



April 11, 2002

Ms. Meredith Riede
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City of Sugar Land
P.O. Box 110
Sugar Land, Texas 77487-0110

OR2002-1655

Dear Ms. Riede:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Texas Government Code. Your request was assigned ID# 161081.

Background

In the early morning hours of January 25, 2002, John Clifford Baxter was found shot to death in his automobile, which was parked in the median of a public street near his home in Sugar Land, Texas. That very afternoon, the Sugar Land Police Department (the "Department") received a written request that it produce information pertaining to Mr. Baxter's death and the Department's related investigation. Since that day, the Department has received an additional fifty-six similar requests.¹ Pursuant to section 552.301 of the Texas Public Information Act, TEX. GOV'T CODE §§ 552.001-.353 (Vernon 1994 & Supp. 2002) ("PIA"), the Department timely requested that this office provide a decision whether the requested information is subject to production under the PIA. The Department has informed this office that it has provided notice to each of the requestors as required under section 552.301(d). As permitted under sections 552.304 and 552.305(b), a number of parties, including counsel for Mr. Baxter's surviving wife, children, and estate (the "Baxter Family"), the Freedom of Information Foundation of Texas ("FOIFT"), and Eric Hanson (a requestor), have submitted

¹The various requests identify and request production of the following items and information: suicide note, 911 tapes, police and incident reports, photographs, video and audio tapes taken at the scene, witness statements and interviews, ballistic reports, toxicology reports, fingerprint analysis, fiber analysis, information from the medical examiner, laboratory reports, computer generated messages, data terminal messages, dispatch tapes and logs, autopsy results, documents found with the deceased, and any information related to the incident and the investigation of the incident.

written comments explaining why they believe that the information should or should not be released under the PIA. In light of the difficult issues that these requests present, this office appreciates and has carefully considered all of these written comments.

In connection with its request for this office's decision, and as required under sections 552.301(e)(1)(D) and 552.303, the Department has submitted to this office the following representative sample of information that is responsive to the requests:²

1. A handwritten note apparently signed by Mr. Baxter and addressed to Mrs. Baxter (the "Note");
2. A copy of a Texas driver's license issued to Mr. Baxter;
3. Copies of credit cards (displaying account numbers);
4. A photograph of a child;
5. ATM receipts,
6. Photographs of the decedent and the car in which his body was discovered (submitted by the Department under "Tab 2"); and
7. A crime report and accompanying attachments, including additional photographs, an incident history detail, property receipts, crime scene entry logs, an autopsy order, and photocopies of the contents of the decedent's wallet (submitted by the Department under "Tab 3").

The Department contends that Items 1-6 are excepted from disclosure by the right to privacy under section 552.101, and that Item 7 consists of "law enforcement information" excepted from disclosure under section 552.108.³ The Baxter Family contends that all of the items are excepted from disclosure under section 552.108. The Baxter Family further contends that the right to privacy under the United States and Texas Constitutions and Texas common law protects the Note (Item 1), the photographs of the decedent and his automobile (Item 6), and the portions of Item 7 that contain quotations or information from either the Note or the

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³In a letter, dated February 11, 2002, the Department stated that it is not claiming that Items 1-6 are exempt under section 552.108.

photographs of the decedent. We have reviewed the parties' comments and the submitted items, and provide the following decision.

Public Information Under Section 552.002

"Public information" means "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by a governmental body. PIA § 552.002(a)(1). All of the requested information was collected by the Department in conducting its investigation of Mr. Baxter's death. The Department obtained the Note from the Baxter Family and is now maintaining the Note as part of its criminal investigative file. Thus, all of the requested information is public information that is subject to the PIA as it is information that is collected and maintained by the Department in connection with the transaction of official business.

Law Enforcement Information Under Section 552.108

We first address the arguments under section 552.108. The Baxter Family contends that all of the information is excepted under section 552.108. The purpose of section 552.108 is to prevent a law enforcement agency's crime prevention techniques from being readily available to the public. *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied). Section 552.108 is a discretionary exception that protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 177 at 3 (1977) (section 552.108 may be waived by a governmental body). Thus, the Baxter Family may not raise this section for the requested information. Moreover, because section 552.108 is a permissive exception, a law enforcement agency may waive the exception and disclose the information to the public. PIA § 552.007; *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.-Austin 1999, pet. denied) (because section 552.112 is a permissive exception, state officials may reject the exception and disclose the information). As the Department does not raise section 552.108 for Items 1-6, we need not address whether the Department may withhold these items under that section.

The Department does assert that the information described in Item 7 is excepted from public disclosure under section 552.108. We note that the submitted information includes a court document. Information filed with a court is generally a matter of public record and may not be withheld from disclosure. PIA § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Thus, the Department must release the court record.

