



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

~~September 15, 2008~~

Mr. Humberto F. Aguilera
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2008-12649

Dear Mr. Aguilera:

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# 321734.

The San Antonio Independent School District (the "district"), which you represent, received a request for a list containing the names, dates of birth, and positions of all non-certified district employees. You state that you will provide the requestor with the names and positions of the non-certified employees. You claim that the dates of birth 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 representative sample of information.¹

Section 552.102 of the Government Code 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). In *Hubert v. Harte-Hanks Texas Newspapers*, the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

under the doctrine of common-law privacy as incorporated by section 552.101 of the Act.² See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976)).

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information 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 demonstrated. *Id.* at 681-82. We note that this office has found that the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); 423 at 2 (1984) (scope of public employee privacy is narrow). We also note that dates of birth are not highly intimate or embarrassing. See *Tex. Comptroller of Public Accounts v. Attorney Gen. of Tex.*, 244 S.W.3d 629 (Tex. App.—2008, n.p.h.) (“We hold that date-of-birth information is not confidential[.]”); see also Attorney General Opinion MW-283 (1980) (public employee’s date of birth not protected under privacy); Open Records Decision No. 455 at 7 (1987) (birth dates, names, and addresses are not protected by privacy). You also raise section 552.101 in conjunction with common-law privacy and “special circumstances.” See Open Records Decision No. 169 (1977). This office considers “special circumstances” to refer to a very narrow set of situations in which release of the information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. Such “special circumstances” do not include “a desire for privacy or a generalized fear of harassment or retribution.” *Id.* at 4-5. In this instance, you argue that the employees’ dates of birth should be withheld under common-law privacy because “the emergence of identity theft and the ability to access sensitive information through names and corresponding dates of birth” constitutes special circumstances that except employee birth dates from disclosure under the Act.

Identity theft, without question, is becoming one of the fastest growing criminal and consumer offenses in the twenty-first century. See *Daly v. Metro. Life Ins. Co.*, 782 N.Y.S.2d 530, 535 (N.Y. Sup. 2004) (denying defendant’s motion for summary judgment in negligence action against insurer who disclosed consumers’ names, social security numbers, and date of birth information). The Federal Trade Commission estimated 27.3 million reported cases of identity theft, causing billions of dollars in damages, in the five years preceding early 2003. *Id.* (citing Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators*, 76-Feb. N.Y. St. B.J. 10, 15 (February, 2004)). A date of birth obtained in combination with other data about an

²Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101.

individual can be used in at least two harmful ways: to obtain sensitive information about an individual and to commit identity theft. *See Daly*, 782 N.Y.S.2d at 535-36; *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz.1998). According to one court, a person can use another individual's name and date of birth to obtain criminal records, arrest records, driving records, states of origin, political party affiliations, current and past addresses, civil litigation records, liens, properties owned, credit histories, financial accounts, and possibly medical and military histories and insurance or investment portfolios. *See id.* Certain public information websites allow individuals to locate this information in any state, including Texas, using only a name and date of birth.

Courts have held that dates of birth are private and their disclosure is a clear invasion of personal privacy. *See Oliva v. U. S.*, 756 F.Supp. 105, 107 (E.D.N.Y.1991) (applying balancing test under exemption 6 of the federal Freedom of Information Act, section 552 of title 5 of the United States Code); *Scottsdale Unified Sch. Dist. v. KPNX*, 955 P.2d 534 (Ariz.1998) (applying balancing test under state law); *Data Tree, LLC v. Meek*, 109 P.3d 1226 (Kan. 2005) (same); *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994) (same). In a request similar to this one, the Delaware Attorney General found that the public release of the dates of birth of all state employees would constitute an invasion of personal privacy under that state's personnel file exception. *See Del. Attorney Gen. Op. No. 94-1019* (1994).

In addition to these judicial and attorney general decisions, the trend in many other states is to protect government employee date of birth information. In conducting a survey of other states' laws and practices concerning the required public disclosure of date of birth information, this office has learned that a majority of the fifty states protect date of birth information in government employee personnel files. *See State Practices for Classification of Date of Birth in Public Records* (on file with Open Records Division of the Office of the Attorney General). According to the survey, states with an "unwarranted invasion of personal privacy" exemption in their open records law protect date of birth information. *See HAW. REV. STAT. § 92F - 13(1)*; *ILL. COMP. STAT. 140/7 (1)(b)*; *KAN. STAT. ANN. § 45-221(30)*; *KY. REV. STAT. § 61.878(1)(a)*; *MASS GEN. LAWS ANN. ch. 66, §10*; *MICH. COMP. LAWS ANN. § 15.243*; *N.H. REV. STAT. ANN. § 91-A:5*; *N.J. STAT. ANN. § 47:1A-10*; *N.Y. PUB. OFF. § 89(2)(b)(iv)*; *UTAH CODE ANN. § 63-2-302(2)(d)*. One state grants date of birth protection under a similar standard, "unreasonable invasion of personal privacy." *See S.C. CODE ANN. § 30-4-40(a)(2)*. Several states protect date of birth information under an exception for employee "personnel" records. *See ARIZ. ADMIN. CODE R2-5-105*; *DEL. CODE ANN. tit. 29 § 10002*; *KAN. STAT. ANN. § 45-221(4)*; *IOWA CODE § 22.7*; *MD. CODE ANN., STATE GOV'T § 10-616(h)(2)(I)*; *MISS. CODE ANN. § 25-1-100*; *N.D. CENT. CODE § 44-04-18.1*; *OR. REV. STAT. § 192.502(3)*; *R.I. GEN. LAWS § 38-2-2*; *VA. CODE ANN. § 2.2-3705.1(1)*; *WYO. STAT. ANN. § 16-4-203*. The state of Georgia protects employee date of birth information under a statute that specifically makes confidential date of birth information "if technically feasible at a reasonable cost." *See GA. CODE ANN. § 50-18-72 11.3 (A)*. Several states protect date of birth information by unofficial policy.

Finally, the state of Washington protects date of birth information under a state plan to curtail identity theft.

In two specific exceptions in the Act, the Texas legislature has recognized the need to protect information that can be used to provide access to personal or private information or that can be used to cause personal financial harm. See Gov't Code §§ 552.136 (making confidential "a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body"), 552.147 (excepting from public disclosure "the social security number of a living person"). Although the crime of identity theft is becoming an increasing problem, the district has not presented to this office sufficient evidence to establish that harmful financial consequences will result from the release of the date of birth information in response to this request. Cf. *In re Crawford*, 194 F.3d 954 (9th Cir. 1999), *cert denied*, 528 U.S. 1189 (2000) (grounding individual's expectation of privacy in his or her social security number in concern for risk of identity theft and other forms of fraud). Thus, as this office has concluded that birth dates do not constitute highly intimate or embarrassing information, the publication of which would be highly objectionable to a reasonable person, they may not be withheld under either section 552.102 or section 552.101 in conjunction with common-law privacy. In future cases, however, based on a presentation of new facts and additional arguments, or based upon legislative changes, it is possible that Texas could join the growing number of states that protect from disclosure broad-based requests for date of birth information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline,

toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/mcf

Ref: ID# 321734

Enc. Submitted documents

c: Mr. Brian New
I-Team Reporter
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(w/o enclosures)