



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2009

Ms. Courtney Alvarez
City Attorney
City of Kingsville
P.O. Box 1458
Kingsville, Texas 78364

OR2009-11332

Dear Ms. Alvarez:

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# 352136.

The Kingsville Police Department (the "department") received a request for information pertaining to a specified incident report. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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 section encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S.589,599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects

of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). We note the right to privacy is a personal right that lapses at death and therefore may not be asserted solely on behalf of 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). However, the United States Supreme Court has determined 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).

Thus, because the submitted information relates to a deceased individual, it may not be withheld from disclosure based on his privacy interests. However, you state, and provide documentation showing, that you notified the deceased individual’s family members of the request for information and of their right to assert a privacy interest in the submitted information. In this instance, the deceased individual’s daughters and their mother have asserted privacy interests in the submitted information. Upon review of their comments and the information at issue, we find that the family members’ privacy interests in some of the information outweigh the public’s interest in the disclosure of this information. We therefore conclude that the department must withhold the information we have indicated under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. We conclude that none of the remaining information may be withheld from disclosure on the basis of constitutional privacy.¹

You claim the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. As noted above, the right to privacy is a personal right that lapses at death, and therefore may not be asserted solely on behalf of a deceased individual. See *Moore* at 491; ORD 272 at 1. Upon review, we find that the department has failed to demonstrate how the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

We note the remaining information includes emergency medical service (“EMS”) records that are confidential under section 773.091 of the Health and Safety Code, which is also

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

encompassed by section 552.101. *See* ORD 598. Section 773.091 provides in part the following:

(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.

...

(g) The 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.

Health & Safety Code § 773.091(b), (g). Thus, except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091 and, therefore, may only be released in accordance with chapter 773 of the Health and Safety Code. *See id.* §§ 773.091-773.094. We note that this 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). Among the individuals authorized to act on the patient’s behalf in providing written consent is a “personal representative” if the patient is deceased. *Id.* The consent must be in writing, signed by the patient, authorized representative, or personal representative, and specify: (1) the information to be covered by the release; (2) the reasons or purposes for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093(a). Thus, the department must withhold the marked EMS records under section 773.091, except as specified by section 773.091(g), unless the deceased patient’s personal representative provides the department with written consent that meets the requirements of section 773.093(a). *See id.* §§ 773.092, .093; ORD 632.

In summary, the department must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. Except for the information specified in section 773.091(g) of the Health and Safety Code, the EMS records we have marked may only be released in accordance with chapter 773 of the Health and Safety Code. The remaining 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 that reads "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 352136

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Deceased Individual's Family Members
(w/o enclosures)