

Comptroller's Brief to Attorney General

December 14, 2005

The Honorable Greg Abbott **VIA: HAND DELIVERY**
Attorney General of Texas
Price Daniel Building
209 West 14th Street, 6th Floor
Austin, Texas 78711

Requestor: Ms. Jennifer LaFleur; *Dallas Morning News*
Date Received: November 18, 2005
AG ID#: 242269

Requestor: Ms. Mirna Araceli Ramos De La Cruz; *El Norte*
Date Received: November 28, 2005^{[11](#)}
AG ID#: 242269

Dear General Abbott:

The Comptroller of Public Accounts received the above-referenced requests for information on November 18 and 28, 2005, respectively. Your office has assigned this request for a ruling ID# 242269.

Both requests ask for payroll information regarding approximately 144,000 state employees, some of which information we believe may be confidential, so we combined these requests and timely referred them to your office regarding the information we believe to be confidential. Both are seeking and are being provided public information regarding state employees, including name, job title/description, agency/department, and gross salary. Ms. LaFleur has clarified her request, and we understand her to also be seeking the following information regarding each identified employee: race, sex, work address, date of employment, pay rate, and information regarding work hours. We understand this to be public information and will provide that information to the extent that we have it.

Based on our understanding of Ms. LaFleur's request as clarified, the categories of information at issue in these requests are now different. We understand Ms. Ramos to additionally seek net salary information and deductions for each identified state employee. We understand that Ms. LaFleur additionally seeks date of birth for all identified state employees, and an additional designation identifying each state employee who is a peace officer. We are concerned that the information at issue may be protected from disclosure under Government Code Sections 552.101 and 552.108.

Government Code Section 552.301

This request for a decision from your office meets the requirements of Section 552.301 of the Government Code, as follows:

- (1) The request was timely made within the ten (10) business day^[2] period for seeking a decision from the attorney general.
- (2) The requestors were timely notified of this agency's determination to seek a decision from the attorney general and were timely provided with a copy of this letter as required by Section 552.301(e-1).
- (3) Our written comments explaining the applicability of the stated exceptions to the information at issue and also a representative sample of the information at issue are being provided to your office within fifteen (15) business days after receipt of the request. **Please note that since these requests have been clarified and Ms. Ramos' request now is broader in scope than Ms. LaFleur's, we intend to supplement our argument regarding Ms. Ramo's request for specific deduction information within the fifteen (15) business days after receipt of her request.**

Date of Birth Information

We believe that both Government Code Sections 552.101 and 552.108 may protect date of birth information of Texas' state agency employees.^[3]

Ms. LaFleur will be provided with the clearly public identifying information regarding thousands of public employees. Such identifying information includes each public employee's first, last, and middle (which may be a maiden name) names, sex, race, agency, date of hire, title/description, and work addresses. In addition, the requestor seeks the date of birth of each identified employee that goes with this other public identifying information.^[4]

Government Code Section 552.022(a)(2) provides that name, sex, ethnicity, salary, title, and dates of employment are public under the Texas Public Information Act for all state employees. While date of birth is not listed as public under Section 552.022, in MW-283 (1980), the then-Attorney General opined that public employees' dates of birth are public under the Open Records Act.

Your office has generally construed information to be protected under a right of privacy under the test set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977), 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.

Industrial Foundation, 540 S.W.2d at 685 (Tex. 1976).

Constitutional privacy protects information in which a person has a legitimate expectation of privacy *and* where the privacy interest outweighs the public interest. *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir. 1996); *Industrial Foundation*, 540 S.W.2d at 685 (Tex. 1976). In Open Records Decision No. 123 (1976), the then-Attorney General recognized that there may exist “exceptional circumstances” to protect otherwise public information from public release. Even in MW-283, your office discussed the prospect that special circumstances could exist to protect what might be otherwise considered public information.

While date of birth might **not** have been considered “highly intimate” information in 1980, most reasonable people today would consider their date of birth, particularly in conjunction with their complete name, work information, sex, race, and work start date, to be highly intimate in nature. Personally identifying information that contains date of birth information is recognized as being sensitive and may require special methods of protection to keep it from being publicly released. *See* Tex. Bus. & Com. Code § 35.48(d) (“When a business disposes of a business record that contains personal identifying information of a customer of the business, the business shall modify, by shredding, erasing, or other means, the personal identifying information to make it unreadable or undecipherable”); *see also id.* § 35.48(a)(1-a)(A) (“personal identifying information” includes date of birth).

It is hard to see what public interest could be at issue when public requestors can be provided a public employee’s age but would prefer to receive more specific information regarding date of birth. *See United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771- 772 (1989). Other states have found privacy interests in date of birth information. The Arizona Supreme Court held that “a person, including a public school teacher, has a privacy interest in his or her birth date.” *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 955 P.2d 534, 539 (Ariz. 1998). The Arizona court further declared:

From the facts presented, the minimal public interest shown by defendants does not override the privacy interest of the teachers. On the facts of this case, plaintiffs correctly withheld the teachers’ birth dates from defendants and the trial court correctly sustained that action.

Id. 955 P.2d at 540.