Section 552.108 of the Government Code states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." PIA § 552.108(a)(1). On January 25, 2002, the Department issued a press release titled "Suicide," and stated that Mr. Baxter "had

an apparent self-inflicted gunshot wound to the head.” Subsequently, on January 28, 2002, the Department issued another press release stating that,

[a]lthough the medical examiner has indicated that the incident is consistent with suicide, the department is completing its work in accordance with proper law enforcement procedures. . . . “However, as is the case with most routine investigations, other forensic tests such as ballistic tests, fingerprinting and hair and fiber analysis must be performed. These and other test results are thoroughly and methodically evaluated before closing an investigation.”

Furthermore, in its brief, the Department informs us that the requested information pertains to a pending “death investigation.” Based on the submitted information and the Department’s representations, we conclude that release of Item 7 “would interfere with the detection, investigation, or prosecution of crime.” *Id.*

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. PIA § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref’d n.r.e.*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information and the court document, the Department may withhold Item 7 from disclosure based on section 552.108(a)(1). Because section 552.108 is a discretionary exception, which may be waived by a governmental body, ORD 177 at 3 (governmental body may waive statutory predecessor to section 552.108), we note that the Department has the discretion to release all or part of the information that is not otherwise confidential by law. PIA § 552.007. Because section 552.108 excepts Item 7 from disclosure, we need not consider the Baxter Family’s privacy claims for Item 7.⁴

The Right to Privacy Under Section 552.101

We turn now to the Department’s and the Baxter Family’s privacy claims. In doing so, we acknowledge that the basic and fundamental precept of the PIA is that “government is the servant and not the master of the people,” and for this reason “the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.” PIA § 552.001(a). Thus, “[a]t the heart of the [PIA] is the principle that the public is entitled to all information ‘collected, assembled, or maintained by a governmental body.’” *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.–Austin 2001, no pet.) (quoting PIA § 552.002(a)). The

⁴With regard to Item 7, the Baxter Family asserts privacy only for those portions that contain quotations or information from either the Note or the photographs of the decedent. Neither the basic information nor the court document contains such information.

exceptions to disclosure set forth within the provisions of the PIA, however, establish limits to this entitlement. As the Texas Legislature has instructed, and the courts have acknowledged, these exceptions must be construed narrowly, “in favor of granting a request for information.” PIA § 552.001(b); *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157.

One such exception, section 552.101, excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Under this exception, a governmental body may not disclose information if the disclosure will violate a person’s constitutional or common-law rights to privacy. *Industrial Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). As the Texas Supreme Court has noted, there is some inherent – though not irreconcilable – conflict between these rights of privacy and the people’s right of access to information held by their government:

The individual’s right to maintain some degree of privacy in the affairs of his personal life must not be forgotten in the effort to maintain the openness of governmental activities. Even in the complex and closely regulated bureaucracy of today’s society, the individual’s right of privacy and the people’s right to be informed may exist, if not in harmony, at least without irreconcilable conflict.

Id. at 686. The issues that these requests present exist at the very center of that conflict.

Relying on section 552.101, the Department asserts that Items 1-6 are excepted from disclosure by the common-law right to privacy. The Baxter Family asserts that the information contained in Items 1-6 and parts of Item 7 is excepted by both common-law and constitutional rights to privacy. We will address each of these rights in turn, but must first address the threshold question of who may assert a right to privacy as an exception to the PIA.

Who May Assert a Right to Privacy?

Because the requests at issue seek information related to the death of Mr. Baxter, we must address the threshold questions of (1) whether Mr. Baxter’s right to privacy survived his death, (2) whether the Baxter Family may assert claims to prevent the violation of Mr. Baxter’s privacy, and (3) whether the Baxter Family’s own privacy rights are implicated by the disclosure of any of the items requested.

Following the clear guidance of our courts, we have no difficulty in answering the first two questions, at least as to Mr. Baxter’s *common-law* right of privacy. “At common law, actions affecting primarily property and property rights survived, whereas an action asserting a purely personal right terminated with the death of the aggrieved party.” *First Nat’l Bank of Kerrville v. Hackworth*, 673 S.W.2d 218, 220 (Tex. App.–San Antonio 1984, no writ). Because “the right of privacy is purely personal,” that right “terminates upon the death of the

person whose privacy is invaded.” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.–Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990 (6th Cir. 1969) (under Tennessee common law, action for public disclosure of private matters lapses with the death of the person whose privacy is invaded); *Swickard v. Wayne County Med. Exam’r*, 475 N.W.2d 304, 309 (Mich. 1991) (“action for the invasion of privacy cannot be maintained after the death of the person whose privacy is invaded”) (quoting Restatement of Torts 2d).

Thus, as this office has repeatedly recognized, any common-law privacy interest that Mr. Baxter may have had in any of the requested items terminated upon his death. *See* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”).

