

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-18-001583  
Victoria Benavides

D-1-GN-18-001583  
CAUSE NO. \_\_\_\_\_

ANN HARRIS BENNETT,  
HARRIS COUNTY  
TAX ASSESSOR-COLLECTOR  
AND VOTER REGISTRAR

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

V.

HONORABLE KEN PAXTON,  
ATTORNEY GENERAL OF TEXAS

459th

\_\_\_\_\_ DISTRICT COURT

**PLAINTIFF'S ORIGINAL PETITION FOR  
DECLARATORY JUDGMENT AND OTHER RELIEF**

COMES NOW, Ann Harris Bennett, in her capacity as Harris County Tax Assessor-Collector and Voter Registrar, and files this *Original Petition for Declaratory Judgment and Other Relief* pursuant to Tex. Gov't Code Ann. § 552.324, seeking relief from an open records decision issued by the office of the Honorable Ken Paxton, Attorney General of Texas, and for cause of action would show:

**NATURE OF THE CASE**

1. The Harris County Voter Registrar seeks relief from a decision of the Attorney General which requires the release of information that must be created or derived from lists obtained by the Voter Registrar pursuant to section 62.113 of the Texas Government Code. Such lists may only be used as provided by section 62.113(c) and any other use of such information is prohibited. *See* Tex. Gov't Code § 62.113(d). In this instance, the use of information obtained by the Voter Registrar under section 62.113 to create the requested information would be a violation of section 62.113(c). Therefore, the plaintiff is prohibited from creating the requested information and therefore need not respond to the request. Because this case arises under the Texas Public Information Act (TPIA), Tex. Gov't Code Ann. §§ 552.001 et seq., discovery is allowed only in

very limited circumstances and, therefore, if discovery is allowed at all, it should be subject to discovery level three, by order of the Court.

### **PARTIES**

2. Plaintiff, Ann Harris Bennett, is the Harris County Tax Assessor-Collector and Voter Registrar and may be served through her attorneys of record in this case.

3. Defendant, the Attorney General of Texas, is the Honorable Ken Paxton. The Attorney General is the state official responsible for issuing decisions under the Public Information Act. The Attorney General issued OR2018-06015 (March 15, 2018), the open records decision that is the subject of this lawsuit. He may be served with citation at the Price Daniel, Sr., Bldg, 209 W. 14<sup>th</sup> Street, 8<sup>th</sup> Floor, Austin, Texas. The mailing address is P.O. Box 12548, Austin, Texas, 78711-2548. Defendant's telephone number is (512) 463-2191.

### **JURISDICTION AND VENUE**

4. The Travis County District Courts have jurisdiction to issue declaratory judgments regarding the applicability of the TPIA and to determine the validity of open records decisions issued pursuant to the TPIA. *See* Tex. Gov't Code Ann. §§ 552.324, 552.325, 552.353(b)(3) and (c).

5. Venue is proper and mandatory in Travis County pursuant to the Public Information Act. *See* Tex. Gov't Code Ann. §§ 552.324, 552.325, 552.353(b)(3) and (c).

6. The doctrine of sovereign immunity is not a bar to jurisdiction because sections 552.324, 552.325, and 552.353 of the Texas Government Code and section 37.006 of the Uniform

Declaratory Judgments Act waive immunity and expressly authorize the relief sought by the plaintiff.

### **NOTICE TO THE REQUESTOR**

7. Mr. Logan Churchwell requested the information at issue. Pursuant to section 552.325 of the Public Information Act, he is not named here as a defendant. However, by copy of this petition sent by certified mail, return receipt requested, he is provided notice, as required by Tex. Gov't Code Ann. § 552.324, as follows: (1) that this lawsuit has been filed; (2) that he 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 in Travis County District Court; and (4) the name and address of the Attorney General are as set forth above. Mr. Churchwell may be notified at 32 E. Washington Street, Suite 1675, Indianapolis, IN 46204 and [lchurchwell@publicinterestlegal.org](mailto:lchurchwell@publicinterestlegal.org).

