In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00158-CV

CAPTAIN EDWIN SCOTT HILBURN, APPELLANT

V.

THE CITY OF HOUSTON, TEXAS; AND KEN PAXTON,[1]
ATTORNEY GENERAL OF TEXAS, APPELLEES

On Appeal from the 261st District Court
Travis County, Texas
Trial Court No. D-1-GV-13-001364, Honorable Gus J. Strauss, Presiding

January 21, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, Captain Edwin Scott Hilburn (Hilburn), appeals from the granting of a summary judgment in favor of appellees, the City of Houston (City) and Ken Paxton, Attorney General of Texas (AG), and the denial of Hilburn's motion for summary judgment in a declaratory judgment action filed regarding a request for disclosure of

[1] Greg Abbott was named in the Order from the trial court, but Ken Paxton has succeeded Greg Abbott as Attorney General for the State of Texas.

information under the Texas Public Information Act.[2] For the reasons hereinafter stated, we will affirm in part and reverse in part.

Factual and Procedural Background

On April 27, 2013, the City conducted the Houston Fire Department Senior Captain examination. Included within this examination, for the first time, were two new exercises: the Subordinate/Organizational Problem Exercise (SP) and the Oral Tactical Exercise (OT). These exercises were video recorded for review by anonymous assessors.

On May 15, 2013, the City received a request for seven categories of records relating to the April 27, 2013 assessment portion of the 2013 Fire Department Senior Captain's examination. The records requested were as follows:

1. Any and all videos of Captain Hilburn's assessment on April 27, 2013;

2. Any and all videos of other Senior Captain candidates who were assessed on April 27, 2013;

3. The names of the individuals that were responsible for the grading of the assessment videos and any documentation reflecting the same;

4. A list of the specific candidates that were assessed by each team;

5. The criteria that each team utilized in performing its assessment;

6. What, if any, tools were utilized to assure that each and every assessment grader and/or team were rendering same or similar scores for similar responses;

[2] *See* TEX. GOV'T CODE ANN. §§ 552.001-.353. (West 2012 & West Supp. 2015).

7. Any and all graded assessment sheets or notes used by the assessors in grading Captain Hilburn's assessment taken on April 27, 2013.

On June 4, 2013, the City answered the request for information by seeking exceptions from disclosure from the AG. Subsequently, a follow-up letter was sent to the AG on June 11, 2013, that specifically urged that the responsive information was excepted from public disclosure by Texas Government Code sections 552.101, 552.103 and 552.122. *See* TEX. GOV'T CODE ANN. §§ 552.101, .103, .122 (West 2012).[3] On August 13, 2013, the AG issued its Open Records Letter Ruling, OR2013-14088, that concluded that the responsive information was excepted from disclosure because of pending litigation in federal court.

On August 27, 2013, the City received a second request for information from Hilburn that requested the same information previously sought in May of 2013. Once again the City sought an exception from disclosure from the AG, citing various provisions of the Texas Government Code. On November 21, 2013, the AG issued its Open Records Letter Ruling, OR2013-20147. In this letter ruling, the AG concluded that no portion of the requested data could be withheld under section 552.101's confidentiality exception. *See* § 552.101. Further, the AG concluded that the City could not withhold some portions of the requested information pursuant to the test question exception of section 552.122. *See* § 552.122. The AG did find that some portions of the information were subject to the section 552.122 exception as either test items or items that reveal the substance of the questions. *See id.* Finally, the AG found that the rating forms were not test items for purposes of section 552.122. *See id.*

[3] Further reference to the Texas Government Code will be by reference to "section ____" or "§ ____."

The City then filed this suit for declaratory judgment. The AG answered the suit and Hilburn intervened. Both the City and Hilburn filed motions for summary judgment. Hiburn's motion for summary judgment was denied on August 7, 2014. The City's motion for summary judgment was granted February 25, 2015. This appeal followed.

Hilburn's contentions on appeal are that the trial court erred in denying his motion for summary judgment and, in granting the City's motion for summary judgment. We will affirm in part and reverse in part.

