



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 3, 2019

Mr. Brian L. Rose
Assistant General Counsel
Harris County District Attorney's Office
500 Jefferson Street, Suite 600
Houston, Texas 77002

OR2019-14543

Dear Mr. Rose:

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# 768677.

The Harris County District Attorney's Office (the "district attorney's office") received a request for the disciplinary committee memo containing the conclusions of a specified investigation pertaining to a named former district attorney's office employee.¹ The district attorney's office claims the submitted information is not responsive. Although the district attorney's office raises no exceptions to disclosure on its own behalf, it states release of the requested information may implicate the interests of the former employee. Accordingly, the district attorney's office notified the former employee of the request for information and the right to submit comments to this office stating 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). We have received comments from the former

¹The district attorney's office explains the requestor initially submitted two requests for information on March 11, 2019, and March 21, 2019. The district attorney's office states the requestor then submitted a new request for information on April 1, 2019, narrowing the scope of the request and replacing the prior requests. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). It is the April 1st request that is the subject of this ruling.

employee. We have reviewed the submitted information and considered the submitted arguments.

Initially, the district attorney's office argues the submitted information is not responsive to the request for information because it is not a "disciplinary committee memo." We note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). We note the district attorney's office submitted information as potentially responsive and it relates to the specified investigation. Because the district attorney's office has submitted information for our review, we find the district attorney's office has made a good-faith effort to submit information that is responsive to the request. Accordingly, we will address the submitted arguments against disclosure of the submitted information.

The former employee claims the information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a separate common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). 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.

Upon review we find the former employee failed to demonstrate disclosure of the information at issue would create a substantial threat of physical harm to an individual. Therefore, the district attorney's office may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

The former employee claims the submitted information is excepted from disclosure under section 552.102(a) of the Government Code. 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). Having carefully reviewed the information at issue, we find no portion of the submitted information is subject to section 552.102(a) of the Government Code, and the district attorney's office may not withhold any of the submitted information on that basis.

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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.” *Id.* at 841. The former employee states she has competitors. In addition, the former employee states release of the submitted information would “damage [her] business and cause [her] economic harm.” 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 the submitted information relates to a competitive situation as contemplated by section 552.104. Therefore, we find the former employee has failed to demonstrate the applicability of section 552.104 in this instance. Accordingly, the district attorney’s office may not withhold any of the information at issue under section 552.104 of the Government Code. The district attorney’s office must release the submitted 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,



Lecelle Clarke
Attorney
Open Records Division

LC/jxd

Ref: ID# 768677

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)