



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2012

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
Office of the City Attorney
City of Dallas
1500 Marilla Street, Room 7BN
Dallas, Texas 75201

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2012-15272

Dear Mr. Ernst:

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# 466507.

The City of Dallas (the "city") received a request for loans made by the Fair Park Trust Fund during a specified time period and trust fund policies and guidelines. We note the city is withholding driver's license numbers pursuant to section 552.130(c) of the Government Code and insurance policy numbers pursuant to section 552.136(c) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Jacob's Ladder. Accordingly, you state, and provide documentation showing, you notified Jacob's Ladder of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Further, section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information, some of which consists of representative samples.²

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the submitted tax return information, which we have marked, is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes. You argue the marked date of birth is excepted from disclosure under section 552.101 in conjunction with section 521.051 of the Business and Commerce Code. Section 521.051 of the Business and Commerce Code provides,

(a) A person may not obtain, possess, transfer, or use personal identifying information of another person without the other person's consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name.

Bus. & Comm. Code § 521.051(a) (formerly Bus. & Comm. Code § 48.101(a)). "Personal identifying information" means "information that alone or in conjunction with other information identifies an individual" and includes an individual's date of birth. *Id.* § 521.002(a)(1)(A). You assert the marked date of birth meets the definition of "personal identifying information" under section 521.002(a)(1) of the Business and Commerce Code. *See id.* § 521.002(a)(1). We note section 521.051(a) of the Business and Commerce Code does not prohibit the transfer of personal identifying information of another person unless

²We assume the "representative samples" of records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

the transfer is made with the intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name without that person's consent. *See id.* § 521.051(a). In this instance, the city's release of the information at issue would be for the purpose of complying with the Act, and not "with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value[.]" *See id.* Therefore, section 521.051(a) of the Business and Commerce Code does not prohibit the city from transferring the requested information. Accordingly, the city may not withhold the marked date of birth under section 552.101 of the Government Code in conjunction with section 521.051 of the Business and Commerce Code.

Section 552.101 of the Government Code also encompasses 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 demonstrated. *See id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). However, the financial information of a company that is an individual or sole proprietorship is confidential under common-law privacy. *See Morton*, 338 U.S. at 652; ORD 620. We note dates of birth of members of the public are generally not highly intimate or embarrassing. *See* Open Records Decision No. 455 at 7 (1987) (home addresses, telephone numbers, dates of birth not protected under privacy). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate how the date of birth you marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold the marked date of birth under section 552.101 in conjunction with common-law privacy.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Jacob's Ladder explaining why any of the remaining information should not be released. Therefore, we have no basis to conclude Jacob's Ladder has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the remaining information on the basis of any proprietary interest Jacob's Ladder may have in the information.

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and common-law privacy. The remaining information must be released.³

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

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³We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

Ref: ID# 466507

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Eric Byrd
Jacob's Ladder
1008 Townsend Lane
DeSoto, Texas 75115
(w/o enclosures)

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-13-00546-CV

Ken Paxton¹, Attorney General of the State of Texas, Appellant

v.

City of Dallas, Appellee

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GV-12-000861, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING**

MEMORANDUM OPINION

The Attorney General appeals from the trial court’s summary judgment declaring that the birth dates of certain members of the general public, contained in documents that were sought from the City of Dallas under the Texas Public Information Act (the PIA), are “confidential by law” and thus excepted from disclosure under section 552.101 of the PIA. *See* Tex. Gov’t Code §§ 552.001-.353. For the reasons that follow, we will affirm the trial court’s grant of summary judgment in favor of the City.

¹ This suit was originally brought against Greg Abbott, the former Attorney General of Texas. We automatically substitute the name of the successor to this office, Ken Paxton. *See* Tex. R. App. P. 7.2(a).

BACKGROUND

In 2012, the City of Dallas received several unrelated requests for information under the PIA.² In each case, documents responsive to the request included the birthdates of certain members of the public, and the City sought to exclude the date-of-birth information through redaction. As required by the PIA, the City requested letter rulings from the Attorney General as to whether the information was excepted from disclosure under the PIA. *See id.* § 552.301 (governmental body receiving request for information it seeks to withhold must request decision from attorney general regarding whether information falls within specified exception). The Attorney General rejected the City’s arguments and, with respect to each request, issued a letter ruling concluding that the date-of-birth information is public information and that it must be released to the requestor. *See* Tex. Att’y Gen. OR2012-08790, OR2012-15272, OR2012-16856, OR2012-17521, OR2013-01218.