As to the second question (whether the Baxter Family may assert claims to prevent the violation of Mr. Baxter’s privacy), the case law is equally as clear, at least as to the common-law right of privacy. As the first Texas court to address this question noted, “the overwhelming weight of authority in other states is that an action for the invasion of privacy cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity.” *Moore*, 589 S.W.2d at 491. Following this majority rule, the court “restrict[ed] the right of recovery in cases of this type to the person about whom facts have been wrongfully published.” *Id.*; *see also Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093 (5th Cir. 1984) (“Texas does not permit a plaintiff to recover for injury caused by the invasion of another’s privacy.”); *Cordell*, 419 F.2d at 990 (under Tennessee law, “one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship”); *Swickard*, 475 N.W.2d at 311-12 (“We follow the general rule that the right of privacy is personal, and the relatives of deceased persons who are objects of publicity may not maintain actions for invasion of privacy unless their own privacy is violated.”). Thus, although we in no way discount the significant pain that a family may experience as a result of the publication of private facts about a deceased family member, the family may only seek to prevent disclosures that would result in invasion of *their own* privacy interests.

Indeed, the Baxter Family concedes as much in the comments they have submitted, at least as to the *common-law* right to privacy. But they strongly dispute “that *constitutional* privacy rights ‘lapse upon the death of the subject,’ and that a victim’s family’s *constitutional* privacy interests are not implicated unless the information in question refers to the family.” Baxter Family’s March 22, 2002 Letter Brief (the Baxter Family Brief) at 19-20 (quoting Attorney General’s 2002 Public Information Handbook at 79) (emphases added).

Contending that there are “fundamental differences between the [common-law] system and constitutional protection,” they argue that “there is no logical, legal or policy reason for the limitations from the [common-law] system to automatically apply to the constitutional right to privacy.” *Id.* at 20.

In support of this argument, they rely upon a number of federal decisions that have recognized a family member’s right to prevent disclosures that would invade a deceased relative’s privacy interests. *See, e.g., Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000) (release of photographs obtained as part of the investigation of the suicide of Vincent Foster would violate family’s personal privacy, which “extends to the memory of the deceased held by those tied closely to the deceased by blood or love”); *Accuracy in Media v. Nat’l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (protecting Foster family’s interest in preventing release of crime scene and autopsy photos, without deciding “whether the interest belongs to living close survivors . . . , or alternatively may inhere posthumously in the subject himself . . . , or both”); *New York Times Co. v. Nat’l Aeronautics & Space Admin.*, 920 F.2d 1002, 1010 (D.C. Cir. 1990) (protecting privacy interests of family members of Challenger astronauts to prevent disclosure of audiotape of astronauts’ communications shortly before explosion); *Campbell v. United States Dep’t of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998) (“The court must also account for the fact that certain reputational interests and family-related privacy expectations survive death.”); *Katz v. Nat’l Archives & Records Admin.*, 862 F.Supp. 476, 485 (D.D.C. 1994) (“the Kennedy family has a clear privacy interest in preventing the disclosure of both the x-rays and the optical photographs taken during President Kennedy’s autopsy”).

However compelling these weighty authorities may appear, we note that none of them address a *constitutional* right to privacy. Instead, they all pertain to the right of privacy protected by specific exceptions within the federal Freedom of Information Act, 5 U.S.C. § 552 (West 1996 & West Supp. 2001) (“FOIA”). As the United States Supreme Court has explained (and as we will discuss further below), the rights of privacy protected under the Constitution and the common law are different from the privacy interests protected under the FOIA. *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 n.13. (1989) (“The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual’s interest in privacy is protected by the Constitution.”). As such, we cannot base such a significant ruling on these federal FOIA cases.

In support of their argument that the constitutional right to privacy does not terminate upon the death of the subject, the Baxter Family also relies on *Sheets v. Salt Lake County*, 45 F.3d 1383, 1388 (10th Cir. 1995). In *Sheets*, the court ruled that the plaintiff had a legitimate expectation of privacy in his deceased wife’s diary. *Id.* at 1388. In reaching this conclusion, however, the court specifically noted that the plaintiff did not claim an interest in avoiding disclosure of the *deceased’s* feelings and thoughts, but instead claimed an interest in

avoiding disclosure of information about *himself* that was contained in the diary. *Id.* Accordingly, *Sheets* does not support the proposition that the constitutional right of privacy does not terminate upon the death of the subject.

In fact, we are aware of at least two cases that expressly hold that the *constitutional* right of privacy does terminate upon the death of the person holding that right. *See United States v. Amalgamated Life Ins. Co.*, 534 F.Supp. 676, 679 (S.D.N.Y. 1982) (constitutional right to privacy terminates upon death and does not descend to heirs of deceased); *Swickard*, 475 N.W.2d at 312 (“Constitutional rights of privacy are personal. A deceased person loses the right of privacy, and the right cannot be asserted by the next of kin.”). The Baxter Family has cited no cases that hold that it does not. Under such circumstances, we must conclude that Mr. Baxter’s rights to privacy, both common-law and constitutional, terminated upon his death, and the Baxter Family may not seek to prevent disclosure based upon those rights.

