



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2007

Mr. Nathan C. Barrow
Assistant City Attorney
Office of the City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2007-09761

Dear Mr. Barrow:

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# 285376.

The Fort Worth Police Department (the "department") received a request for the investigation file regarding a specified accident. The department states that it has redacted any Texas-issued motor vehicle record information.¹ You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception claimed and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), prohibits our office from reviewing unredacted education records, that is, records in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You state that the submitted information contains education records. We understand that these education records were provided to the department by an educational authority. The education records have been submitted to our office in unredacted form. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted records.

¹*See* Open Records Letter Nos. 2006-14726 (2006), 2007-00198 (2007) (previous determinations authorizing the city to withhold Texas-issued motor vehicle information without requesting a ruling from this office).

Such determinations under FERPA must be made by the educational authority from which you obtained the education records. The department should contact the education authority and the DOE regarding the applicability of FERPA to such records. We will, however, address the applicability of the remaining claimed exception to the submitted information.

You claim that the marked information is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. Criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. 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 id.* § 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. 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. After reviewing the submitted information, we agree that the marked information is CHRI and must be withheld under section 552.101 of the Government Code.

You claim that the some of the remaining information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. The common-law right of privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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. *Id.* at 683. You state that the submitted photographs of the deceased and the personal information of the witnesses are protected by common-law privacy. We note, however, that because it is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). The United States Supreme Court has determined, however, that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat’l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). In this instance, you state that you have

notified the deceased individual's surviving parents of the request and of their right to assert a privacy interest in the submitted death scene photographs.² In this instance, the surviving parents of the victim, through an authorized representative, have asserted a privacy interest in the release of the death scene photographs of their son. After reviewing the comments of the surviving parents' authorized representative, and the submitted information, we find that the parents' privacy interest in the photographs of their deceased son outweighs the public's interest in the disclosure of this information. Thus, the department must withhold the submitted image files IMG_0032.jpg through IMG_0042.jpg under section 552.101 of the Government Code in conjunction with common-law privacy. We find, however, that none of the personal information of the witnesses is protected by common-law privacy because it is not highly intimate or embarrassing. Thus, the personal information may not be withheld under section 552.101 of the Government Code.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the education authority from which you received the education records determine that all or portions of those documents consists of "education records" that must be withheld under FERPA, the department must dispose of that information in accordance with FERPA, rather than the Act. The department must withhold the marked CHRI under section 552.101 of the Government Code. The department also must withhold the death scene photographs under section 552.101 in conjunction with common-law privacy and *Favish*. As you do not raise any other exceptions against disclosure, the remaining information must be released.

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

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

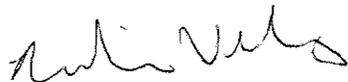
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jb

Ref: ID# 285376

Enc. Submitted documents

c: Ms. Toni F. Johnson, GCA
Farmers Insurance
P.O. Box 2498
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(w/o enclosures)