Section 552.108 generally applies to records of a law enforcement agency or prosecutor. Your office and the Texas Supreme Court have previously recognized that this agency is a law enforcement agency. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). We note that even an administrative agency that is not a law enforcement entity may claim Section 552.108 protection for records in certain circumstances. Section 552.108 is applicable to information gathered by an administrative agency if its release would unduly interfere with law enforcement. *See* Open Records Decision No. 493 (1988). In Open Records Decision No. 413 (1984), the Attorney General agreed that the law enforcement exception would protect from public release a Texas Department of Corrections sketch showing planned pedestrian and vehicle barricades, which were used for security purposes. We are concerned that the wholesale public release of state employees’ identifying information in conjunction with their specific dates of birth could lead to identity theft, and that this situation may constitute a special circumstance under the law

enforcement exception, Government Code Section 552.108. We note this advice to protect date of birth information, taken from your office's website:

Protecting Your Identity

Identity theft can happen to anyone. Previously, criminals stole your wallet for your cash. Now they want your wallet to steal your good name. Protect yourself and your identity.

How to Avoid Identity Theft

Identity theft occurs when someone uses your personal identifying information without your permission. This information may include your name, address, driver's license number, Social Security number, mother's maiden name, birth date, or financial information such as your bank account, credit card, or PIN number. An identity thief may obtain your identifying information by stealing credit card applications, bank statements, or checks from your trash or mail, finding your lost or stolen wallet or purse, hacking your credit card number from a corporate database, or stealing your information from inside a company that holds it.

An identity thief may use your information to obtain new credit cards, open checking accounts, get a bogus driver's license or Social Security card, make long distance calls, apply for a job, or make purchases using your bank account or credit card. ID theft is a felony crime and should be reported to your local law enforcement agency. Because of the nature of the crime, you may not realize your identity has been stolen until you are denied credit, turned down for a job, or sent a bill for purchases you did not make. By that time, your good name and credit history may be in ruins. Rebuilding good credit in the aftermath of identity theft can take months or even years.

Office of the Texas Attorney General, <http://www.oag.state.tx.us/consumer/idtheft.shtml> (last visited Dec. 14, 2005).

We believe that there are special circumstances under both Government Code Sections 552.101 and 552.108 that may protect the date of birth information.

We also note that whether date of birth information is protected from disclosure is an issue in a pending lawsuit, *State Bar of Texas v. Abbott*, Cause No. GV403520, 353rd District Court of Travis County, Texas. *See also* OR2004-9185 (2004) (request for ruling file was closed in regard to information at issue in pending litigation, including date of birth information).

Identification of Employees as Peace Officers

Ms. LaFleur's request is for specifically identifying information—name, race, sex, job title/description, agency, work address, hire date—to include an indicator for each employee who is a peace officer. Before we release to the public information identifying each peace officer employed by Texas State agencies, we are notifying agencies that may wish to address this portion of Ms. Fleur's request. We note that the Attorney General issued an informal ruling concerning identification of officers holding particular work assignment, in OR99-3103 (1999).

Salary Deductions

We believe that some of the information specific only to Ms. Ramos' request is protected from disclosure under Government Code Section 552.101. Ms. Ramos has asked for net salary to include type and amount of each deduction of each identified state employee. Some of this information is protected on the basis of privacy as background financial information, and some is protected by statute, in conjunction with Government Code Section 552.101. We anticipate providing your office with arguments concerning the deductions we believe to be confidential within 15 business days^[5] after receipt of Ms. Ramos' request.

Thank you for your attention to this request for a decision. If you need any further information, please call me.

Sincerely,

Ruth H. Soucy
Manager and Legal Counsel
Open Records Division
Phone: (512) 475-0411
Fax: (512) 463-4288

cc: Ms. Jennifer LaFleur
Dallas Morning News
JLafleur@dallasnews.com

Ms. Mirna Araceli Ramos De La Cruz
El Norte
Mirna.ramos@elnorte.com

Ms. Sylvia Salazar
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

Ms. Pamela Smith
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

Ms. Karen Rabon
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Ms. Ann Bright
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

Ms. Lilly Alderete
Texas Commission on Law Enforcement
Officer Standards and Education
6330 U.S. 290 East, Suite 200
Austin, Texas 78723

Mr. Mike Viesca
Texas Department of Criminal Justice
P.O. Box 13084 — Capitol Station
Austin, Texas 78711-3084

Ms. Sandy Joseph
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

Enclosures: Copies of requests for information
Representative sample of information at issue

Endnotes

^[1] This e-mail request is dated November 23, 2005. However, this agency was on a “skeleton crew” schedule on November 23, 2005. Your office has determined that skeleton crew days are not to be counted as “business days” for purposes of calculating deadlines under the Public Information Act. Therefore, the request was not “received” until the following business day: November 28, 2005.

^[2] We note that November 24 and 25, 2005, were state holidays. Additionally, this agency was on a “skeleton crew” schedule on November 23, 2005. Therefore, November 23-25, 2005, are not “business days” for purposes of calculating deadlines under Section 552.301 of the Government Code.

^[3] We note that if this information is found to be public, it not only must be released upon request but can be further re-released and posted on the Internet as a public document.

^[4] Please note that this agency offered to provide age as a substitute for date of birth; however, the requestor clarified that she does want specific date of birth for each employee. Our understanding is that age is public information.

^[5] As noted above, Ms. Ramos' e-mail request is dated November 23, 2005. However, this agency was on a "skeleton crew" schedule on November 23, 2005. Additionally, this agency was closed for state holidays on November 24 and 25, 2005. Your office has determined that holidays and skeleton crew days are not to be counted as "business days" for purposes of calculating deadlines under the Public Information Act. Therefore, the request was not "received" until the following business day: November 28, 2005.