



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2012

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2012-16936

Dear Ms. Soucy:

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# 467833 (Comptroller ID# 8471237466).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for the photographs and identification badges of Comptroller Susan Combs and three current or former employees. You inform us the comptroller has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.139 of the Government Code.¹ You also inform us that release of this information may implicate the interests of the current or former employees. Accordingly, you notified the named employees of their rights to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). You have submitted comments from one of these individuals. We have

¹Although you also raise section 552.110 of the Government Code, we note this section is designed to protect the interests of third parties, not the interests of a governmental body. As we have received no arguments from any third party seeking to withhold any portion of the submitted information under section 552.110, we do not address the applicability of this section to the submitted information. *See Gov't Code § 552.305.*

considered the submitted arguments and reviewed the submitted representative sample of information.²

Section 552.139(b)(3) of the Government Code provides, “a photocopy or other copy of an identification badge issued to an official or employee of a governmental body” is confidential. *Id.* § 552.139(b)(3). Therefore, the comptroller must withhold the submitted photocopy of an identification badge and the submitted photographs that were created specifically for use on an identification badge under section 552.139(b)(3) of the Government Code.³

You raise section 552.101 of the Government Code in conjunction with common-law and constitutional privacy for the remaining photographs. This section excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by statute. *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which 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 satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. Upon review, we find the remaining photographs are not highly intimate or embarrassing information of no legitimate public interest. Thus, the comptroller may not withhold these photographs under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *See id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the “most intimate

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 that submitted to this office.

³As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

aspect of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we conclude you have not explained how the remaining photographs at issue fall within the zones of privacy or demonstrated that an individual’s privacy interests outweigh the public’s interest in these photographs. Therefore, the remaining photographs may not be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

We understand the employee whose comments you have submitted to argue the remaining photographs at issue are 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 noted above, protected information from disclosure when “special circumstances” existed 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. The employee argues the remaining photographs should not be released because it would create an unnecessary security risk for the comptroller and its employees. Upon review, we find the employee has failed to demonstrate how the release of these photographs would subject the comptroller’s employees to a specific risk of harm. Accordingly, the comptroller may not withhold the remaining photographs under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

The comptroller also claims section 552.102(a) of the Government Code for the remaining photographs at issue. This section 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 held that 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.*, No. 08-0172, 2010 WL 4910163 (Tex. 2010). Upon review, we find the remaining photographs are not subject to section 552.102(a) of the Government Code, and the comptroller may not withhold any of these photographs on that basis.

In summary, the comptroller must withhold the submitted photocopy of an identification badge and the submitted photographs that were created specifically for use on an identification badge under section 552.139(b)(3) of the Government Code. As no further exceptions to disclosure are raised for the remaining photographs, the comptroller must release them.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 467833

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)