



November 1, 2002

Ms. Allyson Mitchell
Anderson County Criminal District Attorney
500 North Church
Palestine, Texas 75801

OR2002-6233

Dear Ms. Mitchell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171597.

The Anderson County Sheriff's Department (the "sheriff"), which you represent, received a request for the investigative file pertaining to the death of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Although you contend that portions of the submitted information are excepted from required public disclosure pursuant to sections 552.108 and 552.130 of the Government Code, we note that you did not raise these arguments within the initial ten business days following the sheriff's receipt of the current records request. Normally, a governmental body must raise an otherwise applicable exception to required public disclosure within the ten business days following the governmental body's receipt of an open records request. *See Gov't Code § 552.301(a)*. This office will not consider an exception raised after the initial ten days unless there exists a compelling reason for doing so. Open Records Decision No. 515 at 6 (1988). Section 552.108 is designed to protect the government's interests, and thus, the existence of this privilege by itself does not demonstrate a compelling interest to withhold the information. *See Open Records Decision No. 473 at 2 (1987)* (discretionary exceptions under the Public Information Act can be waived). Accordingly, we do not address the applicability of section 552.108 in this instance. However, the application of section 552.130 may provide such a compelling reason. *See Open Records Decision No. 150 (1977)*.

Therefore, we will address your argument under section 552.130 with respect to the submitted information.

As section 552.101 is the more inclusive of the exceptions you claim, we will address it first. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Therefore, you must withhold the marked CHRI from the requestor pursuant to section 552.101 of the Government Code as information that is made confidential by law.

Sections 411.192 and 411.193 of the Government Code govern the release of all information maintained by DPS (the "department") concerning the licensure of individuals to carry a concealed handgun. Section 411.192 provides:

The department shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. The department shall, on written request and payment of a reasonable fee to cover costs of copying, disclose to any other individual whether a named individual or any individual whose full name is listed on a specified written list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. *Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open*

records law, Chapter 552, Government Code, except that the applicant or license holder may be furnished a copy of disclosable records on request and the payment of a reasonable fee. The department shall notify a license holder of any request that is made for information relating to the license holder under this section and provide the name of the person or agency making the request. This section does not prohibit the department from making public and distributing to the public at no cost lists of individuals who are certified as qualified handgun instructors by the department.

Gov't Code § 411.192 (emphasis added). Section 411.193 further states:

The department shall make available, on request and payment of a reasonable fee to cover costs of copying, a statistical report that includes the number of licenses issued, denied, revoked, or suspended by the department during the preceding month, listed by age, gender, race, and zip code of the applicant or license holder.

Gov't Code § 411.193. We have marked the information that is confidential under section 411.192 of the Government Code. In addition, we find that the circumstances of this request do not meet the access requirements of that section. Accordingly, the marked information must be withheld under section 552.101 in conjunction with section 411.192 of the Government Code.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information 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. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy;

the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

This office has determined that some personal financial information is highly intimate or embarrassing and thus it meets the first part of the *Industrial Foundation* test. *See* Open Records Decision Nos. 600 (1992) (Employee’s Withholding Allowance Certificate; designation of beneficiary of employee’s retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989).

However, 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), *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); *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”). Thus, after carefully reviewing the information at issue, we conclude that no portion of the submitted information is excepted from disclosure by a constitutional or common-law right of privacy under section 552.101.

You also claim that section 552.130 of the Government Code excepts a portion of the submitted information from public disclosure. Section 552.130 provides in relevant part:

- (a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

The sheriff must withhold the copy of the Texas driver's license in Exhibit E under section 552.130. We note, however, that section 552.130 is designed to protect the privacy interest of the individual. Thus, as privacy rights lapse upon an individual's death, the sheriff may not withhold driver's license information for the deceased individual. The sheriff must withhold the vehicle identification number and license plate number of the deceased's vehicle under section 552.130 only to the extent that a living person has an ownership interest in the vehicle. Otherwise, the sheriff must release the vehicle identification number and license plate number to the requestor.

We note that the submitted information contains an account number. Section 552.136 of the Government Code states 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." Gov't Code § 552.136. This provision was enacted to protect the privacy of an individual, and therefore, the protection extinguishes upon the individual's death. Thus, pursuant to section 552.136, the sheriff must withhold the account number only if the account is jointly owned by the deceased and a person who is a joint holder of the account. Otherwise, the sheriff must release the account number.

Finally, we note that the submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.¹ Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The sheriff must, therefore, withhold e-mail addresses of members of the public under section 552.137.

¹The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

In summary, the marked CHRI and information concerning the licensure of individuals to carry a concealed handgun must be withheld under section 552.101. The sheriff must withhold the copy of the Texas driver's license in Exhibit E under section 552.130. The sheriff must withhold the vehicle identification number and license plate number of the deceased's vehicle under section 552.130 only to the extent that a living person has an ownership interest in the vehicle. Otherwise, the sheriff must release the vehicle identification number and license plate number to the requestor. Pursuant to section 552.136, the sheriff must withhold the marked account number only if the account is jointly owned by the deceased and a person who is a joint holder of the account; otherwise, the sheriff must release the account number. The sheriff must withhold e-mail addresses of members of the public under section 552.137. The remaining submitted information must be released to the requestor.

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 Public 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,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 171597

Enc. Submitted documents

c: Ms. Suzanne Meaux
The Clarion
309 West Oak
Palestine, Texas 75801
(w/o enclosures)