



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2009

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Section
City of Dallas
1400 South Lamar
Dallas, Texas 75215

OR2009-10593

Dear Ms. Middlebrooks:

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# 349715 (DPD PIR No. 09-3561).

The Dallas Police Department (the "department") received a request for information relating to an internal affairs investigation of a fatal accident involving a named police officer. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.¹ We also have considered the comments that we received from an attorney for a member of the accident victim's family.²

You note that information relating to the fatal accident was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2008-15715 (2008), 2009-00916 (2009), and 2009-02724 (2009). In those decisions, we concluded, among other things, that records of related criminal and administrative investigations of the

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²*See* 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).

accident were excepted from disclosure under section 552.108(a)(1) of the Government Code. You now inform us, however, that a grand jury heard the criminal matter and no-billed the officer involved in the accident prior to the department's receipt of the present request for information. You do not inform us that either the department or the Dallas County District Attorney's Office continues to assert a law enforcement interest in information pertaining to the related investigations of the accident. Thus, because there has been a change in the facts and circumstances on which the previous decisions were based, the department may no longer rely on our rulings under section 552.108 in Open Records Letter Nos. 2008-15715, 2009-00916, and 2009-02724. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Next, we note that the department previously released a portion of the submitted video recording to the public. Additionally, the previous rulings reflect that other information pertaining to the department's investigations of the accident has been released to the public. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). You seek to withhold the submitted information under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 neither prohibits public disclosure of information nor makes information confidential under law. Therefore, the portion of the submitted video and any other information that were previously released may not be withheld from the present requestor under section 552.103.

We also note that the submitted information falls within the scope of section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of records of completed investigations made by the department. You do not claim an exception to disclosure under section 552.108. Section 552.103, which you do claim, is a discretionary exception that may be waived; as such, section 552.103 is not other law that makes information expressly confidential for the

purposes of section 552.022(a)(1). *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76. Therefore, the department may not withhold any of the submitted information under section 552.103 of the Government Code.

We note, however, that sections 552.101, 552.117, and 552.130 of the Government Code are applicable to some of the submitted information.³ These sections are confidentiality provisions for the purposes of section 552.022(a)(1). Moreover, information that falls within the scope of section 552.101 is confidential under law for the purposes of section 552.007. Accordingly, we will address sections 552.101, 552.117, and 552.130.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. Section 773.091 of the Health and Safety Code is applicable to information relating to the provision of emergency medical services (“EMS”) and provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 further provides, however, that

[t]he privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Id. § 773.091(g). The EMS information that we have marked is confidential under section 773.091. We note that such information may be released to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf.” *Id.* § 773.092(e)(4). Therefore, the department must withhold the marked EMS information under section 552.101 of the Government Code in conjunction with section 773.091 of the

³Unlike other exceptions to disclosure under the Act, this office will raise sections 552.101, 552.117, and 552.130 on behalf of a governmental body, because these exceptions are mandatory and may not be waived. *See Gov’t Code* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Health and Safety Code, except as specified by section 773.091(g), unless the department receives the required written consent for release under sections 773.092 and 773.093 of the Health and Safety Code.

Section 552.101 also encompasses common-law privacy, which protects information that contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The submitted video depicts an incident in which a Dallas police officer's vehicle struck and fatally injured a child. We note that common-law privacy is a personal right that lapses at death and does not protect information related only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. 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 concluded, 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*, 541 U.S. 157 (2004). The department notified an attorney for the mother of the child to whom the submitted video pertains of this request for information and of her right to assert a privacy interest in the video. We have received a letter in which the mother's attorney contends that release of the videotape "would be a gross and unwarranted invasion of [her] right to privacy." Having considered the letter and reviewed the video, we find that the mother's privacy interest in the contents of the video outweighs the public's interest in disclosure of that information. We therefore conclude that the department must withhold the submitted video in its entirety under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked information relating to a peace officer that the department must withhold under section 552.117(a)(2).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code* § 552.130(a)(1)-(2). We have marked Texas driver's license and motor vehicle information that the department must withhold under section 552.130. We note that one of the submitted photographs contains a Texas license plate number that also must be withheld under section 552.130.

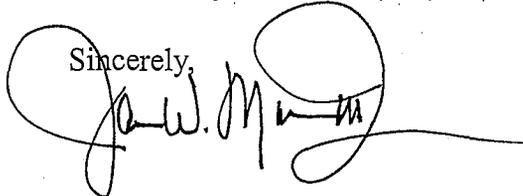
In summary: (1) the marked EMS information must be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the department receives the required written consent for release under sections 773.092 and 773.093 of the Health and Safety Code; (2)

the video must be withheld in its entirety under section 552.101 in conjunction with common-law privacy; (3) the marked information relating to a peace officer must be withheld under section 552.117 of the Government Code; and (4) the department must withhold the marked Texas driver's license and motor vehicle information and the Texas license plate number in the submitted photograph under section 552.130 of the Government Code. The rest of the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 349715

Enc: Submitted information

c: Requestor
(w/o enclosures)

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(w/o enclosures)