



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 20, 2015

Mr. Brendan W. Guy
Assistant Criminal District Attorney
County of Victoria
205 North Bridge Street, Suite 301
Victoria, Texas 77901-8085

OR2015-22013

Dear Mr. Guy:

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# 584275.

The Victoria County Criminal District Attorney's Office (the "district attorney's office") received a request for information related to two specified cases. You state you do not have information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you indicate the district attorney's office need not release information responsive to the portion of the request seeking information related to "TDC summaries" because the district attorney's office "does not know what the [r]equestor meant by 'TDC Summary.'" We note if a request for information is unclear, a governmental body may ask the requestor to clarify the request. Gov't Code § 552.222(b); *see also* Open Records Decision Nos. 561 at 8 (1990), 333 (1982). However, this office has also stated a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Nos. 561 at 8-9 (1990), 87 (1975). In this case, you do not inform us the district attorney's office sought a clarification from the requestor, nor did you submit to our office any information responsive to this portion of the request. Thus, to the extent any information responsive to this portion of the request existed when the district attorney's office received the request for information, the district attorney's office must release this information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ *ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental

body from an attorney for a potential opposing party.² See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. See Open Records Decision No. 361 (1983).

You explain the responsive information involves criminal cases that were resolved with guilty pleas. You state the defendant in the cases “has not yet filed a habeas corpus writ,” and, thus, “[the defendant] has not exhausted his post-conviction remedies in state court.” However, you do not assert any post-conviction or habeas corpus proceedings were pending on the date the district attorney’s office received the instant request. Furthermore, you have not demonstrated the defendant had taken any concrete steps towards initiating a post-conviction or habeas corpus proceeding prior to the date the district attorney’s office received the request for information. Therefore, we find you have failed to demonstrate the district attorney’s office was a party to pending or anticipated litigation on the date it received the request for information. Accordingly, none of the responsive information may be withheld on the basis of section 552.103.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. Section 552.101 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.

The remaining information contains the dates of birth of public citizens. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the

²In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

³The 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).

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 *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. Consequently, the dates of birth of public citizens are confidential under section 552.101 of the Government Code in conjunction with common-law privacy. Accordingly, the department must withhold the dates of birth we have marked within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130(a). The district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the district attorney's office must withhold the dates of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office must withhold the information we have marked under section 552.130 of the Government Code. The district attorney's office must release the remaining information to this requestor.⁵

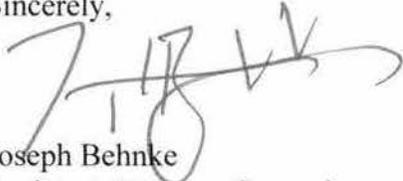
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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).

⁵We note the information to be released includes information to which the requestor has a right of access under section 552.023 of the Government Code. *See* Gov't Code §§ 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, if the district attorney's office should receive another request for this information from a different requestor, the district attorney's office must again request an opinion from this office.

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 black ink, appearing to read 'J. Behnke', with a large, sweeping flourish extending to the right.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 584275

Enc. Submitted documents

c: Requestor
(w/o enclosures)