IN THE
TENTH COURT OF APPEALS

No. 10-11-00060-CV

ROBERT WALTER BONNER,

Appellant

v.

CITY OF BURLESON TEXAS,

Appellee

From the 413th District Court
Johnson County, Texas
Trial Court No. C201000638

MEMORANDUM OPINION ON REHEARING

We grant the motion for rehearing filed by appellee, the City of Burleson (the "City"), vacate and withdraw our previous opinions and judgment dated August 31, 2011, and issue this opinion in its place.

In this appeal, appellant, Robert Walter Bonner, currently incarcerated in a Tarrant County jail and advancing pro se, challenges the trial court's granting of summary judgment in favor of the City. We affirm.

I. BACKGROUND

On November 15, 2010, Bonner filed an original petition for writ of mandamus seeking to compel the City to disclose a Burleson Police Department investigative report under the Texas Public Information Act ("TPIA").[1] In particular, Bonner wanted portions of the investigative report which contained statements made by Amanda Dawn Dodd (a/k/a Amanda Dodd Bonner), now Bonner's ex-wife, on May 10, 2007. Bonner alleged that Dodd made "untrue, inflammatory, and misleading statements" in an interview with police. Dodd's statements apparently contained allegations of suspected abuse and neglect involving children. Bonner also indicated that, on May 20, 2008, the City informed him that the investigative report he sought "is confidential and [the City] has asked for a decision from the Attorney General about whether the information is within an exception to public disclosure."

The City responded to Bonner's petition for writ of mandamus by filing an original answer denying all of Bonner's allegations, a plea to the jurisdiction, and a motion for summary judgment.[2] With regard to its motion for summary judgment, the

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[1] Bonner attached to his petition for writ of mandamus a copy of an affidavit executed by Don Adams, a peace officer with the Burleson Police Department. In his affidavit, Adams explained that, pursuant to a search warrant, several of Bonner's computers contained child pornography and were subsequently seized. Adams also noted that he interviewed Dodd and that she "stated during the interview that Bonner had been investigated previously by the Texas Department of Family and Protective Services for a complaint relating to 'inappropriately touching' a neighbor[']s female daughter who was under the age of 18."

[2] The City's original answer, plea to the jurisdiction, and motion for summary judgment were filed as one motion. Within the subsection, entitled "Plea to the Jurisdiction," the City described the matter as follows:

> On or about May 8, 2008[,] the City of Burleson received a Public Information Act request via electronic mail from "Texas Brat."

City argued that Bonner did not have standing to bring this action because he had not personally made the TPIA request and because he is incarcerated.[3] *See* TEX. GOV'T CODE ANN. § 552.028(a) (West 2004).

Bonner responded by filing a "Traverse to the Return" arguing, among other things, that he was the requestor of the information and that "a plea to the jurisdiction is not the appropriate vehicle for bringing such a challenge."[4] Bonner included a contract with an investigative service, American Bureau of Protective Services ("ABPS"), which was apparently retained by his family and alleged that "Texas Brat" probably was either "Jeff Arnold" or another associate from ABPS. Bonner further argued that the information sought would assist him with his yet-to-be-filed habeas corpus petition.

. . . .

> Plaintiff admits in his petition that he is not the individual who filed this request. Rather, Plaintiff alleges that the requestor was making the request on his behalf. Nowhere on the face of the request is it indicated that that [sic] the requestor was an agent of any third party, including Plaintiff. Nevertheless, as "Texas Brat" was the requestor for information under the Act, pursuant to Section 552.321, only "Texas Brat" or the Texas Attorney General have standing to bring a writ of mandamus.

[3] The City stated that section 552.223(a), rather than section 552.028(a), of the government code did not require it to provide Bonner, an incarcerated individual, with the requested information. In making this assertion, the City cited to the exact language of section 552.028(a); thus, we presume that the listing of section 552.223(a) was a typographical error. *See* TEX. GOV'T CODE ANN. § 552.028(a) (West 2004).

[4] Though this case focuses on the inquiry made by "Texas Brat," the record contains three inquiries for the information made by Bonner himself on February 8, 2010, June 17, 2010, and July 30, 2010.

The trial court scheduled a hearing on this matter for February 15, 2011. However, the trial court ultimately granted the City's plea to the jurisdiction and motion for summary judgment without a hearing.[5] This appeal ensued.

