

NO. D-1-GN-16-001701

TRAVIS COUNTY, TEXAS

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98th JUDICIAL DISTRICT COURT

V.

KEN PAXTON,
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE COURT:

Travis County, Texas, Plaintiff, files this Original Petition challenging an open records ruling of Ken Paxton, State of Texas Attorney General. Plaintiff would show the following:

I. INTRODUCTION

This suit is brought pursuant to Tex. Gov't Code § 552.324, to challenge a letter ruling of the Attorney General (OR2015-26495) and to seek a declaratory judgment that the information at issue is not subject to disclosure under the Texas Public Information Act, TEX. GOV'T CODE §§552.001, *et seq.* Plaintiff is not seeking to recover any amount of damages.

II. DISCOVERY CONTROL PLAN

Discovery in this case is intended to be conducted under Level 1 of Rule 190.2 of the Texas Rules of Civil Procedure.

III. PARTIES

Plaintiff, Travis County, Texas, is a duly and lawfully organized county of the State of Texas.

Defendant Ken Paxton is the Attorney General of the State of Texas. He may be served with process at the Price Daniel, Sr. Building, 209 W. 14th Street, 8th Floor, Austin, Texas

78701. The telephone number for the Office of the Attorney General is 512.463.2100. The Attorney General's Open Government Hotline is 877.673.6839.

IV. NOTICE TO REQUESTOR

Zenobia Joseph requested the information at issue. Pursuant to section 552.325 of the Texas Public Information Act, she is not named here as a defendant. By copy of this petition (sent to her by certified mail - return receipt requested), Zenobia Joseph is provided notice as follows: (1) that this lawsuit has been filed; (2) that she has the right to intervene in the lawsuit or to choose not to participate in the lawsuit; (3) that the Texas Attorney General is named as defendant; and (4) that the name, address and telephone number of the Attorney General are as set forth above. Zenobia Joseph's address is P. O. Box 143832, Austin, TX 78714-3832.

V. FACTS

On December 23 2015, Zenobia Joseph requested from the Travis County Justice Planning Department ("TCJPD") a list of employers participating in the Department's Workforce Development [Re-Entry] Program ("WD Program"). This program is open to any resident of Travis County who has a criminal record. These individuals are the clients of the TCJPD. In order to be accepted into the WD Program, a person must complete an orientation and assessment by the WD Program coordinator. This WD Program coordinator then helps match potential employers with participants in the WD Program. If selected by a potential employer for an interview, the WD Program participant will receive an official referral card signed by the WD Program coordinator. This allows the potential employer to verify that the applicant was assessed and referred by the WD Program.

Employer participation in the WD Program is free and the TCJPD assures potential employers that, "[o]ut of respect for employers' privacy, the WD program coordinator does not

publicize which businesses are engaged with the program.” Therefore, the potential employers who take part in the WD Program by interviewing and potentially hiring these WD Program participants do so with the understanding that their names will not be made public. There is also no contract entered between WD Program and the individual employers. There is no public money spent on or payments made to these private employers in connection with the WD Program.

In order to preserve the participating employers’ privacy and guarantee the continuation of the WD Program, Plaintiff requested a decision from the Office of the Attorney General (“OAG”) that the list of employers can be withheld from disclosure under the Texas Government Code: Sections 552.101 and 552.104. On March 18, 2016, Defendant issued a decision, ruling that neither section excepted the list from disclosure. Travis County received this ruling on March 22, 2106.

VI. APPLICABLE LAW

A. Government Code section 552.101 - common-law & constitutional privacy

Government Code section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 incorporates the doctrine of common law privacy.

The doctrine of common law privacy protects from public disclosure information that (1) contains highly intimate or embarrassing facts about a person’s private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S.589,

599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985). This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information.

In disclosing private, personal information, a balancing test is applied that weighs the individual's interest in privacy against the public's right to know the information.

The requestor is seeking the identities of the employers who hire ex-offenders as part of the WD Program. Releasing this list of employers would violate their privacy and create a stigma that would be detrimental to their business. The stigma placed on hiring ex-offender is undeniable and real. There have been numerous studies and articles written regarding the stigma attached to hiring ex-offenders. For instance, in a presentation made at the University of North Texas, the presenter explained that based on past research, the factors that presented the greatest employer apprehension involved their customer's concern and feeling uncomfortable if they knew that an ex-offender was working at the business. *See Stigma and Recidivism: How Stigma Effects an Ex-Offender's Ability to Find Employment*, University of North Texas Digital Library, www.digital.library.unt.edu/ark:/67531/metadc93288 (April 15, 2010).

Additionally, an article published in The Economist addressed the difficulty and stigma placed on those persons who have been incarcerated. *See A Stigma That Never Fades*, The Economist, www.economist.com/node/1270755 (August 8, 2002). The article explains that a

survey conducted of employers in five larger cities found that 65% of these employers would not knowingly hire an ex-offender.

Another survey showed only 50% of individuals on probation or parole in Washington D.C. had found employment. *See The Struggle for Employment*, www.corrections.com/news/article/28521-the-struggle-for-employment (May 5, 2009). This article further recognized that recidivism is reduced with stable employment. *Id.* However, it was found that businesses would not hire ex-offenders because of “the high liability, and the perception within the community.” *Id.* at page 1.

Because of the stigma placed on hiring ex-offenders, Plaintiff contends that the privacy interests of these potential private employers outweighs the public’s right to know these private companies’ hiring practices. The request to obtain this information about private companies is of no legitimate public concern. Thus, the list identifying the employers that participate in the WD Program must be withheld under Government Code section 552.101.

B. Government Code section 552.104 – unfair competition

Government Code section 552.104 excepts from disclosure information that would, if released, “give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the interests of a governmental body, as well as a private third party, against unfair competition. *See Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015).

Both TCJPD and their clients, as well as the private employers, would be harmed by the release of the requested information by providing an advantage to other applicants for the same jobs, and to competitors of the participating businesses.

If the names of the employers who participate in the WD Program are revealed, then the TCJPD will lose employers who will potentially hire their participants. This could cause the program to fail and harm those seeking employment by taking away their employment

possibilities. This will provide an advantage to other applicants for the same position because there would no longer be a referral for the WD Program participants. Also, the stigma placed on these ex-offenders will hurt their employment opportunities against other applicants who were not involved in the criminal justice system.

Further, release of the information would provide an advantage to competitors of the private businesses involved in the WD Program, in that these competitors could exploit society's stigma of hiring ex-offenders in attempt to deter the public from doing business with these businesses. Therefore, the requested information should be withheld under section 552.104.

VII. RELIEF SOUGHT

Plaintiff, Travis County, Texas, prays that the Defendant be cited to appear and answer herein. Plaintiff further requests that, upon the trial of the merits, the Court render a judgment that the identities of the businesses that participate in the WD Program are excepted from disclosure. Plaintiff also requests that the Court assess all costs of court against Defendant. Plaintiff further requests such other and further relief, legal and equitable, to which it shows itself to be justly entitled.

Respectfully submitted,

DAVID ESCAMILLA
TRAVIS COUNTY ATTORNEY

BY: /s/ Tim Labadie
State Bar No. 11784853
Assistant Travis County Attorney
P. O. Box 1748
Austin, Texas 78767
(512) 854-9415
(512) 854-9316 (fax)
tim.labadie@traviscountytexas.gov

ATTORNEY FOR PLAINTIFF