We now face the third question in this threshold issue: whether the Baxter Family’s own privacy rights are implicated by the disclosure of any of the items requested. In addressing this question, we must review the items at issue to determine whether they refer to the family members or contain facts or information about them. *See Moore*, 589 S.W.2d at 491 (right of privacy belongs to the “person about whom” facts have been published). Having conducted that review, we conclude that Item 2 (the driver’s license) and Item 6 (the photographs) do not refer to or contain information about the Baxter Family. As such, the privacy interests that the Baxter Family can assert do not protect these items from disclosure under section 552.101. The Department must therefore release Item 2 and Item 6.

As to Item 3, the credit cards displaying account numbers, and Item 5, the ATM receipts, we have insufficient information to determine whether these items contain information about any of the Baxter Family members. We believe that, to the extent that the accounts belonged only to Mr. Baxter and consisted only of his separate property, only he had an interest in them. But to the extent that they contain community property or are joint accounts, the person or persons who share any interest in the accounts may have an interest to assert as to these credit card numbers and receipts. Because we cannot make that factual determination, however, we will further address Items 3 and 5 only on the *assumption* that a Baxter Family member had an interest in them.

As to the remaining Items 1 and 4, these do appear to refer to or contain information about some Baxter Family members. Therefore, we must decide whether disclosure of these items would violate the Baxter Family’s right of privacy.

Common-Law Right of Privacy

We now turn to the question of whether, under the “judicial law” provision of section 552.101, the common-law right of privacy prohibits the disclosure of information contained in Items 1, 3, 4, and 5. The Texas Supreme Court has determined that this section of the PIA

prevents the government from disclosing items if the disclosure would give rise to a tort action for the “invasion of an individual’s freedom from the publicizing of his private affairs.” *Industrial Found.* 540 S.W.2d at 683; *see also Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref’d n.r.e) (under the PIA, “the proper way to evaluate a claimed invasion of privacy is to apply the state tort law dealing with that injury”). The elements of a tort action for disclosure of private facts are: “(1) publicity was given to matters concerning one’s personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern.” *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995) (citing *Industrial Found.*, 540 S.W.2d at 682). Thus, as expressly articulated by the Texas Supreme Court, section 552.101 exempts information from mandatory disclosure under the PIA if: “(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.” *Industrial Found.*, 540 S.W.2d at 685.

To demonstrate the applicability of this exception, a person must affirmatively establish *both* prongs of this test. *Id.* at 681-82. We note that, in this respect, the common-law right of privacy that the Texas PIA protects differs from the privacy right protected under the FOIA’s exemptions that expressly prohibit the disclosure of information that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *See* 5 U.S.C. §§ 552(b)(6), (7)(C). To determine whether the FOIA exemptions prohibit disclosure, courts must *balance* the individual’s privacy interest against the public interest in the disclosure. *See, e.g., United States Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989), *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981). In applying Texas common law, however, the courts have rejected the balancing of interests test. *See Industrial Found.*, 540 S.W.2d at 681-82 (under policy determination that Texas legislature made in enacting section 552.101, court is not free to balance public’s interest in disclosure against harm to person’s privacy); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (rejecting “open-ended balancing of interests” and applying *Industrial Foundation* test). As the Austin Court of Appeals has noted, the requirement of showing both elements of the *Industrial Foundation* test properly “balances” the individual’s privacy and the articulated purpose of the PIA. *Hubert*, 652 S.W.2d at 550.

The first prong of the privacy test requires a showing that the disclosure is of highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. *Industrial Found.*, 540 S.W.2d at 683. In *Industrial Foundation*, the party seeking to prevent disclosure asserted that the information there contained facts about sexual assault, illegitimacy of a child, pregnancy resulting from the failure of birth control, psychiatric treatment of mental disorders, injuries to sexual organs, injuries stemming from an attempted suicide, and physical or mental abuse. *Id.* The Court stated that it was “satisfied that *at least some* of these claims are of such a nature that their publication would be highly offensive to

a reasonable person.” *Id.* (emphasis added). In determining whether the release of information would be “highly objectionable to a reasonable person,” we must look to the information itself, to determine whether it contains “highly intimate or embarrassing facts.”

Specifically as to the Note, we agree that, generally speaking, there can hardly be a more “intimate” communication than a husband’s final words to his wife. But we cannot simply speak generally in this context. Instead, under *Industrial Foundation*, we must consider the information conveyed by those words to determine whether they contain “highly intimate or embarrassing facts.” In that context, the Baxter Family points out that this office has previously held that “the details of self-inflicted injuries are presumed protected by common law privacy.” Baxter Family Brief at 23 (citing Open Records Decision No. 422 (1984)). Specifically, this office held in Open Records Decision No. 422 that information regarding whether a self-inflicted wound was intentional or accidental would “reveal highly intimate or embarrassing facts, the disclosure of which would be highly objectionable to a person of ordinary sensibilities.” Such details, however, would reveal intimate or embarrassing facts *about the injured person*, not about his or her family members. Thus, to the extent that the Note contains similar details about Mr. Baxter, the only privacy interest in those details has been terminated by his death.

