



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 28, 2015

Mr. Richard A. McCracken
Assistant City Attorney
Office of the City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2015-22606

Dear Mr. McCracken:

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# 584817 (PIR No. W044756).

The City of Fort Worth (the "city") received a request for a specified police report. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception 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. This section encompasses the doctrine of common-law privacy. Common-law privacy 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.

In Open Records Decision No. 393 (1983), this office concluded generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). In this instance, the city seeks to withhold the entirety of the submitted information under section 552.101 in conjunction with common-law privacy. However, the city has not demonstrated, nor does it otherwise appear, this is a situation in which the entirety of the information at issue must be withheld on the basis of common-law privacy. Accordingly, the city may not withhold the entirety of the submitted information under section 552.101 of the Government Code on that basis.

However, we note this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We also note the Third Court of Appeals has considered whether a public citizen's date of birth is private. In performing such consideration the court of appeals looked to the 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.¹ *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 generally confidential under section 552.101 of the Government Code in conjunction with common-law privacy. Furthermore, upon review, we find some of the remaining information also satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation* and is also generally confidential on that basis.

However, we note some of the information at issue pertains to the requestor, who has a special right of access under section 552.023 of the Government Code to the information pertaining to himself that would otherwise be private. *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

¹Section 552.102(a) exempts 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).

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). Therefore, the city may not withhold the requestor's date of birth from him.

Additionally, we note some of the remaining information pertains to an individual for whom the requestor states he holds a durable power of attorney. Accordingly, he may be acting as the authorized representative of this individual. *See* Gov't Code § 552.023; ORD 481. Therefore, if the requestor is not acting as the authorized representative of the individual for whom the requestor claims power of attorney, the city must withhold the date of birth of the individual at issue, as well as the information you have marked and the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, if the requestor is acting as the authorized representative of the individual at issue, he has a special right of access to the information at issue, and it may not be withheld from this requestor under section 552.101 on the basis of that individual's common-law privacy interests.

In any event, we have no indication the requestor has a right of access to the remaining date of birth. Accordingly, the city must withhold the date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, if the requestor is not acting as the authorized representative of the individual for whom the requestor claims power of attorney, the city must withhold the date of birth of the individual at issue, as well as the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must release the remaining information to this requestor.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.

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

²We note the requestor has a right of access to some of the information being released pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); ORD 481 at 4. Accordingly, the city must again seek a decision from this office if it receives another request for the remaining information from another requestor.

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 'JBH', with a long horizontal stroke extending to the right.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 584817

Enc. Submitted documents

c: Requestor
(w/o enclosures)