



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 18, 2015

Ms. Tiffany Evans
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2015-26698

Dear Ms. Evans:

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# 591301 (GC No. 22730).

The City of Houston (the "city") received a request for all applications submitted by a named individual for a sexually oriented business permit. You claim portions of the submitted information are 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. You state the submitted information is subject to the decision in *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003). The question in *N.W. Enterprises* was the constitutionality of an ordinance of the city that regulated sexually-oriented businesses and specified the personal information required of individuals applying for permits to work as managers or entertainers in such businesses. With regard to the required public disclosure under the Act of certain information provided by entertainers and managers in their permit applications, the district court in *N.W. Enterprises* concluded that:

"there is meaningful potential danger to individuals working in sexually oriented businesses if the information in their permit applications is disclosed to the public. The Court concludes further that the potential for disclosure is

likely to have a chilling effect on the applicants' protected speech. These dangerous and chilling effects are sufficiently severe that the information should be held confidential by the [c]ity.”

N.W. Enters., Inc. v. City of Houston, 27 F.Supp. 2d 754, 843 (S.D. Tex.1998). In upholding the confidentiality determination of the district court, the United States Court of Appeals for the Fifth Circuit stated that “[b]ecause the district court declared the information on entertainer and manager permit applications confidential under the [Act], the [c]ity cannot disclose it to the public.” *N.W. Enters.*, 352 F.3d at 195. The appellate court also agreed the entertainers' and managers' home addresses and telephone numbers were confidential. *Id.* Thus, pursuant to *N.W. Enterprises*, information revealing the identity of an entertainer or manager of a sexually-oriented business, including the entertainer's or manager's home address and telephone number, is generally confidential. Portions of the submitted information reveal the types of information protected in *N.W. Enterprises*. Therefore, the identifying information we have marked must be withheld under section 552.101 of the Government Code in conjunction with the court's holding in *N.W. Enterprises*. However, *N.W. Enterprises* did not address the confidentiality of the remaining information. Therefore, the remaining information is not confidential under the decision in *N.W. Enterprises* and may not be withheld on that basis under section 552.101 of the Government Code.

Section 552.101 of the Government Code also 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. 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. *Indus. Found.*, 540 S.W.2d 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 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. However, we note the date of birth you seek to withhold relates to an individual whose identity has been withheld and whose privacy interests are thus protected. Therefore, we find the city may not withhold the otherwise private information relating to

¹Section 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).

an individual who has been de-identified under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the court's holding in *N.W. Enterprises*. The city 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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 591301

Enc. Submitted documents

c: Requestor
(w/o enclosures)