



**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

January 22, 2013

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.**

OR2013-01218

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# 476707.

The City of Dallas (the "city") received a request for any and all correspondence that relates to a specified case with the city's Fair Housing Office. You state the city will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the submitted information is part of a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public

---

<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Although you assert portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. See Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, pursuant to section 552.022(a)(1), the city may not withhold any portion of the submitted information under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. Furthermore, because sections 552.101 and 552.137 of the Government Code make information confidential under the Act, we will address the applicability of these sections to the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. You argue the marked date of birth in Exhibit B is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 521.051 of the Business and Commerce Code. Section 521.051(a) 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 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 in Exhibit B 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 types of information considered highly intimate or embarrassing 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 that personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. *See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983).* 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 in Exhibit B is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate how the information you have marked in Exhibit B is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the information it has marked under section 552.101 in conjunction with common-law privacy.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a

lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim Exhibit C is protected by the attorney-client privilege. You state Exhibit C consists of communications between city attorneys and a city employee made for the purpose of facilitating the rendition of professional legal services to the city. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit C. Accordingly, the city may withhold Exhibit C under rule 503 of the Texas Rules of Evidence.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Upon review, we find the e-mail address the city has marked in Exhibit B is not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the city must

withhold the e-mail address it has marked in Exhibit B under section 552.137 of the Government Code, unless the owner affirmatively consents to disclosure.<sup>2</sup>

In summary, the city must withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold Exhibit C under rule 503 of the Texas Rules of Evidence. The city must withhold the e-mail address it has marked in Exhibit B under section 552.137 of the Government Code, unless the owner affirmatively consents to disclosure. The city must release the remaining information.

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](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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/som

Ref: ID# 476707

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>2</sup>We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.



**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

---

---

**NO. 03-13-00546-CV**

---

---

**Ken Paxton<sup>1</sup>, 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.

---

<sup>1</sup> 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.<sup>2</sup> 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

---

<sup>2</sup> 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.<sup>3</sup> The City argues that it met its burden of establishing that the release

---

<sup>3</sup> 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