The Baxter Family asserts that the Note contains intimate or embarrassing facts about them because it “describes intimate, personal details of private family interaction.” Having reviewed the Note, we cannot agree with this characterization. Although the Note refers to one or more of the Baxter Family members, it does not contain any factual information about them that is highly intimate or embarrassing. We conclude that the Note does not meet the first prong of the *Industrial Foundation* test.

Having already concluded that the Baxter Family has no privacy interest in Item 2 (the driver’s licence), we turn to Item 3 (credit cards displaying account numbers). In doing so, we take a brief detour, because the disclosure of credit card numbers is expressly governed by section 552.136, which provides that, “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” PIA § 552.136(b). This provision was enacted to protect the privacy of an individual, and therefore, the protection extinguishes upon the individual’s death. This conclusion is consistent with prior decisions of this office, which held that exceptions of the PIA that only protect a person’s privacy interest do not survive the death of that person. *See* Attorney General Opinion H-917 (1976) (common-law privacy under sections 552.101 and 552.102 lapses on person’s death); Open Records Decision Nos. 536 (1989) (section 552.119 does not except peace officer’s photograph after officer’s death), 524 (1989) (section 552.114 does not except student records after student’s death). Thus, pursuant to section 552.136, the Department must withhold the three credit card numbers only if the credit card accounts are jointly owned by the deceased and a person who is a joint holder of the account. Otherwise, the Department must release the credit card numbers.

Item 4 is a photograph of a child. Having reviewed the photograph, we find that it contains no depiction or information that is in any way intimate or embarrassing to the child. Of course, the photograph does in essence “identify” the child, and we share concerns about the unwanted publicity that the child may receive if this photograph is disclosed. Those concerns, however, arise not from the government’s production of the photograph but rather from its potential exploitation by the media. *See, e.g., Favish*, 217 F.3d at 1173 (“Strictly speaking, it is not ‘the production’ of the records that would cause the harms suggested by the declaration but their exploitation by the media . . .”). The right to privacy, however, does not protect one from such unwanted publicity under these circumstances. Therefore, the Department may not withhold Item 4 under common-law privacy.

The ATM receipts in Item 5 contain the account balances and the amounts that were withdrawn or transferred from Mr. Baxter’s and possibly a family member’s or another person’s accounts. This office has previously found that personal financial information not relating to a financial transaction between an individual and a governmental body ordinarily satisfies the first prong of *Industrial Foundation*. *See* Open Records Decision Nos. 600 (1992), 373 (1983). A person’s decisions regarding disposition of one’s personal finances is one type of intimate information that a person of ordinary sensibilities would object to having publicly disclosed. *See, e.g.,* Open Records Decision No. 545 (1990) (allocation of salary to voluntary deferred compensation plan is personal investment decision protected by common-law privacy). Because the financial transactions reflected in Item 5 are not transactions with a governmental body, the information is a highly intimate fact about a person and satisfies the first criterion. Open Records Decision No. 545 at 3 (1990) (financial information relating to individual ordinarily satisfies first requirement of *Industrial Foundation*). However, because Mr. Baxter’s privacy interest in such information terminated upon his death, this information meets the first prong only to the extent that Mrs. Baxter or another person has an interest in these accounts. Because we do not know whether this is the case, we will address this issue further below.

We have previously concluded that Item 6 does not contain information about anyone other than Mr. Baxter. Therefore, the Baxter Family has no privacy interest in Item 6.

We now turn to the second prong of the *Industrial Foundation* test, which requires that the person having a privacy interest in the information show that the information “is not of legitimate public concern.” *Industrial Found.*, 540 S.W.2d at 684-85. Because the test requires an affirmative showing of both elements, “[t]here may be circumstances in which the special nature of the information makes it of legitimate concern to the public even though the information is of a highly private and embarrassing nature.” *Id.* at 685.

Whether any particular information is “of legitimate public concern” must be determined on a case-by-case basis, “considering the nature of the information and the public’s legitimate interest in its disclosure.” *Star-Telegram, Inc.*, 915 S.W.2d at 474. Relying on a number of federal cases, the Baxter Family contends that the only interest that qualifies as a “legitimate

public concern” is the public’s interest in knowing about the conduct of its government. *See, e.g., United States Dep’t of Defense*, 510 U.S. at 495 (“the only relevant ‘public interest in disclosure’ to be weighed in this balance is the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’”); *Sherman v. United States Dep’t of the Army*, 244 F.3d 357, 361 (5th Cir. 2001) (a significant public interest “is not implicated by disclosure of information about private citizens that has accumulated in various government files but reveals little or nothing about an agency’s own conduct”); *Accuracy in Media*, 194 F.3d at 124 (“To show that the invasion of privacy was not ‘unwarranted,’ AIM must show ‘compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [information] is necessary in order to confirm or refute that evidence.’”); *Halloran*, 874 F.2d at 323 (“[I]f disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.”).

