSTORM INSURANCE ASSOCIATION, *Defendants.*	§	201st JUDICIAL DISTRICT
	§	TRAVIS COUNTY, TEXAS

Filed in The District Court of Travis County, Texas
MAY 07 2015 MYR
At 905A M.
Velva L. Price, District Clerk

AGREED ORDER OF DISMISSAL WITHOUT PREJUDICE

On this date, the Court heard the parties' motion for agreed order of dismissal without prejudice. Plaintiff Alvarez & Marsal Insurance and Risk Advisory Services, LLC (Alvarez & Marsal), and Defendants Ken Paxton, Attorney General of Texas (Attorney General), John Polak, in his official capacity as General Manager of the Texas Windstorm Insurance Association, and the Texas Windstorm Insurance Association (collectively, TWIA), appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Alvarez & Marsal to challenge Attorney General Open Records Letter Ruling OR2013-17486 (the Ruling). TWIA received a request from Mr. Jason Byrd (the Requestor) pursuant to the Public Information Act (the PIA), Tex. Gov't Code ch. 552, for documents related to payments made by TWIA to Alvarez & Marsal over a specified period of time. These documents contain information Alvarez & Marsal contends is confidential and proprietary information excepted from disclosure under the PIA. TWIA requested an open records ruling from the Open Records Division of the Office of the Attorney General (ORD). ORD subsequently issued the Ruling,

ENTERED

ordering the release of portions of the requested information, including a portion of the information Alvarez & Marsal contends is protected from disclosure (the Alvarez & Marsal Contested Information). TWIA holds the information that has been ordered to be disclosed.

The parties represent to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn the request for information and (2) in light of this withdrawal and pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

IT IS THEREFORE ORDERED that:

1. Because the request was withdrawn, TWIA shall not release the Alvarez & Marsal Contested Information, or any portion thereof, in reliance on Letter Ruling OR2013-17486.
2. Letter Ruling OR2013-17486 shall not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
3. If TWIA receives any future requests for the Alvarez & Marsal Contested Information it must request a new decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2013-17486.
4. All costs of court are taxed against the parties incurring same. The bond previously posted by Alvarez & Marsal is hereby released.
5. This cause is hereby DISMISSED without prejudice. Nothing herein shall limit Alvarez & Marsal's right to argue in the future that the Alvarez & Marsal Contested Information is confidential, proprietary, and not subject to disclosure under the PIA

Signed this 7th day of May, 2015.

JUDGE PRESIDING

TIM SULAK

AGREED:

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