In response to the letter rulings, the City filed suit against the Attorney General seeking a declaration that it was not required to disclose the redacted date-of-birth information. *See* Tex. Gov’t Code § 552.324 (authorizing suit by governmental body seeking to withhold information); *see also* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011 (declaratory judgment act). Specifically, the City asserted that (1) date-of-birth information implicates common-law privacy interests, (2) the information is therefore considered “confidential by law,” and (3) as a result, the information is excepted from disclosure under section 552.101 of the PIA. *See* Tex. Gov’t Code

² Generally, the requests are for (1) shoplifting-incident forms, (2) economic and community development loan applications, (3) safety policies and training manuals given to lifeguards and staff at one of the City’s public parks, and (4) correspondence related to a specified case with the City’s fair housing office. *See* Tex. Att’y Gen. OR2012-08790, OR2012-15272, OR2012-16856, OR2012-17521, OR2013-01218.

§ 552.101 (excepting from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision”). Both the City and the Attorney General moved for summary judgment on the issue of whether the date-of-birth information is excepted from disclosure under section 552.101. The trial court granted the City’s motion for summary judgment and denied the Attorney General’s motion.

In a single issue appeal, the Attorney General argues that the trial court erred in granting the City’s motion for summary judgment because birth dates of members of the general public are not protected by common-law privacy and therefore are not excepted from required disclosure under section 552.101 of the PIA.

STANDARD OF REVIEW

We review summary judgment decisions de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Texas State Bd. of Chiropractic Exam’rs v. Abbott*, 391 S.W.3d 343, 346 (Tex. App.—Austin 2013, no pet.). Summary judgment is proper when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law on the issues set out in the motion. Tex. R. Civ. P. 166a(c). When both parties move for summary judgment on the same issue, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). On appeal, when the trial court grants one motion and denies the other, we consider the summary-judgment evidence presented by both sides and determine all of the questions presented. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In these situations, if we determine

that the trial court erred in granting summary judgment, we render the judgment that the trial court should have rendered. *Id.*

DISCUSSION

The Public Information Act

The Texas Legislature enacted the Texas Public Information Act with the purpose of providing the public “complete information about the affairs of government and the official acts of public officials and employees.” Tex. Gov’t Code § 552.001. The Legislature has instructed courts to liberally construe the provisions of the statute “in favor of granting a request for information” to ensure this policy goal is met. *Id.*

The PIA guarantees access to public information subject to certain exceptions. *Id.* § 552.006. Under the PIA, information that is collected, assembled, or maintained by or for a governmental body is “public information.” *Id.* § 552.002. A governmental body that receives a request for information must promptly produce public information for inspection, duplication, or both. *Id.* § 552.221. The PIA does not limit the availability of public information except as expressly provided. *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *see* Tex. Gov’t Code §§ 552.101-.154.

When a governmental body believes the information requested of it is excepted from disclosure and there has been no previous determination about the requested information, the governmental body must request a ruling from the Attorney General asserting which exceptions to disclosure under the PIA permit it to withhold the information. Tex. Gov’t Code § 552.301. If the

Attorney General rules that the information must be released, the governmental body may file suit in Travis County seeking declaratory relief from compliance with the Attorney General's decision within 30 days of the ruling. *Id.* § 552.324. The governmental body seeking to withhold the information has the burden of proving that an exception to disclosure applies. *York v. Texas Guaranteed Student Loan Corp.*, 408 S.W.3d 677, 688 (Tex. App.—Austin 2013, no pet.).

Common-law privacy

In this case, there is no dispute that the date-of-birth information at issue is “public information” as defined within the PIA. Instead, the City contends that the information is excepted from disclosure under section 552.101, which provides that information is excepted from mandatory release if it is considered “confidential by law, either constitutional, statutory, or by judicial decision.” *See* Tex. Gov't Code § 552.101. Specifically, the City contends that the information is considered confidential by judicial decision because it is confidential under the doctrine of common-law privacy and the rationale presented by the Texas Supreme Court in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010).

It is well established that information that is confidential under the common-law privacy doctrine is considered “confidential by law” under section 552.101. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682-83 (Tex. 1976); *see also Texas Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 119 (Tex. 2011) (noting that “thirty-five years ago, [the Texas Supreme Court] held that the common law privacy protection exempted documents from disclosure under the PIA”). 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. *Industrial Found.*, 540 S.W. 2d at 682; see also *Abbott v. Dallas Area Rapid Transit*, 410 S.W.3d 876, 880 (Tex. App.—Austin 2013, no pet.). As a result, information that is protected under the doctrine of common-law privacy is excepted from mandatory disclosure under the PIA, unless the requestor can show that the information is of legitimate public concern. *Industrial Found.*, 540 S.W. 2d at 685.

In this case, the Attorney General does not contend that the requestors have shown or can show that the redacted date-of-birth information is of any legitimate public concern. Instead, the Attorney General asserts only that the City has failed to establish that the information is protected under the common-law privacy doctrine. Accordingly, our examination of whether the date-of-birth information is “confidential by law” under section 552.101 turns solely on whether the information is protected under the common-law privacy doctrine.

