



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

October 22, 2012

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

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

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Section
City of Dallas
1400 South Lamar
Dallas, Texas 75215

OR2012-16856

Dear Mr. Ernst and Ms. Middlebrooks:

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# 468516 (DPD Reference No. 2012-09527).

The City of Dallas (the "city") received a request for nine categories of information pertaining to an incident involving the requestor's client, including safety policies and procedures in relation to drowning and training manuals given to lifeguards and staff at a named city park. You state some information will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.148 of the Government Code.¹ We have

¹Although you initially raised sections 552.101 through 552.142 of the Government Code, you have withdrawn your claim under the remaining sections.

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the city did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request.” Gov’t Code § 552.301(b). While you raised sections 552.101 through 552.142 within the ten-business-day time period required by subsection 552.301(b), you did not raise section 552.148 until after the ten-business-day deadline had passed. Accordingly, with respect to section 552.148, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.148 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the information at issue.

Next, we note the submitted information contains completed reports. Section 552.022(a)(1) of the Government Code provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). Although you claim section 552.103 of the Government Code for this information, we note section 552.103 is a discretionary exception 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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the completed reports, which we have marked, under section 552.103 of the Government Code. However, because section 552.101 of the Government Code makes

²We assume 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 those records contain substantially different types of information than those submitted to this office.

information confidential under the Act; we will consider its applicability to this information. We will also consider your claims under sections 552.101, 552.103, 552.111, and 552.148 of the Government Code for the information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides, in relevant part, as follows:

(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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the city received the request for information, and (2) the information at issue is related to that litigation. *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 prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded a governmental body's receipt of a claim letter it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance, is sufficient to establish litigation is reasonably anticipated. See Open Records Decision No. 638 at 4 (1996).

You inform us that, prior to receipt of the instant request for information, the requestor and an attorney for the other party involved in the same incident as the requestor's client submitted notice of claim letters to the city. You state the requestor's filed claim form meets the requirements of chapter XXIII of the city charter, which you have provided for our review

and you state “requires written notice before any claim for injury or damage may be considered by the city.” You have also provided for our review the requestor’s claim form. Based on your representations and our review, we find the city reasonably anticipated litigation on the date of the request. In addition, you state the information at issue is related to the anticipated litigation. Accordingly, the city may generally withhold the information at issue that is not subject to section 552.022 of the Government Code, which we have marked, under section 552.103 of the Government Code.³

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We now turn to the remaining information, including the information that is subject to section 552.022(a)(1) of the Government Code. 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 section encompasses information protected by other statutes, such as section 261.201 of the Family Code. Section 261.201 provides, in relevant part, as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of

³As our ruling is dispositive for this information, we need not address your arguments under section 552.111 of the Government Code.

reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

(1) any personally identifiable information about a victim or witness under 18 years of age unless that victim or witness is:

(A) the child who is the subject of the report; or

(B) another child of the parent, managing conservator, or other legal representative requesting the information;

(2) any information that is excepted from required disclosure under [the Act], or other law; and

(3) the identity of the person who made the report.

Fam. Code § 261.201(a), (k), (l). We note the submitted incident reports prepared by the city's police department (the "department") pertain to an investigation of suspected child neglect conducted by the department. *See id.* §§ 101.003(a) (defining "child" as person under eighteen years of age who is not and has not been married and who has not had disabilities of minority removed for general purposes), 261.001(4) (defining "neglect" for purposes of chapter 261 of the Family Code). Accordingly, we find this information, which we have marked, is subject to chapter 261 of the Family Code. Thus, the city must withhold the incident report we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. We note, however, the requestor is the attorney for the family of the child victim listed in the remaining incident report, and the family members are not alleged to have committed the suspected neglect. Thus, pursuant to section 261.201(k), this report may not be withheld from this requestor on the basis of section 261.201(a). *See* Fam. Code § 261.201(k). We note, however, section 261.201(l)(2) of the Family Code provides that any information that is excepted from required disclosure under the Act or other law must still be withheld from disclosure. *Id.* § 261.201(l)(2). Therefore, we will consider your arguments under section 552.101 of the Government Code for this information.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of

medical records. See Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). Upon review, we find a portion of the department's incident report, which we have marked, constitutes a medical record of an individual who is not represented by the requestor's client. Thus, the city may only release the marked medical record in accordance with the MPA.

You argue the dates of birth in the remaining information are excepted from disclosure under section 521.051 of the Government Code 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. & Com. Code § 521.051(a) (formerly Bus. & Com. 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 dates of birth meet 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 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 dates 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 or 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. We note a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We also 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 some of the information is highly intimate or embarrassing and of no legitimate interest; however, this information relates to the requestor's client. Pursuant to section 552.023 of the Government Code, the requestor has a special right of access to private information pertaining to his client, and the city may not withhold such information from him under section 552.101 in conjunction with common-law privacy. *See Gov't Code § 552.023* (person or person's authorized representative has special right of access to information that is protected by laws intended to protect person's privacy); *Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when individuals request information concerning themselves). Further, the remaining information is not highly intimate or embarrassing information of no legitimate public interest. Therefore, none of the information at issue is confidential under common-law privacy, and the city may not withhold it on that ground.

We note section 261.201(1)(1) of the Family Code provides that any personally identifiable information about a victim or witness who is under 18 years of age and is not the child of the parent, managing conservator, or other legal representative requesting the information shall be withheld from disclosure. Fam. Code § 261.201(1)(1). The department's incident report contains identifying information of the other child victim and witnesses who are under eighteen years of age and these individuals are not children of the requestor's client. Thus, the city must withhold this information, which we have marked and indicated, under section 552.101 of the Government Code in conjunction with section 261.201(1)(1) of the Family Code. Further, section 261.201(1)(3) of the Family Code provides that the identity of the reporting party shall be withheld from disclosure. *Id.* § 261.201(1)(3). Thus, the city must also withhold the identifying information of the reporting party, which we have marked and indicated, under section 552.101 of the Government Code in conjunction with section 261.201(1)(3) of the Family Code.

Lastly, we address your argument under section 552.148 of the Government Code for a portion of the remaining information. Section 552.148 provides:

- (a) In this section, "minor" means a person younger than 18 years of age.
- (b) The following information maintained by a municipality for purposes related to the participation by a minor in a recreational program or activity is excepted from the requirements of Section 552.021:
 - (1) the name, age, home address, home telephone number, or social security number of the minor;
 - (2) a photograph of the minor; and
 - (3) the name of the minor's parent or legal guardian.

Gov't Code § 552.148. Upon review, we find none of the remaining information at issue is maintained by the city for purposes related to the participation by a minor in a recreational program or activity. Accordingly, the city may not withhold any of the remaining information under section 552.148 of the Government Code.

In summary, the city may withhold the information we have marked under section 552.103 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The city may only release the marked medical record in accordance with the MPA. The city must withhold the information we have marked and indicated under section 552.101

of the Government Code in conjunction with subsection 261.201(1)(1) and subsection 261.201(1)(3) of the Family Code. The remaining information must be released.⁴

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/ag

Ref: ID# 468516

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴Because this requestor has a right of access to some of the information being released, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.

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

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