Again, however, the Baxter Family is proposing that we adopt for the Texas PIA a standard that applies only to the federal FOIA. The cases construing the common-law right of privacy do not impose such a limited concept of a “legitimate public concern.” *See, e.g., Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124, 127 (Tex. App.–San Antonio 2001, pet. denied) (information regarding a custody proceeding where one parent raised concerns for the child’s safety is “of legitimate public concern”); *see also Swickard*, 475 N.W.2d at 313-14 (“The circumstances surrounding the alleged suicide of a public figure . . . are matters of legitimate public concern.”).

Instead, the courts have consistently recognized that matters of “legitimate public concern” in the common-law tort context extend “beyond subjects of political or public affairs to all matters of the kind customarily regarded as ‘news’ and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published.” *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. App.–Houston [1st Dist.] 1993, writ denied). In fact, because of the breadth of the meaning of “legitimate public concern,” this element has given rise to the courts’ recognition of a First Amendment-based “newsworthiness” privilege to a common-law tort action for public disclosure. *Id.* (This element “gives rise to a first amendment privilege, sometimes referred to as the ‘newsworthiness defense,’ to publish or broadcast news or other matters of public interest”); *see also Ross*, 870 F.2d at 273 (under First Amendment privilege, no tort liability for publishing true details of rape if such details are relevant to newsworthy topic).

Indeed, as the U.S. Supreme Court has explained, it is in this tort of public disclosure “that claims of privacy most directly confront the constitutional freedoms of speech and press.” *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975). As the Fifth Circuit has explained, this privilege

is not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs. Rather, the privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period. The ambit of protection offered by [this] privilege often encompasses information relating to individuals who either have not sought or have attempted to avoid publicity.

Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980). In light of such authorities, we cannot accept the Baxter Family's proposal that we adopt the FOIA's more limited definition of "legitimate public concern."

Of course, the Texas common-law definition is not without its own limits. While a general subject matter may be of legitimate public concern, the specific identity of or facts regarding a particular individual may not be. "[T]he privacy of such individuals is protected . . . by requiring that [a] logical nexus exist between the identity of the individual and the matter of legitimate public interest." *Anonsen*, 857 S.W.2d at 705; *see also Campbell*, 614 F.2d at 397. With these principles in mind we turn to the question of whether there is any legitimate public concern in any of the items requested.

Until he resigned on May 2, 2001, Mr. Baxter was vice chairman of Enron Corporation. On December 2, 2001, and on other dates thereafter, Enron Corporation and dozens of its subsidiaries and related companies filed for bankruptcy. The bankruptcy of Enron is reportedly the largest in American history. The harm resulting from Enron's collapse has affected thousands of people nationwide. Private pensions and those of government retirement systems have suffered losses of millions, if not billions, of dollars. The possible causes of Enron's downfall are the subject of numerous Congressional hearings, federal criminal investigations, and civil lawsuits. Enron's bankruptcy has resulted in concerns about practices and standards of accountants and stock market analysts, prompting the government to consider reforms and regulations of the accounting industry, corporate management, administration of pensions, and disclosures to the Securities and Exchange Commission. We think there can be no doubt that the "general subject matter" of the collapse of Enron is a matter of legitimate public concern.

Moreover, we conclude that information regarding Mr. Baxter and the circumstances of his death has a logical nexus to the collapse of Enron and is therefore also a matter of legitimate public concern. In her memorandum warning former Enron Chief Executive Officer Kenneth Lay of serious problems at Enron, Ms. Sherron Watkins stated that Mr. Baxter had expressed concerns about the inappropriateness of some of Enron's business transactions. In addition, prior to his death Mr. Baxter had received a subpoena compelling him to testify before a subcommittee of the United States Senate. Since his death, former Enron executive

Jeffrey Skilling has testified regarding Mr. Baxter and his death before a congressional subcommittee.

In this sense, we note our belief that Mr. Baxter -- like many others who were involved with Enron -- has in essence involuntarily become a limited-purpose public figure, about whom there exists a heightened legitimate public interest. *See, e.g., Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.D.C. 1985) (“Injection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will.”). With this in mind, we address the items requested.