### **BACKGROUND FACTS**

8. On December 18, 2017, the plaintiff received written clarification in response to a December 15, 2017 request for clarification related to a December 1, 2017 request for information from Logan Churchwell, Communications & Research Director with the Public Interest Legal Foundation, for:

Item 1. Documents regarding all registrants who were identified as potentially not satisfying the citizenship requirements for registration from any official information source, including information obtained from the various agencies within the U.S. Department of Homeland Security, Texas Department of Public Safety, and from the Texas Secretary of State since January 1, 2006. This request extends to all documents that provide the name of the registrant, the voting history of such registrant, the nature and content of any notice sent to the registrant, including the date of the notice, the response (if any) of the registrant, and actions taken regarding the registrant's registration (if any) and the date of the action. This request extends to electronic records capable of compilation. [Clarification: includes, but is not limited to, information obtained by your office

under Section 62.113(b)(1)—“the list of persons excused or disqualified because of citizenship” received from the clerk of court. To the extent information derived from these lists is helpful in providing the other requested information, we ask that it be so used.]

Item 2. All documents and records of communication received by your office from registered voters, legal counsel, claimed relatives, or other agents since January 1, 2006 requesting a removal or cancellation from the voter roll for any reason related to non-U.S. citizenship/ineligibility. Please include any official records indicating maintenance actions undertaken thereafter. [Clarification: limited to records that relate to ineligibility for citizenship reasons];

Item 3. All documents and records of communication received by your office from jury selection officials—state and federal—since January 1, 2006 referencing individuals who claimed to be non-U.S. citizens when attempting to avoid serving a duty call. This request seeks copies of the official referrals and documents indicating where your office matched a claim of noncitizenship to an existing registered voter and extends to the communications and maintenance actions taken as a result that were memorialized in any written form. [Clarification: includes, but is not limited to, information obtained by your office under Section 62.113(b)(1)—“the list of persons excused or disqualified because of citizenship” received from the clerk of court. To the extent information derived from these lists is helpful in providing the other requested information, we ask that it be so used.]; and

Item 4. All communications regarding your list maintenance activities relating to #1 through 3 above to the District Attorney, Texas Attorney General, Texas State Troopers/DPS, any other state law enforcement agencies, the United States Attorney’s office, or the Federal Bureau of Investigation. [Clarification: The timeframe for the requested information is January 1, 2006 to the present].

9. By letter dated January 4, 2018, plaintiff timely requested a decision from the Attorney General.<sup>1</sup> The Voter Registrar timely followed that letter on January 11, 2018 with the submission of representative samples of the information and with a memorandum brief that described why the particular exceptions to disclosure apply. The January 11, 2018 memorandum brief is expressly incorporated herein by reference.

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<sup>1</sup> December 25, 2017, December 26, 2017, and January 1, 2018 were Harris County holidays and should not be counted as part of the timeframe within which to respond.

10. By letter dated March 15, 2018, the Attorney General issued Texas Attorney General Decision OR2018-06015 (March 15, 2018). The Voter Registrar received the decision on March 20, 2018. Although the decision indicated that much of the requested information must be withheld, the decision required the release of information that can only be created or derived from lists obtained by the Voter Registrar pursuant to section 62.113 of the Texas Government Code. The decision did not directly respond to the Voter Registrar's assertion that the use of such information to create the requested information would be a violation of section 62.113(c). The Voter Registrar seeks relief from this and other aspects of the decision.

## **ARGUMENT AND AUTHORITIES**

**The Attorney General erred in concluding that the Voter Registrar must release information that can only be derived or created using lists in an unauthorized manner.**

### **I. Section 62.113 of the Texas Government Code**

11. The information requested includes documents that fall under Section 552.101 of the Government Code, which provides as follows:

Information is excepted from [required public disclosure] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

Tex. Gov't Code § 552.101. Section 552.101 also encompasses section 62.113 of the Texas Government Code, which strictly limits the use of the information requested by Items 1 and 3 to only two purposes by governmental entities. Section 62.113 of the Texas Government Code provides as follows:

- (a) The clerk of the court shall maintain a list of the name and address of each person who is excused or disqualified under this subchapter from jury service because the person is not a citizen of the United States.
- (b) On the third business day of each month, the clerk shall send a copy of the list of persons excused or disqualified because of citizenship in the previous month to:
  - (1) the voter registrar of the county;
  - (2) the secretary of state; and
  - (3) the county or district attorney, as applicable, for an investigation of whether the person committed an offense under Section 13.007, Election Code, or other law.
- (c) A list compiled under this section may not be used for a purpose other than a purpose described by Subsection (b) or Section 16.0332 or 18.068, Election Code.**
- (d) A person commits an offense if the person violates Subsection (c). An offense under this section is a Class C misdemeanor.
- (e) The information required to be filed with the secretary of state under this section must be filed electronically. The secretary of state may waive this requirement on application for a waiver submitted by the clerk.

