



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2012

Mr. William Schultz
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2012-12269

Dear Mr. Schultz:

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# 461308.

Denton County (the "county") received a request for twelve categories of information pertaining to all county employees and elected or appointed officials. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.152 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted information.

We first address your argument that the requested information should be withheld because the requestor is a "vexatious litigant" who has made multiple repetitive requests. We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. Open Records Decision No. 561 at 8-9 (1990). We also note section 552.222 of the Government Code authorizes a governmental body to ask the requestor to clarify or narrow requests for information that are unclear or burdensome. *See* Gov't Code § 552.222(b). Further, sections 552.232 and 552.275 of the Government Code

¹While you also raise sections 552.107, 552.108, 552.111, 552.1175, and 552.139, you have not presented arguments explaining how these exceptions apply to the submitted information, as required by section 552.301. Thus, this ruling does not address those exceptions. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

provide governmental bodies with a method to handle repetitious or redundant requests, and requests that require large amounts of personnel time, respectively. However, a governmental body may not refuse to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); *see also* Open Records Decision No. 497 at 4 (1988) (fact that submitting copies for review may be burdensome does not relieve governmental body of its responsibility to do so). Therefore, although you argue that the requested information should not be released due to the manner and number of the requests, the county may not refuse to comply with the Act on that basis. Thus, the county must release the submitted information unless it falls within the scope of an exception to disclosure. As you have submitted information you state is responsive to the request, we will address your arguments against its disclosure under the Act.

Next, we note some of the requested categories of information are subject to section 552.022 of the Government Code. Section 552.022(a)(2) provides for the required public disclosure of "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]" unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(2). Although you raise section 552.103 of the Government Code for this information, this is a discretionary exception to disclosure that may be waived and does not make information confidential under the Act. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, section 552.103 does not make information confidential for the purposes of section 552.022(a)(2), and the county may not withhold the categories of information at issue on that basis. However, you also raise sections 552.101, 552.102, and 552.152 of the Government Code. Because these exceptions make information confidential for purposes of the Act, we will address your arguments under these exceptions for the submitted information, along with your argument under section 552.103 for the categories of information not subject to required release under section 552.022(a)(2).

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, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) 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 met. *Id.* at 681-82. We understand you to argue the submitted information is excepted from required disclosure under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected information

from disclosure when “special circumstances” exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011) (holding “freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. You argue the submitted information concerning county employees should not be released because the requestor has been known to harass government employees and was convicted in 1987 of assault on a public servant. Upon review, however, we conclude you have not demonstrated that release of the information would subject any county employee to a specific risk of harm. Accordingly, the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.102(a) 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). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). You argue the submitted ages of county employees should be withheld under section 552.102 because this requestor may use the employees’ ages in conjunction with other publicly available information to determine the employees’ dates of birth. We first note the identity of the requestor is generally not a factor to be considered when a governmental body receives a request for information. *See* Gov’t Code § 552.223 (requiring uniform treatment of all requests for information). Further, the Act does not permit a governmental body or this office to consider a requestor’s intended use of information. *See id.* § 552.222(a) (stating governmental body may not inquire into purpose for which information will be used); *see also* Open Records Decision Nos. 508 (1988) at 2 (motives of a person seeking information under the Act are irrelevant), 51 (1974). Finally, section 552.204 of the Government Code provides that a governmental body is not responsible for a requestor’s use of information released pursuant to the Act. *See* Gov’t Code § 552.204(a). Therefore, whether this requestor might use employees’ ages in conjunction with other available information to discover employees’ dates of birth from

another source does not affect whether employees' ages are confidential under section 552.102. *See A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 675-76 (Tex. 1995) (holding PIA does not permit public information to be withheld because it might be used in conjunction with other publicly available information, thereby allowing requestor to deduce confidential information); *see also City of Lubbock v. Cornyn*, 993 S.W. 2d 461, 465 (Tex. App.—Austin 1999, no pet) (holding city could not withhold accident reports or public dispatch logs, even though requestor could obtain from the logs two pieces of information needed to request confidential accident reports). Therefore, upon review, we find the employees' ages are not private under section 552.102 and may not be withheld on that basis.

Section 552.152 of the Government Code 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 § 552.152. As noted above, you argue release of the submitted information could result in the harassment of county employees. Upon review, we find you have not demonstrated release of the submitted information would subject any employee or officer to a specific substantial risk of physical harm. Accordingly, the county may not withhold any of the submitted information under section 552.152 of the Government Code. As you raise no additional exceptions to disclosure for the information subject to section 552.022(a)(2), it must be released to the requestor.

You raise section 552.103 for the remaining categories of information, which are not subject to release under section 552.022(a)(2). Section 552.103 of the Government Code provides, in relevant part:

(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.

...

(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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies 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 requested information 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, no pet.); *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). The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that 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 Open Records Decision No. 555 (1990); *see* 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. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert that the county reasonably anticipated litigation on the date it received the request because the requestor, in a prior request for information, stated the requested information would be necessary for a "possible civil rights lawsuit." However, upon review, we find you have not demonstrated the requestor has taken any objective, concrete, steps toward filing litigation against the county. Therefore, we find the county did not reasonably anticipate litigation on the date it received the instant request. Accordingly, the county may not withhold any of the remaining information at issue under section 552.103. As you raise no additional exceptions to disclosure for the submitted information, it must be released to the requestor.

²In addition, this office has concluded that 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).

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 461308

Enc. Submitted documents

c: Requestor
(w/o enclosures)