Standard of Review

As a reviewing court, we review a trial court's decision to grant a summary judgment *de novo*. *Sw. Bell Tel., L.P. v. Emmett,* 459 S.W.3d 578, 583 (Tex. 2015). When, as in this case, we are faced with competing summary judgment motions where the trial court denied one and granted the other, we consider the summary judgment evidence presented by both sides to determine all questions presented. *Id.* If the trial court erred, we render the judgment the trial court should have rendered. *Id.*

Applicable Law

The Texas Public Information Act has as its fundamental policy that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." § 552.001 (West 2012), *Thomas v. Cornyn,* 71 S.W.3d 473, 480 (Tex. App.—Austin 2002, no pet.). Any governmental body seeking to withhold information bears the burden of establishing that the requested information falls within an exception from disclosure under the Act. *Thomas,* 71 S.W.3d at 480-81. The issue of whether an

exception to disclosure applies is a question of law that we review *de novo. See Tex. Dep't of Pub. Safety v. Abbott,* 310 S.W.3d 670, 673 (Tex. App.—Austin 2010, no pet.) (citing *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 357 (Tex. 2000)).

Analysis

We now turn to considering the issues raised by Hilburn's appeal. We will first analyze his contention that the trial court erred in denying his motion for summary judgment. Hilburn raises four areas where he contends that the trial court erred in its holding denying his motion for summary judgment. They are as follows:

1. the City failed to provide the disputed materials for *in camera* review;

2. the City failed to establish an exception to prevent disclosure of the material requested;

3. the City improperly raised new exceptions to Hilburn's request for open records that were not previously raised with the AG when a ruling was requested; and

4. the City waived any exception when it provided review and appeal of the written portion of the Senior Captain's test.

Failure to provide materials for *in camera* inspection

In connection with the first issue raised by Hilburn, he cites the Court to section 552.3221 of the Act for the proposition that the failure of the City to provide the information for *in camera* inspection should result in a finding that the City failed to meet its burden of establishing an exception to disclosure of the materials sought. § 552.3221 (West Supp. 2015). Subsection (a) of section 552.3221 provides that, "[i]n any suit filed under this chapter, the information at issue may be filed with the court for in camera inspection as is necessary for the adjudication of the case." § 552.3221(a).

The record before the Court contains the trial court's order of February 18, 2015, that ordered the sealing of the information at issue that had been submitted for *in camera* inspection. Thus, the record reflects that the City did, in fact, comply with section 552.3221(a). Further, we note that the requirement to provide the information at issue for *in camera* inspection is couched in permissive terms, "may," as opposed to the mandatory term of "shall." Therefore, even had the City not provided the material for *in camera* inspection, we fail to see how this would alter the outcome of this litigation. Hilburn's first issue is overruled.

Failure to establish exception to prevent disclosure

Next, Hilburn contends that the City failed to establish an exception to prevent disclosure of the information requested. With regard to the second request for disclosure, the City asked for an exception to disclosure pursuant to sections 552.101 and 552.122. *See* §§ 552.101, .122. In connection with section 552.101, the City contended that the material was confidential as a matter of law. To support this proposition, the City cited the AG to section 143.032 of the Texas Local Government Code. *See* TEX. LOC. GOV'T. CODE ANN. § 143.032 (West 2008). Subsection (h) of this statute makes it a criminal offense to knowingly or intentionally reveal part of a promotional examination which establishes this information as confidential as a matter of law. *See id.* § 143.032(h). However, the AG, in its initial ruling on Hilburn's second request, determined that the SP portion of the exercises was not a test in writing and, therefore, did not qualify for the exemption to production. *See id.* § 143.032(c). After the City filed its suit for declaratory judgment, the City's brief-in-support of its motion for summary judgment referred the trial court to the aforementioned section 143.032 of the

Texas Local Government Code along with section 174.006 of the same code. Section 174.006 provides that the terms of the civil service code prevails over a collective bargaining agreement unless the collective bargaining agreement specifically provides otherwise. *See id.* § 174.006(a) (West 2008). Additionally, the City's summary judgment evidence provided the trial court with the applicable section of its collective bargaining agreement that allowed for the administration of the videotaped exercise at issue, the SP portion. Thus, the collective bargaining agreement specifically provided otherwise than the requirement that the entire test be in writing. *See id.* §§ 143.032(c), 174.006(a). It is this connection between sections 143.032(c) and 174.006(a) upon which Hilburn objects.

HIlburn's contention is that the failure of the City to provide the AG with the reference to section 174.006(a) of the Texas Local Government Code is fatal to its summary judgment argument because the same has been waived. To support this proposition, Hilburn cites the Court to section 552.326(a), which provides that, "the only exceptions to required disclosure within Subchapter C that a governmental body may raise in a suit filed under this chapter are exceptions that the governmental body properly raised before the attorney general . . . ." *See* § 552.326(a) (West 2012). However, Hilburn only cites the Court to the section of the Texas Government Code without any analysis or case citations. We feel that Hilburn's interpretation is more restrictive than the legislature intended. The City did put the AG on notice that it was raising the exceptions under sections 552.101 and 552.122. These are the exceptions under Subchapter C of the act that the governmental body raised before the attorney general and, pursuant to the statute, the only exceptions that must be specifically stated

in the request to the AG. *See* § 552.326; *In re City of Georgetown,* 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we find that the City did not waive its contention that the exception under section 552.101 would preclude the necessity of disclosing the information requested.