Tex. Gov't Code § 62.113 (emphasis added).

12. The Voter Registrar is prohibited from using the lists obtained under Section 62.113 for any purpose other than to deliver to each registered voter whose name appears on the list a written notice requiring the voter to submit to the registrar proof of United States citizenship. Any other use of the information is a criminal offense. *Id.* §62.113(d). Items 1 and 3 of the request seek these same lists compiled under Section 62.113 by the Clerk and received by the Harris County Voter Registrar. The Voter Registrar's Office would be required to use these lists to create the requested voter registration information, including the names of the individuals, the voting histories of the registrants, and notices sent to or from the registrant in relation to the Voter Registrar's notices that were generated as a result of having received the lists. Such information does not currently exist in the form requested by the requestor and there is no authority for the Voter Registrar to produce and/or create the lists or information directly derived from the list in the performance of their duties under Section 62.113.

13. Using the information received by the Clerk and Secretary of State's offices under Section 62.113 in order to produce and/or create the information requested under Items 1 and 3 would not constitute a use of the information permitted by Section 62.113(c). Therefore, the Harris County Voter Registrar is precluded from producing and/or creating the requested information in Items 1 and 3.

## **II. Common-Law Privacy**

14. Section 552.101 of the Act also encompasses the doctrine of common-law privacy, and protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of the test must be satisfied. *See id.* at 681-82. Under the doctrine of common-law privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682.

15. In this instance, the information at issue is highly intimate and embarrassing, in that it is information derived from the official juror questionnaire mandated and made confidential by Section 62.0132 of the Texas Government Code. Each individual completing the juror questionnaire had a reasonable expectation of privacy as to the information contained in their responses. In fact, that is exactly what it says on the form: "THE FOLLOWING JUROR QUESTIONNAIRE IS MANDATED BY GOVERNMENT CODE 62.0132. Your answers are CONFIDENTIAL and may be disclosed only to the judge, court personnel, the litigant, and the litigant's attorney." Section 62.0132 of the Texas Government Code states as follows:

- (a) The Office of Court Administration of the Texas Judicial System shall develop and maintain a questionnaire to accompany a written jury summons.
- (b) A written jury summons must include:
- (1) a copy of the questionnaire developed under this section; or
  - (2) the electronic address of the court's Internet website from which the questionnaire developed under this section may be easily printed.
- (c) The questionnaire must require a person to provide biographical and demographic information that is relevant to service as a jury member, including the person's:
- (1) name, sex, race, and age;
  - (2) residence address and mailing address;
  - (3) education level, occupation, and place of employment;
  - (4) marital status and the name, occupation, and place of employment of the person's spouse; and
  - (5) citizenship status and county of residence.
- (d) Except as provided by this subsection, a person who has received a written jury summons shall complete and submit a jury summons questionnaire when the person reports for jury duty. If the district and criminal district judges of a county adopt a plan for an electronic jury selection method under Section 62.011, the county may allow a person to complete and submit a jury summons questionnaire on the court's Internet website as authorized under Section 62.0111(b)(5).
- (e) In developing and maintaining the questionnaire required by this section, the Office of Court Administration of the Texas Judicial System shall solicit and consider the opinions of the members of the judiciary, district clerks, and attorneys.
- (f) Except as provided by Subsection (g), information contained in a completed questionnaire is confidential and is not subject to Chapter 552.**
- (g) The information contained in a completed questionnaire may be disclosed to:
- (1) a judge assigned to hear a cause of action in which the respondent to the questionnaire is a potential juror;
  - (2) court personnel;
  - (3) a litigant and a litigant's attorney in a cause of action in which the respondent to the questionnaire is a potential juror; and
  - (4) other than information provided that is related to Section 62.102(8) or (9), the voter registrar of a county in connection with any matter of voter registration or the administration of elections.
- (h) The questionnaire must notify a person that if the person states that the person is not a citizen, the person will no longer be eligible to vote if the person fails to provide proof of citizenship.