As for the Note, we ordinarily would not need to address the legitimate public concern requirement since we have determined that the Note does not meet the first prong as to the Baxter Family members. However, under these circumstances, we believe it is important to address the intense public interest in all of the circumstances surrounding the collapse of Enron and the actions and knowledge of its current and former executives. Given the substantial public interest in the causes of Enron’s failure and its far-reaching consequences, we conclude that the contents of the Note and the investigation of Mr. Baxter’s death have a logical nexus to the investigation into Enron’s business practices, which is a matter of public concern. *See Haynes v. Knopf*, 8 F.3d 1222 (7th Cir. 1993) (information about plaintiffs’ lives is not private because book does not reveal intimate details of plaintiffs’ lives and disclosed details are germane to story that is of legitimate public interest); *Campbell*, 614 F.2d at 397 (logical nexus exists between subject matter of autobiography, which is of legitimate public interest, and details of plaintiff’s home life and marriage to author’s brother). As FOIFT has explained in the comments it has submitted to this office:

The reasons for Baxter’s suicide *is the issue*. . . . If the [Note] reflects that Mr. Baxter took his own life to avoid having to testify regarding the partnerships about which he is reported to have “complained mightily,” or out of [his] own misgivings for having betrayed the public trust, or any other matter related to the Enron debacle, this is a matter in which the public has a legitimate interest.

FOIFT’s March 27, 2002 Brief at 4 (emphasis in original). We do not quote this statement to indicate that the Note does or does not reflect such matters. Under these circumstances, we find that there is a legitimate public concern not only in what it says, but also in knowing what it does not say. Accordingly, the Note has not met either prong of the *Industrial Foundation* test because the Note does not contain intimate details about Mr. Baxter’s family or other individuals, and the public has a legitimate interest in the contents of the Note. Thus, the Note is not excepted under common-law privacy.

Because we have concluded that the ATM receipts (Item 5) contain account balances and dollar amounts and thus meet the first prong, we must determine whether the information is of no legitimate public concern. After considering all of the information that the Department

has presented to this office, we are unable to determine that the financial information in Item 5 has a substantial nexus to the Department's investigation of Mr. Baxter's death. Furthermore, we are presented with no information showing that there is a logical nexus between Mr. Baxter's personal finances and the circumstances surrounding Enron Corporation's bankruptcy and its business practices. Hence, we find that there is no legitimate public concern in this personal financial information. Thus, assuming (as we have discussed above) that a Baxter Family member or a joint account holder has an interest in the accounts, the account balances and the amounts that were withdrawn or transferred are protected from disclosure under common-law privacy. We have marked the information that the Department must withhold if our assumption is correct.

Constitutional Right of Privacy

We now turn to the Baxter Family's reliance upon the constitutional right of privacy to prevent the disclosure of private facts. The contours of such right are not necessarily well-defined. In fact, as recently as 1997, a panel of the D.C. Circuit expressed "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information." *Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997). The Texas Supreme Court and the Fifth Circuit, however, appear to have clearly recognized such a right. As the Texas Supreme Court has explained:

Neither the [United States or Texas] Constitution expressly provides a right of privacy. Indeed, neither Constitution even contains the word 'privacy.' However, the United States Supreme Court has recognized that at least two different kinds of privacy interests are protected by the United States Constitution. The first type of privacy protects an individual's interest in avoiding the disclosure of personal information. This is the 'right to be let alone,' which has been characterized as "the right most valued by civilized men."

City of Sherman v. Henry, 928 S.W.2d 464, 467 (Tex. 1996) (citing and quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)); *see also Ramie v. Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985) ("The Constitution protects individuals against invasion of their privacy by the government. The liberty interest in privacy encompasses two notions: the freedom from being required to disclose personal matters to the government and the freedom to make certain kinds of decisions without government interference. The disclosure strand of the privacy interest in turn includes the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern." (citations omitted)).

Constitutional privacy does not apply to all manner of personal information, but it also is not necessarily limited only to the highly intimate matters that pertain to the concept of autonomy. Matters falling outside of the scope of the autonomy strand of constitutional

privacy may nevertheless implicate the strand of constitutional privacy that protects an individual's interest in avoiding disclosure of one's personal information. *Fadjo*, 633 F.2d at 1175.

Under the federal constitution, "in the context of governmental disclosure of personal matters, an individual's right to privacy is violated if: (1) the person had a legitimate expectation of privacy; and (2) that privacy interest outweighs the public need for disclosure." *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir 1996); *see also Abdeljalil v. City of Fort Worth*, 55 F. Supp.2d 614 (N.D. Tex. 1999). The constitutional test requires a balancing of these two elements. This balancing test considers a number of factors, including the potential for harm in any subsequent non-consensual disclosure of the information, and "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980)). We will apply the balancing test to Items 1, 3, 4, and 5 to determine whether the Department must withhold them under the constitutional right to privacy.

