



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 7, 2015

Ms. Lisa Calem-Lindström
Public Information Coordinator
Texas Facilities Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR2015-21022

Dear Ms. Calem-Lindström:

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# 582203.

The Texas Facilities Commission (the "commission") received a request for information prepared for the executive director's interview of applicants for specified years. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed 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. Section 552.101 encompasses section 411.1391 of the Government Code, which governs the release of information maintained by the Department of Public Safety (the "department") concerning certain individuals. Section 411.1391 provides:

(a) The [commission] is entitled to obtain from the department criminal history record information ["CHRI"] maintained by the department that relates to a person who:

(1) is an employee or an applicant for employment with the commission;

(2) is a consultant, intern, or volunteer for the commission or an applicant to serve as a consultant, intern, or volunteer;

(3) proposes to enter into a contract with or has a contract with the commission to perform services for or supply goods to the commission; or

(4) is an employee or subcontractor, or an applicant to be an employee or subcontractor, of a contractor that provides services to the commission.

(b) [CHRI] obtained by the [commission] under Subsection (a) may not be released or disclosed to any person except:

(1) on court order; or

(2) with the consent of the person who is the subject of the [CHRI].

Id. § 411.1391; *see also id.* § 411.082(2) (defining CHRI for purposes of Gov't Code ch. 411, subch. F). You state the information you marked constitutes CHRI. You explain the information you marked indicates whether the individuals at issue have CHRI in the department's CHRI database. You explain the commission received the information from the department pursuant to section 411.1391(a). Thus, we find you have demonstrated the information at issue consists of confidential CHRI. Therefore, we find the commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 411.1391(a).

The commission seeks to withhold the marked dates of birth under section 552.102(a) of the Government Code. Section 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). The Texas Supreme Court has considered the applicability of section 552.102, and has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). We note the requestor seeks information pertaining to applicants of the commission. Thus, we are unable to determine if the dates of birth you have marked pertain to current or former commission employees. Therefore, to the extent the marked dates of birth pertain to current or former employees of the commission, the commission must withhold the information you have marked under section 552.102(a). However, the commission may not withhold this information under section 552.102(a) if the applicants at issue are not current or former employees of the commission.

Public citizens' dates of birth are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. 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. *Texas 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. Thus, to the extent the individuals at issue are not current or former commission employees, then the commission must withhold the dates of birth of the individuals at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the commission must withhold the CHRI it has marked under section 552.101 in conjunction with section 411.1391. The commission must withhold the dates of birth of current or former commission employees under section 552.102(a) and must withhold the remaining dates of birth for public citizens under section 552.101 in conjunction with common-law privacy. The commission must release the remaining information.

You also ask this office to issue a previous determination that would permit the commission to withhold dates of birth for former and current employees under section 552.102(a) of the Government Code without the necessity of requesting a decision under section 552.301 of the Government Code. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). Having considered your request, we decline to issue such a previous determination at this time.

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,

A handwritten signature in cursive script that reads "Ashley Crutchfield".

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 582203

Enc. Submitted documents

c: Requestor
(w/o enclosures)