II. STANDARD OF REVIEW

The doctrine of standing identifies suits appropriate for judicial determination. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). "The general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.'" *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993) (quoting *Bd. of Water Engineers v. City of San Antonio*, 155 Tex. 111, 283 S.W.2d 722, 724 (1955)). Unless standing is conferred by statute, a plaintiff must demonstrate that he "possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury." *Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2001); *see also Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) (stating that standing consists of some interest peculiar to a person as an individual and not as a member of the general

[5] On original submission, the record did not contain a signed order granting summary judgment in favor of the City. *See Bonner v. City of Burleson*, No. 10-11-00060-CV, 2011 Tex. App. LEXIS 7209, at *1 n.1 (Tex. App.—Waco Aug. 31, 2011, no pet. h.) (mem. op.). However, in its motion for rehearing, the City acknowledged that "[t]he parties . . . only requested the order granting the motion for summary judgment be included in the clerk's record. But the only order that appeared in the clerk's record was the one granting the plea to the jurisdiction." APPELLEE'S MOTION FOR REHEARING, at 5 (footnote omitted). The City explained that,

> in the district court's computer system, the document scanned under the heading "Order Granting Defendant City of Burleson's Motion for Summary Judgment" is actually the order granting the plea to the jurisdiction. Due to some innocent mistake[,] it appears the order granting the plea was scanned in, but the similar order granting the motion for summary judgment was not.

Id. at 5-6. Therefore, on rehearing, the City filed a supplemental clerk's record, which contains the summary judgment order granted in favor of the City.

public). It is the plaintiff's burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear the case. *Tex. Ass'n of Bus.*, 852 S.W.2d at 445-46. Standing is a question of law subject to de novo review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

As a component of subject-matter jurisdiction, standing is never presumed and cannot be waived. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443-44. We apply the same standard of review to determine standing as we do to determine subject-matter jurisdiction generally. *Id.* at 446. When conducting our de novo review, we exercise our own judgment and re-determine each legal issue, giving no deference to the trial court's decision. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1999) (op. on reh'g).

Moreover, Texas courts have repeatedly held that "'[t]he absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment.'" *See State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009) (quoting *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *see also City of Houston v. Estrada*, 2009 Tex. App. LEXIS 1970, at **8-9 (Tex. App.—Houston [14th Dist.] Mar. 26, 2009, no. pet.) (mem. op.) (concluding that a motion for summary judgment, rather than a plea to the jurisdiction, is the proper vehicle for challenging an entity's standing under the TPIA) (citing *Dubai Petroleum v. Kazi*, 12 S.W.3d 71, 76-77 (Tex. 2000) ("'The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.'") (quoting 21 C.J.S. *Courts* § 16, at 23 (1990)); *Concerned Cmty. Involved Dev., Inc. v.*

City of Houston, 209 S.W.3d 666, 673-74 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)).

We analyze the granting of a traditional motion for summary judgment under well-established standards of review. *See generally* TEX. R. CIV. P. 166a; *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The movant bears the burden to show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). We review the motion and any evidence de novo, taking as true all evidence favorable to the non-movant, and indulging every reasonable inference and resolving any doubts in the non-movant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

III. APPLICABLE LAW

The TPIA entitles persons to obtain complete information about the affairs of government and the official acts of public officials and employees unless otherwise expressly provided by law. *See* TEX. GOV'T CODE ANN. § 552.001(a) (West 2004). The TPIA is to be construed liberally in favor of granting requests to implement its underlying policy. *See id.* § 552.001(a), (b). The TPIA provides that:

> A requestor or the attorney general may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body refuses to request an attorney general's decision as provided by Subchapter G or refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C.

Id. § 552.321(a) (West 2004). A "requestor" is defined as "a person who submits a request to a governmental body for inspection or copies of public information." *Id.* § 552.003(6) (West 2004).

IV. DISCUSSION

In his original appellate brief, Bonner asserted that the trial court abused its discretion in granting the City's motion for summary judgment because a material fact issue existed as to whether he is entitled to the information sought. The City countered that the determination of whether Bonner was a "requestor" under section 552.321(a) is a jurisdictional issue. The City also argued that, because he did not personally make the TPIA request, Bonner lacked standing, and thus, the trial court did not err in granting the City's motion for summary judgment.