In support of their contention that the Baxter Family has a legitimate expectation of privacy in the Note (Item 1), the Baxter Family cites to the Tenth Circuit's finding that "information conveyed to one's spouse or that one's spouse has observed about one's character, marriage, finances and business to be personal in nature and subject to a reasonable expectation of privacy." *Sheets*, 45 F.3d at 1388 (emphasis added). We think the Tenth Circuit's statement is too generalized for these purposes. Certainly, information conveyed to (or observations about) one's spouse can be subject to a legitimate expectation of privacy; but not all such information is. Ultimately, it depends on the nature of the information conveyed (or the observations made). Here, given the nature of the information at issue and under these circumstances, we agree that the Baxter Family has a legitimate expectation of privacy in the Note.

Under the constitutional privacy test, we must weigh that privacy interest with "the public need for disclosure." The Baxter Family would have us define "the public need for disclosure" narrowly and analogous to the privacy test under FOIA, which limits the public interest to an interest in shedding light upon an agency's actions. However, the Baxter Family has failed to cite to any cases in which the courts have defined "the public need for disclosure" aspect of the constitutional privacy test so narrowly. We cannot agree that the Constitution would protect an individual's privacy interest, no matter how minimal, in all cases except those in which disclosure is necessary to enable the public to know about the conduct of its government. "The public need for disclosure" is broader than the Baxter Family suggests, and we must balance that need against the privacy interest. *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (in weighing the competing interests to determine whether a governmental body may disclose private information, court considers whether there is "an express statutory mandate, articulated public policy, or other recognizable public interest

militating toward access”). As we discussed above, there is substantial public interest in the contents of the Note. Furthermore, we conclude that the legitimate public interest in the Note far outweighs any privacy interest, and the Department may not withhold the Note under constitutional privacy.

Next, we consider Item 3 (credit cards displaying account numbers) and Item 5 (ATM receipts). Because we have concluded that these items must be withheld under common-law privacy if a family member or another person has an interest in these accounts, we need not determine whether these items are protected under the constitutional right to privacy.

The final item is Item 4 (photograph of a child). As we stated above, the photograph “identifies” the child but does not depict any information that is intimate or embarrassing to the child. However, we do recognize that disclosure of the photograph may engender unwanted publicity upon the child. Thus, as to the threshold question of legitimate expectation of privacy, we conclude that, under the facts and circumstances presented in this instance, the Baxter Family has no more than a minimal expectation of privacy in the child’s photograph. As for the “public need for disclosure” prong of the constitutional privacy test, we can discern no legitimate public interest in the child’s photograph. Thus, in balancing the Baxter Family’s privacy interest in withholding the photograph with the public’s interest in release of the photograph, we find that the public interest does not outweigh the Baxter Family’s expectation of privacy. Hence, the Department must withhold the child’s photograph under constitutional privacy.

As a final issue under this privacy analysis, the Baxter Family asserts a right to privacy under the Texas Constitution that they contend is more protective than the federal constitutional right to privacy. In doing so, they rely upon the Texas Supreme Court’s 1987 holding that

the Texas Constitution protects personal privacy from unreasonable intrusion. The right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means.

Tex. State Employees Union v. Tex. Dep’t of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) (*TSEU*). Thus, the Baxter Family contends that the Texas constitutional right to privacy demands a strict scrutiny test that is even more stringent than the federal constitution’s balancing test.

However, in *TSEU*, the Court addressed and found within the Texas Constitution a personal privacy right against “unreasonable intrusion.” In the context of that case, the Court addressed a state agency’s policy that required state employees to submit to polygraph tests. We believe there is a significant difference between intrusions resulting from the government’s requiring an employee to submit to a polygraph test and the government’s

release of information that contains personal information about an individual. As the Baxter Family acknowledges, “[t]here is little judicial precedent applying the Texas Constitution’s right to privacy in any context, and none applying it in circumstances comparable to this matter.” Baxter Family’s April 3, 2002 Reply Brief at 3. In the absence of direct authority from the Texas Supreme Court on the issue of the applicability of the Texas constitutional right to privacy to a government’s release of information that contains personal information about an individual, we cannot extend the *TSEU* holding to the present matter. We therefore interpret the right of privacy under the Texas Constitution to be consistent with that right under the federal Constitution, which we have previously addressed. *City of Sherman*, 928 S.W.2d at 473 (“While the Texas Constitution has been recognized to possess independent vitality, separate and apart from the guarantees provided by the United States Constitution, there is no reason to expand Texas constitutional protections” (citations omitted)).

Summary

In summary, the Department must withhold the photograph of the child (Item 4) under constitutional privacy. The Department must withhold the credit card numbers (Item 3) and the financial information we have marked on the ATM receipts (Item 5) under common-law privacy if a family member or another person has an interest in these accounts. Except for basic information and the court document, Item 7 may be withheld under section 552.108. The Department must release the following information: the Note (Item 1), copy of a Texas driver’s license issued to Mr. Baxter (Item 2), photographs of the decedent and the car in which his body was discovered (Item 6), the marked court document, and the basic information in Item 7.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling,

the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Pubic Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
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YHL/sdk

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