Tex. Gov't Code § 62.0132 (emphasis added).



16. The responses, or information derived from the responses on the juror questionnaires, are not only intimate details about the individual, they may include embarrassing errors or misstatements that were never intended to be released to the public. Further, the fact that the juror questionnaire is a confidential form speaks to the fact that the responses contained therein are not of legitimate concern to the public. For the above stated reasons and authority, as well as other applicable law, the relevant records and information represented should be excepted from disclosure in their entirety.

17. The doctrine of common-law privacy also protects the responsive information to Item 2, which seeks the names, addresses, and voter registration information associated with individuals who have requested the removal or cancellation of a voter from the voter roll due to ineligibility due to non-citizenship. This information is also both highly intimate and embarrassing to the individuals at issue and is not of legitimate concern to the public. The publication of detailed name, address, and other identifying information about potential non-citizens (beyond government/law enforcement use) would be highly objectionable to a reasonable person. The likelihood is high that such protected personal information would be disseminated (beyond government/law enforcement use) without regard to the privacy and safety of the individuals at issue. Less invasive alternatives exist, such as providing data points that are devoid personal information, in order to balance the privacy and retaliation concerns with the legitimate concerns to the public for information related to voter registration. For the above stated reasons and authority, as well as other applicable law, the records and relevant information should be excepted from disclosure in their entirety or at least in part.

### **III. OR2018-06015 undermines and disregards Section 62.113**

18. Portions of OR2018-06015 are counterintuitive, illogical, and undermine the purpose of section 62.113 of the Texas Government Code. OR2018-06015 has two conflicting holdings. On one hand the decision states that the lists themselves are confidential, must be withheld, and may only be used as provided by section 62.113(c). We agree with this holding. On the other hand, the decision also requires the Voter Registrar to use the lists, in an unauthorized manner, to produce underlying documents which contain the exact same identifying information that is contained on the lists themselves. We disagree with this holding.

### **IV. Previous Open Records Decision OR2013-00351**

19. The Attorney General has issued a prior ruling regarding substantially similar information. *See* OR2013-00351 (January 7, 2013). In that ruling, the Attorney General concluded that the information at issue is made confidential by section 62.113 of the Texas Government Code and must be withheld under section 552.101 of the Act.

### **V. *In Camera* Review**

20. Plaintiff requests this Court to conduct an *in camera* inspection of the information at issue so that the court can determine if the asserted exceptions apply.

### **VI. Attorney's Fees**

21. Pursuant to the express authority of section 552.323(b) of the TPIA, the Voter Registrar is entitled to seek recovery of its costs of litigation and reasonable attorneys' fees. At this time, the Voter Registrar does not seek attorneys' fees against Defendant, but the Voter Registrar reserves

the right to amend regarding attorneys' fees, and should any other party seek attorneys' fees, the Voter Registrar makes a like claim for its fees.

#### **VII. Conditions Precedent**

22. All conditions precedent have been performed or have occurred.

#### **VIII. Permanent Injunction**

23. Plaintiff asks this Court to set its request for a permanent injunction for a full trial on the merits and, after trial, issue a permanent injunction enjoining the enforcement of the ruling in OR2018-06015 and prohibiting the Attorney General or any interested party from compelling the release of the information at issue that is the subject of OR2018-06015.

#### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff Voter Registrar prays,

- (1) that the defendant be cited to appear and answer herein;
- (2) that this Court issue a permanent injunction as requested herein;
- (3) that this Court render a declaratory judgment that the portions of OR2018-06015 which require the Voter Registrar to release information is legally erroneous and that the information, which was subject to the plaintiff's request for an Attorney General's decision, as pled herein, is exempt from disclosure under the Texas Public Information Act and must be withheld; and
- (4) that this Court grant such other and further relief, legal and equitable, to which the Voter Registrar may be justly entitled.

Respectfully submitted,

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