In analyzing Bonner's issue, several statutory provisions are relevant. In particular, section 552.028(a) of the government code provides that:

> (a) A governmental body is not required to accept or comply with a request for information from:
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> (1) an individual who is imprisoned or confined in a correctional facility; or
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> (2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

TEX. GOV'T CODE ANN. § 552.028 (West 2004). Furthermore, section 261.201 of the family code states that: (1) "a report of alleged or suspected abuse or neglect . . . and the identity of the person making the report"; and (2) "the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an

investigation" involving suspected abuse and neglect are not subject to disclosure under the TPIA. TEX. FAM. CODE ANN. § 261.201(a) (West Supp. 2010).

Here, viewing the evidence in Bonner's favor as the non-movant, we cannot say that he has demonstrated that he was a "requestor" and, therefore, had standing under the TPIA. Bonner admits that he is incarcerated and that the information sought pertains to Dodd's interview with police, wherein allegations of suspected child abuse and neglect were made. Furthermore, Bonner asserts that "Texas Brat" was either "Jeff Arnold" or an associate from ABPS. At no point does Bonner contend that "Texas Brat," the focus of the inquiry in this case, was his attorney.[6] Because he is incarcerated, the information requested involved child abuse and neglect, and he did not tender evidence demonstrating that "Texas Brat" was his attorney, we conclude that Bonner did not have any right to the information requested and, thus, did not qualify as a "requestor" under the TPIA.[7] *See* TEX. GOV'T CODE ANN. §§ 552.003(6), 552.028(a), 552.321(a); TEX. FAM. CODE ANN. § 261.201(a); *see also Cox v. State*, 202 S.W.3d 454, 455

[6] In his response to the City's motion for rehearing, Bonner asserts that attorneys Grace Neil and Abe Factor made requests on Bonner's behalf for the information sought in this matter. However, the record does not support Bonner's assertion; moreover, Bonner does not argue nor does he direct us to portions of the record indicating that either Neil or Factor was "Texas Brat."

[7] Also in his response to the City's motion for rehearing, Bonner contends that section 552.028 of the government code is unconstitutional. Bonner relies heavily on the Amarillo Court of Appeals' decision in *Cox v. State* to support his contention that section 552.028 is unconstitutional as applied to his case. 202 S.W.3d 454 (Tex. App.—Amarillo 2006, no pet.). After reviewing the *Cox* opinion, we fail to see how that case supports Bonner's constitutional argument. In *Cox*, the court affirmed the trial court's refusal to provide various records pertaining to Cox's prior conviction, including "all transcripts, written and oral," "Grand Jury deliberations to handing down indictment, to final sentencing in plea bargain," and transcripts or motions the district attorney's office had. *Id.* at 455. The *Cox* court specifically noted that because Cox is a prison inmate, the trial court was authorized to deny his request for the information. *Id.* Based on the foregoing, we find the situation in *Cox* to be analogous to the facts in this case, and as such, we conclude that the *Cox* opinion supports our conclusion in this case rather than Bonner's constitutional argument.

(Tex. App.—Amarillo 2006, no pet.) ("So, because the record illustrates that appellant is a prison inmate, [the] statute authorized the trial court to deny his request."). As such, we cannot say that he had standing to file his petition for writ of mandamus under the TPIA. *See Williams*, 52 S.W.3d at 178-79; *Kazi*, 12 S.W.3d at 76-77; *Tex. Ass'n of Bus.*, 852 S.W.2d at 443-44; *see also Estrada*, 2009 Tex. App. LEXIS 1970, at **8-10 (noting that whether a "requestor" has standing under the TPIA necessarily "goes to the merits of [a party's] right to relief . . ."). We therefore conclude that the trial court did not err in granting the City's motion for summary judgment. *See* TEX. R. CIV. P. 166a(c); *see also Fielding*, 289 S.W.3d at 848. Accordingly, we overrule Bonner's sole issue on appeal.

V. CONCLUSION

We affirm the trial court's granting of summary judgment in favor of the City.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed
Opinion delivered and filed November 2, 2011
[CV06]

*(Chief Justice Gray concurs in the Court's judgment to the extent it affirms the trial court's order granting the City's plea to the jurisdiction. A separate opinion will not issue.)