ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2011

Mr. Robert E. Hager
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
For City of Lancaster
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2011-03626

Dear Mr. Hager:

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# 411301 (File Nos. 47010 and 47542).

The Lancaster Police Department and the City of Lancaster (collectively, the "city"), which you represent, each received a request for information related to a specified investigation. You state you will release some responsive information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.119, and 552.130 of the Government Code. You further state the submitted photographs and videos may be subject to the privacy interests of the family of the deceased individual at issue in the submitted photographs and videos. We have received and considered comments from a member 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). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the information submitted as Exhibit C was encompassed by a previous request for information, in response to which this office issued Open Records Letter No. 2011-01796 (2011). In that ruling, we determined the city must withhold portions of the information at issue under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code, chapter 411 of the Government Code, and common-law privacy, as well as sections 552.117 and 552.130 of the Government Code. However, we also determined the city could not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004), as no

member of the deceased individual's family submitted comments asserting a privacy interest in the information. A family member of the deceased individual has since submitted comments asserting a privacy interest in some of the information at issue. Accordingly, with respect to the information related to the family member of the deceased, we conclude there has been a change in the facts upon which the previous ruling was based. In addition, the city now seeks to withhold the information in Exhibit C under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code, as well as section 552.108 of the Government Code. We note the Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, 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). Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 neither prohibits public disclosure of information nor makes information confidential under law. Therefore, no portion of the information in Exhibit C may be withheld from the present requestors under section 552.108 of the Government Code. However, because section 552.101 makes information confidential under law, we will consider the arguments under that section.

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 information made confidential by other statutes, such as section 58.007(c) of the Family Code, which provides as follows:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
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> > (1) if maintained on paper or microfilm, kept separate from adult files and records;
> >
> > (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

> (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997 are confidential under section 58.007(c). *See id.* § 51.03(a), (b) (defining "delinquent conduct" and "conduct indicating a need for supervision"). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age. *Id.* § 51.02(2). Upon review, we find the submitted information does not identify a juvenile suspect or offender for purposes of section 58.007. Accordingly, we find you have not demonstrated the applicability of section 58.007(c) of the Family Code. Thus, you may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

Section 552.101 also 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); 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 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 that 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*, 589 S.W.2d at 491; ORD 272 at 1 (privacy rights lapse upon death).

Because a portion of the submitted information relates to a deceased individual, it may not be withheld from disclosure based on privacy interests of the decedent. 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). A family member of the decedent has asserted a privacy interest in portions of the submitted information. Upon review, we find the family member's privacy interests in some of the information at issue outweigh the public's interest in the disclosure of this information. We note the requestor who submitted his request to the city is the same individual who submitted comments asserting a privacy interest in the information at issue. As such, this requestor has a right of access under section 552.023 of the Government Code to any information relating to the deceased individual that the city might be required to withhold from the public on privacy grounds under *Favish*. *See* Gov't Code § 552.023. Thus, information relating to this requestor's deceased family member may not be withheld from him under section 552.101 on privacy grounds. However, the city must withhold from the requestor who submitted his request to the city's police department the

information we have indicated in Exhibit C under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. We find none of the remaining information in Exhibit C may be withheld from disclosure under section 552.101 of the Government Code on the basis of constitutional privacy.

With respect to the remaining information previously ruled upon, we have no indication there has been any change in the law, facts, or circumstances on which Open Records Letter No. 2011-01796 was based. Accordingly, we conclude the city must continue to withhold or release the remaining information in Exhibit C in accordance with Open Records Letter No. 2011-01796.[1] *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We note the remaining information, which you have labeled Exhibit D, was created after the date the city received the previous request for information, and, thus, is not encompassed by that prior ruling. Accordingly, we will consider your arguments for the information in Exhibit D.

Section 552.101 of the Government Code also encompasses section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).[2] *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

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[1]As we are able to make this determination, we need not address the city's remaining arguments against disclosure of the information in Exhibit C.

[2]Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055.

You state the information in Exhibit D is maintained by the city's police department pursuant to section 143.089(g) of the Local Government Code. You further state this information involves an internal affairs investigation that did not result in disciplinary action under chapter 143. However, the information at issue includes emergency medical services ("EMS") records related to the specified investigation. The present request does not specifically seek information from an officer's personnel file maintained by the city's police department. Instead, the requestor seeks all information related to a specified investigation. Because the requestor generally seeks information related to the specified investigation, both information in an officer's personnel file and any copies of investigatory materials the city's police department maintains for law enforcement purposes are responsive. The city may not engraft the confidentiality afforded to records under section 143.089(g) to records that exist independently of the internal files. To the extent the submitted EMS records do not exist independently of the internal files, we find these records, as well as the remaining information in Exhibit D, are contained in an internal file maintained by the city's police department for its own use and thus, are confidential under section 143.089(g) of the Local Government Code. Accordingly, the city must withhold the information in Exhibit D under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.[3] To the extent the submitted EMS records exist independently of the internal files, we find these records are not confidential under section 143.089(g) and may not be withheld under section 552.101 of the Government Code on this basis. We will, however, consider whether the EMS records are excepted under the Act.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state the submitted EMS records in Exhibit D relate to a closed criminal case that did not result in a conviction or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to this information. Accordingly, the city may withhold the submitted EMS records in Exhibit D under section 552.108(a)(2) of the Government Code.[4]

In summary, the city must withhold from the requestor who submitted his request to the city's police department the information we have indicated in Exhibit C under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The city must continue to withhold or release the remaining information in Exhibit C in accordance with Open Records Letter No. 2011-01796. To the extent the submitted EMS records do not exist independently of the internal files, the city must

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[3]As our ruling is dispositive, we need not address your remaining arguments against disclosure of the remaining information in Exhibit D.

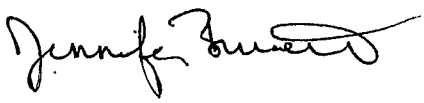
[4]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

withhold the information in Exhibit D under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. To the extent the submitted EMS records exist independently of the internal files, the city may withhold the EMS records under section 552.108(a)(2) of the Government Code.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 411301

Enc. Submitted documents

c: Requestors
(w/o enclosures)