The doctrine of common-law privacy protects against four distinct kinds of invasions: (1) intrusion upon one’s seclusion or solitude, or into one’s private affairs, (2) public disclosure of embarrassing private facts, (3) false light publicity, and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. *Cox Tex. Newspapers*, 343 S.W.3d at 117; *Industrial Found.*, 540 S.W.2d at 682 (quoting William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960)); see also *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973) (recognizing tort for “intrusion upon one’s seclusion or solitude, or into one’s private affairs”). Here, the City contends that the disclosure of birth dates implicates the first type of privacy interest—intrusion upon one’s seclusion or solitude, or into one’s private affairs.³ The City argues that it met its burden of establishing that the release

³ The Attorney General argues that the City’s reliance on the privacy interest articulated as “intrusion upon one’s seclusion or solitude, or into one’s private affairs” is misplaced because,

of the redacted date-of-birth information would constitute an intrusion into private affairs because, according to the City, “[a]ll persons have a substantial privacy interest in their dates of birth because their birth dates can be used to facilitate identify theft.”

In support of its argument, the City relies on the Texas Supreme Court’s opinion in *Texas Comptroller*, 354 S.W.3d at 343-346. In that opinion, the supreme court held that public employee date-of-birth information in the Comptroller’s payroll database was excepted from disclosure under section 552.102 of the PIA, which excepts from disclosure personnel-file information whose release “would constitute a clearly unwarranted invasion of personal privacy.” *See id. at* 348. In reaching this holding, the supreme court decided, as a preliminary matter, that state employees have a “nontrivial privacy interest” in their birth dates, arising from concerns about the potential for and growing problem of identity theft and fraud. *See id. at* 344-45. As the supreme court explained,

[T]here is little question that one “can take personal information that’s not sensitive, like birth date, and combine it with other publicly available data to come up with something very sensitive and confidential.”

according to the Attorney General, it was not argued in the City’s motion for summary judgment before the trial court and, as a result, should not be considered now in this appeal. *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (“Summary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion.”).

In its motion for summary judgment, the City argued that the date-of-birth information is confidential by judicial decision under section 552.101 based on the rationale of *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). In its appellate brief before this Court, the City again argues that resolution of this case is governed by *Texas Comptroller* and suggests that the supreme court in *Texas Comptroller* employed an intrusion-into-private-affairs analysis. We disagree with the Attorney General’s assertion that the City is asking this Court to affirm the trial court’s grant of summary judgment on a ground that the City did not present in its motion. *See* Tex. R. App. P. 38.1(e) (“The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.”).

Id. at 344 (citing Hadley Legget, *Social Security Numbers Deduced From Public Data*, WIRED SCI. (July 6, 2009, 5:05 PM) <http://www.wired.com/wiredscience/2009/07/predictingssn.com>). Moreover, “[t]he Attorney General has observed that preventing identity theft ‘begins by reducing the number of places where your personal information can be found.’” *Id.* (citing *Preventing Identity Theft*, FIGHTING IDENTITY THEFT, <http://www.texasfightsidtheft.gov/preventing.shtml>). Concluding that the state employees’ privacy interest in this information substantially outweighed the negligible public interest in disclosure, the court held that “disclosing employee birth dates constitutes a clearly unwarranted invasion of personal privacy, making them exempt from disclosure section 552.102.” *Id.* at 348.

Although the supreme court’s decision in *Texas Comptroller* concerned the privacy rights of public employees under section 552.102, we do not see why the court’s concerns about identity theft and fraud would not apply equally to members of the general public and, in turn, to claims of confidentiality under section 552.101. Therefore, we conclude that based on the supreme court’s rationale in *Texas Comptroller*, public citizens have a privacy interest in their birth dates such that the “publication [of birth dates] would be highly objectionable to a reasonable person.” *Cox Tex. Newspapers*, 343 S.W.3d at 117 (citing *Industrial Found.*, 540 S.W.2d at 686, and explaining that “sole criteria” for assessing “confidential by judicial decision” based on invasion-of-privacy tort is whether information is of legitimate public concern and whether its publication would be highly objectionable to reasonable person). There is no dispute that the redacted date-of-birth information at issue is not of legitimate public concern; the City has therefore established that the information is “confidential by judicial decision” under section 552.101 of the PIA.

Because the redacted date-of-birth information is excepted from mandatory disclosure, the trial court did not err in granting summary judgment in favor of the City. Accordingly, we overrule the Attorney General's sole issue on appeal.

CONCLUSION

Having overruled the Attorney General's issue on appeal, we affirm the judgment of the trial court.

Scott K. Field, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: May 22, 2015