



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 19, 2016

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2016-18823

Dear Mr. Ramirez:

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# 623279.

The Lower Colorado River Authority (the "authority") received a request for certain information pertaining to a specified employment announcement.¹ We understand you have redacted some information under section 552.130(c) of the Government Code.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.104, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.

¹You state the authority sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) 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).

Initially, we address your claim that the authority is not required to comply with the instant request for information. You inform us the authority received the request via e-mail. You state the authority has, via e-mail, asked the requestor to establish proper identification and the requestor has failed to do so. You assert that, pursuant to section 552.222(a) of the Government Code, the authority is not required to provide the requested information until the requestor provides proper identification. Section 552.222 of the Government Code provides:

(a) The officer for public information and the officer's agent may not make an inquiry of a requestor except to establish proper identification or except as provided by Subsection (b), (c), or (c-1).

(b) If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request . . . but the governmental body may not inquire into the purpose for which information will be used.

(c) If the information requested relates to a motor vehicle record, the officer for public information or the officer's agent may require the requestor to provide additional identifying information[.]

(c-1) If the information requested includes a photograph described by Section 552.155(a), the officer for public information or the officer's agent may require the requestor to provide additional information[.]

Gov't Code § 552.222(a)-(c-1). Section 552.222 establishes the permissible inquiries a governmental body may make to a requestor. Although a governmental body may not inquire into the purpose for which information will be used, a governmental body may ask the requestor to clarify a request if the request for information is unclear. *See id.* § 552.222(b). Further, since a special right of access to information exists in some circumstances that require a requestor to establish proper identification, a governmental body may ask the requestor to establish proper identification. *See id.* § 552.222(a), (c)-(c-1); *see, e.g., id.* § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests). However, the identity of the requestor is generally not a factor to be considered when a governmental body receives an open records request. *See id.* § 552.223 (requiring uniform treatment of all open records requests). *But see id.* § 552.028 (governmental body not required to accept or comply with request for information from an individual who is imprisoned or confined in a correctional facility, or an agent of the individual other than that individual's attorney). We find you have failed to explain the reason identification would be necessary in this instance. Furthermore, failure to provide identification under section 552.222 is not grounds for a governmental body to refuse to respond to a request for public information. *See id.* § 552.222(b)-(c-1). Therefore, upon

review, we find the present request to be a valid request for information under the Act. Accordingly, we will address the arguments against disclosure for the submitted information.

Next, we note you have only submitted information pertaining to job applicants and interviewers for our review. Thus, although you state the authority has submitted a representative sample of the requested information, we find the submitted information is not representative of all the information to which the requestor seeks access. Please be advised this open records letter ruling applies only to the type of information you have submitted for our review. This ruling does not authorize the authority to withhold any type of information that is substantially different from the types of information you submitted to this office. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public). Therefore, we presume the authority has released the information responsive to the remaining portions of the request to the extent such information existed when the authority received this request for information. If not, then the authority must release any such information immediately. *See id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The authority states it has specific marketplace interests in the information at issue because the authority is competing for job applicants with entities that are not subject to the Act. However, this office has consistently interpreted section 552.104 to apply in competitive bidding and procurement situations. *See, e.g.*, Open Records Decision Nos. 604 at 1 (1992), 593 at 1 (1991) (statutory predecessor to section 552.104 “designed to protect interests in commercial transactions”), 592 at 5 (1991), 568 at 2 (1990), 541 at 3 (1990), 514 at 1 (1988) (statutory predecessor to section 552.104 protects purchasing interests), 463 at 1-2 (1987) (statutory predecessor to section 552.104 “has been construed to protect the sealed bid process”), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). In light of this office’s prior interpretations of section 552.104, we are not persuaded that a competition among applicants for a position of public employment is a competitive situation contemplated by section 552.104. *Cf.* ORD 463 at 2 (stating, by analogy, that “competition” between two job applicants seeking one job offered by the state is not a process the statutory predecessor to section 552.104 was intended to protect). Therefore, we find you have failed to demonstrate the applicability of section 552.104 in this instance, and the authority may not withhold the submitted information on that basis.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll

database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the authority must withhold the public employee's date of birth we have marked under section 552.102(a). However, upon review, we find you have failed to demonstrate the applicability of section 552.102(a) to the remaining information, and the authority may not withhold it on this basis.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the authority may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of 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. 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. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the remaining information, we find you have failed to demonstrate the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the authority may not withhold the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the

employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You contend release of the remaining information would subject employees to harm by revealing certain information. Upon review, we find you have failed to demonstrate the release of the remaining information would subject an employee to a substantial risk of physical harm. Accordingly, the authority may not withhold the remaining information under section 552.152 of the Government Code.

In summary, the authority must withhold the public employee's date of birth we have marked under section 552.102(a) of the Government Code. The authority 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 623279

Enc. Submitted documents

c: Requestor
(w/o enclosures)