City waiver by providing for review and appeal.

Hilburn's last issue alleges that the City waived any right to be excepted from disclosure because the procedures for the test provide for review and appeal. This is the sum total of Hilburn's argument regarding this contention. As such, the issue is not properly briefed. *See* TEX. R. APP. P. 38.1(i) (requiring that brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and the record). As to this issue, Hilburn's brief contains neither citation to authorities nor the record. Therefore, we overrule the same as improperly briefed. *See id.*

The City's proof of exceptions

Because we have ruled that the City properly presented the issues of the exceptions to disclosure, the only remaining question is whether they proved entitlement to those exceptions. Through our analysis of Hilburn's contention that the City was precluded from arguing the section 552.101 exception because it did not include the reference to Texas Local Government Code section 174.006 in its initial submission to the AG, we find that the record is clear that video recordings of the SP and OT tests are confidential. The record supports the proposition that, although a portion of the test was not written, the collective bargaining agreement between the City and the Firefighter's Bargaining Representative specifically provided for an exception to that civil service

requirement. *See* TEX. LOC. GOV'T CODE ANN. §§ 143.032(c), 174.006(a) . Accordingly, Hilburn's issues to the contrary are overruled. Having determined that the trial court did not err in denying Hilburn's motion for summary judgment, we turn to the issues not previously discussed regarding the granting of summary judgment in favor of the City.

Is the SP assessment a test excepted from disclosure?

The SP exercise is demonstrated to be a test question which is exempted from disclosure by section 552.122(b). This section of the Act provides that a test developed by a licensing agency or governmental body is excepted from disclosure. *See* § 552.122(b). The summary judgment proof offered by the City included the affidavit of David Morris, which sets forth the facts surrounding the development of the assessment SP exercises specifically for the City's promotional examination. Further, the Morris affidavit set forth the fact that assessment examinations of this type are accepted as appropriate means to test the supervisory skills of candidates for senior supervisory ranks. From our review of the record, we find that the exception from disclosure contained in section 552.122(b) for test questions is applicable to the SP assessment test. As such, the SP assessment is exempt from disclosure.

Assessor identity and rating forms for other candidates

The City contends that the rating forms of the candidates are exempt from disclosure because those forms contain the signatures of the assessors. Under the City's theory, this allows the assessors to be identified and, thus, violates their common-law privacy rights. To support this proposition, the City refers the Court to *Indus. Found. of the S. v. Tex. Indus. Accident Bd.,* 540 S.W.2d 668, 683 (Tex. 1976). However, our

reading of the *Indus. Found.* opinion does not support the City's proposition. The Texas Supreme Court ruled in *Indus. Found.* that common-law rights of privacy only protect highly intimate or embarrassing information about a person's personal life, for which the disclosure would be highly objectionable to a reasonable person. *See id.* The information which was sought to be disclosed in this matter was the individual assessor's names. We fail to see how this information could be deemed highly intimate or embarrassing information.

Nor do we agree that a person's name would fall under the section 552.101 "judicial decision" exception. *See* § 552.101. The Texas Supreme Court has determined that section 552.101's "judicial decision" provision prohibits the government from disclosing information if the disclosure would give rise to the tort action for "invasion of an individual's freedom from the publicizing of his private affairs." *See Indus. Found.,* 540 S.W.2d at 683. The tort action for publicizing private facts requires the following elements to be shown: (1) publicity of one's personal life, (2) publication would be highly offensive to the ordinary person, and (3) the matter publicized is not of legitimate public concern. *See Star-Telegram, Inc. v. Doe,* 915 S.W.2d 471, 473-74 (Tex. 1995). From our review, we do not think the names of the assessors contained on the rating forms meets the requirements set forth above. Accordingly, we reverse that portion of the trial court's judgment granting the City's motion for summary judgment exempting the release of the rating forms.

Conclusion

Having sustained the trial court's granting of summary judgment in favor of the City on all issues other than the rating forms, we reverse the portion of the trial court's judgment that excepted the release of the rating forms, render judgment that the City must produce the rating forms, and, in all other respects, we affirm the judgment of the trial court.

Mackey K. Hancock
Justice