



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 25, 2003

Ms. Tenley A. Aldredge
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2003-2792

Dear Ms. Aldredge:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 180180.

The Travis County District Attorney's Office (the "District Attorney") received a request for "all witness statements and all physical evidence in the state's possession . . . related to the investigation and prosecution of [a named individual]." You inform us of the District Attorney's willingness to release most of the submitted information; however, you assert some of the information is excepted from disclosure under section 552.101 of the Government Code. We have reviewed the information you submitted and we have considered the exception you claim.

Initially, we note your comment that although the District Attorney provided you with no physical evidence in response to this request, you understand other responsive information, such as photographs and other physical evidence, exists and constitutes public information as the prosecution introduced such evidence at trial. If the District Attorney possesses additional responsive information that it neither submitted to this office for review nor released to the requestor, then the District Attorney must release such information at this time. See Gov't Code §§ 552.301(a), .302. However, we note that the Act does not apply to all physical evidence, but only to tangible items such as documents and other "developed materials." Attorney General Opinion JM-640 (1987). For example, physical evidence such as clothing, DNA samples, and blood samples are not items subject to the Act.

Next, we address your assertion section 552.101 of the Government Code excepts the highlighted portions of the submitted information from disclosure. Section 552.101 protects from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the disclosure of the information. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). 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. *Indus. Found.*, 540 S.W.2d at 683. 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 Broad. 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 Publ’ns, 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). In this instance, the information pertains to a criminal murder investigation that also involves a sexual assault.

While you acknowledge the victim’s right of privacy terminated upon her subsequent death, you contend common-law privacy protects the surviving family members, witnesses, or family members of others involved in the crime. With respect to the privacy interests of the deceased person’s family members, 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 the invasion of *their own* privacy interests. After reviewing the submitted documents, we find no information that implicates the privacy interests of the victim’s family because the family members are not the subjects of the information. Therefore, the District Attorney may not withhold any of the submitted information based on the privacy interests of the victim’s family members.

However, we agree that one witness statement contains highly intimate or embarrassing information about the witness herself. Further, we believe the public has no legitimate interest in the information. Therefore, the District Attorney must withhold the information we have marked under section 552.101 of the Government Code and common-law privacy. The District Attorney must release the remainder of the information as it asserts no other exceptions to public disclosure.

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).

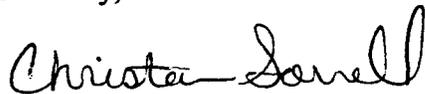
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 180180

Enc: Submitted documents

c: Mr. Jordan Smith
The Austin Chronicle
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(w/o enclosures)