



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2010

Mr. Fred M. Barker
Assistant County Attorney
County of Parker
118 West Columbia Street
Weatherford, Texas 76086

OR2010-17990

Dear Mr. Barker:

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# 401600.

Parker County (the "county") received a request for the names, positions, and salaries of county employees. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.151 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the county does not maintain the requested information in the format requested. A governmental body is not required to produce the responsive information in the format requested or create new information to respond to the request for information. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). However, section 552.228 of the Government Code requires a governmental body to provide a copy of the public information in the requested medium if it has the technological ability to do so without the purchase of software or hardware. *See Gov't Code* § 552.228(b)(1), (2). Accordingly, because you state the county would need to purchase software in order to comply with the request, the county may provide any information not excepted from disclosure in the submitted paper format or in another medium acceptable to the requestor. *See id.* § 552.222(c).

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 common-law right to privacy. Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See 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. *See id.* at 681-82.

You assert the submitted information is confidential pursuant to common-law privacy and “special circumstances.” You argue that release of this information would subject one of more employees to a substantial threat of physical harm. However, the Third Court of Appeals recently ruled that the “special circumstances” exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 287 S.W.3d 390, 394-95 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the “sole criteria” for determining whether information can be withheld under common-law privacy. *Id.*; *see also Indus. Found.*, 540 S.W.2d at 686. In this instance, the information at issue consists of the names, positions, and salaries of county employees. Upon review, we find this information is not highly intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we conclude the submitted information is not confidential under common-law privacy and the county may not withhold it under section 552.101.

We understand you to assert that the submitted information is confidential pursuant to constitutional privacy. Section 552.101 also encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual’s privacy interests against the public’s need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is narrower than that under the common-law right to privacy; the material must concern the “most intimate aspects of human affairs.” *See id.* at 5 (citing *Ramie*, 765 F.2d at 492). Upon review, we find you have failed to demonstrate how any portion of the submitted information falls within the zones of privacy or implicates any party’s privacy interests for purposes of constitutional privacy. Accordingly, the county may not withhold any of the submitted information under section 552.101 in conjunction with constitutional privacy.

You seek to withhold the submitted information under section 552.151 of the Government Code which relates to a public employee's safety. This section provides:

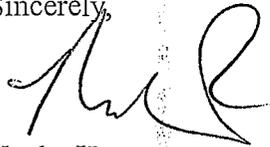
Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.151. In this instance, you state that the requestor threatened the lives of county employees. You also state the submitted information would be useful to act on the threat. Based on your representations and our review, we find the county has demonstrated release of some of the information at issue would subject the county employees to a substantial threat of physical harm. Accordingly, the county must withhold the information we have marked under section 552.151 of the Government Code. However, we find you have failed to demonstrate that release of the remaining information would, under the specific circumstances pertaining to the employees at issue, subject them to a substantial threat of physical harm. Therefore, none of the remaining information may be withheld under section 552.151 of the Government Code. As you raise no other argument against disclosure, the remaining information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

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Ref: ID# 401600

Enc. Submitted documents

cc: Requestor
(w/o enclosures)