NOV27'07 AM11:34 PERAC

The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Alan N. Cote
Supervisor of Records

November 26, 2007
SPR07/301

Joseph E. Connarton
Executive Director
Public Employee Retirement Administration Commission
5 Middlesex Avenue, Suite 304
Somerville, MA 02145

Dear Mr. Connarton:

I have received your request for an advisory opinion. See 950 C.M.R. 32.07 (Supervisor of Public Records may issue advisory opinion upon written request of a custodian of records). Specifically, you request clarification of the public records status of an individual's date of birth and the balance in a member's annuity account.

"Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26) (2006 ed.). There is a presumption that all governmental records are public records. G. L. c. 66, § 10(c) (2006 ed.); 950 C.M.R. 32.08(4).

The statutory exemptions are strictly and narrowly construed. Attorney General v. Assistant Comm'r of the Real Property Dep't of Boston, 380 Mass. 623, 625 (1980); Attorney General v. Board of Assessors of Woburn, 375 Mass. 430, 432 (1978). Public records, and any non-exempt, segregable portions thereof, are subject to mandatory disclosure upon request. G. L. c. 66, § 10(a) (2006 ed.); see also Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are not blanket in nature). It is the burden of the record custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(c) (2006 ed.); see also District Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has burden of establishing applicability of exemption).

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Dates of Birth

With respect to date of birth, an examination of exemption (c) to the Public Records Law is warranted. Exemption (c) applies to:

> personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.
>
> G. L. c. 4, § 7(26)(c) (2006 ed.).

Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-34 (1983). Only the second clause is relevant to this opinion. Analysis under the second clause is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. Real Property Dep't, 380 Mass. at 625; Torres v. Attorney General, 391 Mass 1, 9 (1984). Therefore, determinations can only be made on a case-by-case basis.

The second clause only protects "intimate details of a highly personal nature." Real Property Dep't, 380 Mass. 623,625 (1980). Marital status, legitimacy of children, paternity, medical condition, government assistance, substance abuse, family disputes and reputation are examples of the kind of information the exemption was designed to protect. Id. at 626 n.2. Since the Public Records Law favors disclosure, the exemption will apply only where the privacy interest of the record subject outweighs the public interest in disclosure. Attorney General v. Collector of Lynn, 377 Mass. 151, 156 (1979).

An individual has certain rights with respect to the disclosure of his or her own date of birth. Doe v. Registrar of Motor Vehicles 26 Mass. App. Ct. 415, 424 (1988) (individual may have privacy interest in date of birth). A person's age may be gleaned from several publicly available sources, including street lists and marriage certificates. See G.L. c. 51, § 4, 6, 7 (2006 ed.); see also G.L. c. 46, § 1 (2006 ed.). Until recently, a person's date of birth did not rise to the level of confidentiality traditionally afforded to other intimate personal information; however, the current trend, in light of identity theft, is to protect an individual's date of birth from public disclosure.

Presently, there is a bill before the legislature calling for modifications to G.L. c. 51, § 4. Senate Bill No. 455 would make street lists and the information contained therein, including date of birth, no longer a public record. Additionally, Chapter 82 of the Acts of 2007, an Act Relative to Security Freezes and Notification of Data Breaches,

adds a definition of "Proper Identification" to G.L. c. 93, § 50. "Proper identification," defined as information sufficient to identify a person, includes date of birth. In light of concerns related to identity theft and the current trend in the legislature, this office now finds that date of birth may be characterized as an intimate detail of a highly personal nature, the privacy interest of which clearly outweighs the public's interest in disclosure, and may be redacted pursuant to exemption (c).

Balance in a Member's Annuity Account

It is my understanding that the amount in a member's annuity account is the amount contributed by the member and the interest accrued on that account. The amount an individual contributes to the Annuity Savings Fund is a percent of their regular compensation per pay period. The percent of compensation contributed is determined with respect to the date that an individual became a member of the Retirement System. See G.L. c. 32, § 22(1) (2006 ed.). The interest rate is set annually by PERAC. Once a member retires, the amount in his annuity account, with the accumulated interest, is transferred to the Annuity Reserve Fund and a portion of his retirement allowance is paid from the account. See G.L. c. 32, § 22(2) (2006 ed.).

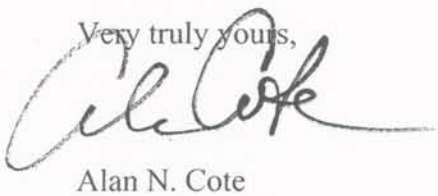
A member's contributions to the Annuity Savings Fund are merely his fulfillment of a contractual obligation with his employer. Member contributions are a reflection of the benefits that accrue to government employees and retirees. A member does not decide the amount of the contribution, as it is statutorily determined, nor may he prevent the amount from being withdrawn from his regular compensation. Such contributions are, in effect, a measure of the compensation received. As such, the percent of compensation contributed to a member's annuity account is akin to payroll records. Payroll information pertaining to public employees is clearly public record. See Hastings & Sons Publishing Company v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978).

However, the disclosure of voluntary participation in a retirement plan reflects personal decisions made by the public employee. Under G.L. c. 32, § 22(1)(g), a member may pay into the Annuity Savings Fund such an amount as he shall designate for the purpose of providing an additional annuity. Disclosure of information relative to this additional contribution does not further the public interest in monitoring the operations of government. This information would reflect a personal financial decision in which the employee's privacy interest will outweigh the minimal public interest in that information, therefore, exemption (c) will allow the Retirement System to withhold the total amount in a member's annuity account, to avoid disclosure of any additional contributions.

Conclusion

Due to current trends in the legislature and identity theft concerns, an individual's date of birth may be withheld from disclosure pursuant to exemption (c). The percent of an individual's regular compensation that he is required to contribute is statutorily determined and the interest rate is set annually by PERAC. These amounts are public records, akin to payroll records, and are not intimate details of a highly personal nature. However, as additional contributions to a member's annuity account are not required by statute and are personal financial choices, the total amount in a member's account may be withheld under exemption (c), so as not to disclose additional contributions by a member. I hope this opinion has been helpful to you. If you have further questions, please feel free to contact this office.

Very truly yours,



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