



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 25, 2010

Ms. Robin King
Custodian of Records
Kaufman County Sheriff's Office
1900 East U.S. Highway 175
Kaufman, Texas 75142

OR2010-09408

Dear Ms. King:

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# 384321.

The Kaufman County Sheriff's Office (the "sheriff") received a request for information pertaining to the death of a named individual. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by a representative of the deceased individual's family. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the sheriff's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the sheriff received the request for information on April 7, 2010. Thus,

the sheriff's fifteen-business-day deadline was April 28, 2010. However, you did not submit the written request until May 10, 2010. Thus, we find the sheriff failed to comply with the requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you assert section 552.108 of the Government Code as an exception to disclosure, this exception is discretionary in nature. It serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Consequently, the sheriff may not withhold any of the information under section 552.108. However, the sheriff raises sections 552.101 and 552.102 of the Government Code. We also note the submitted information may be subject to sections 552.130, and 552.136 of the Government Code.¹ Thus, because sections 552.101, 552.102, 552.130, and 552.136 can provide compelling reasons for non-disclosure, we will address these sections for the submitted information. We will also address the family's arguments under sections 552.115 and 552.147 of the Government Code.

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 Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. 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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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) (holding surviving family members have a right to personal privacy with respect to their close relative's death-scene images and such privacy interests outweigh public interest in disclosure).

Thus, because the submitted information relates to a deceased individual, it may not be withheld from disclosure based on his privacy interests. However, the decedent's family has asserted a privacy interest in the submitted information. Upon review of the family's comments and the information at issue, we find the family's privacy interests in some of the information outweigh the public's interest in the disclosure of this information. We therefore conclude the sheriff must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. We conclude none of the remaining information may be withheld from disclosure on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of 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. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. See *id.* at 681-82. 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 sheriff has failed to demonstrate how the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the sheriff may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

The sheriff also raises section 552.102(a) of the Government Code. Section 552.102(a) exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. See

Hubert v. Harte-Hanks Tex. Newspapers, Inc., 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In this instance, the information at issue is contained in a police report, and not a personnel file. Therefore, the sheriff may not withhold any portion of the submitted information under section 552.102(a) of the Government Code.

Next, we note the submitted information contains Texas motor vehicle record information subject to section 552.130. Section 552.130 excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. Gov't Code § 552.130(a)(1), (2). However, section 552.130 is designed to protect the privacy of individuals, and the right to privacy expires at death. *See Moore* at 491; ORD 272 at 1. Accordingly, to the extent the Texas motor vehicle record information we have marked in the submitted information pertains to a living individual or a vehicle owned by a living person, it must be withheld under section 552.130. However, if any of this information pertains solely to a deceased individual, it may not be withheld under section 552.130.

Finally, a portion of the submitted information is subject to section 552.136 of the Government Code. Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining “access device”). However, as with section 552.130, section 552.136 protects the privacy interests of individuals, and the right to privacy lapses at death. *See Moore* at 491. Therefore, if the information we marked under section 552.136 is associated with account numbers that belonged solely to the deceased, the information we marked is not excepted from disclosure under section 552.136. However, to the extent the information we marked pertains to account numbers held by a living individual, the sheriff must withhold the information we marked under section 552.136 of the Government Code.²

The family claims the requested information is excepted from disclosure under section 552.115 of the Government Code. Section 552.115 excepts from disclosure “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]” Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration official. *See Open Records Decision No. 338 (1982)* (finding statutory predecessor to section 552.115 excepted only those birth and death records maintained by bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the sheriff, none of the submitted information may be withheld on this basis.

² We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130, and account numbers under section 552.136, without the necessity of requesting an attorney general decision.

The family claims section 552.147 of the Government Code for the deceased's social security number. Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147. We note section 552.147 is not applicable to the social security number of a deceased individual. Therefore, the sheriff may only withhold social security numbers pertaining to living persons under section 552.147.³

In summary, the sheriff must withhold the information we marked under section 552.101 in conjunction with constitutional privacy. To the extent the Texas motor vehicle record information we have marked in the submitted information pertains to a living individual or a vehicle owned by a living person, it must be withheld under section 552.130. To the extent the information we marked pertains to account numbers held by a living individual, the sheriff must withhold the information we marked under section 552.136 of the Government Code. The sheriff may only withhold social security numbers pertaining to living persons under section 552.147. 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, toll free, at (888) 672-6787.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division

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³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Ref: ID# 384321

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ira E. Tobolowsky
Tobolosky & Burk, P.C.
4305 West Lovers Lane
Dallas, Texas 75209
(w/o enclosures)