



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 22, 2011

Ms. Linda M. Champion  
Assistant City Attorney  
City of Victoria  
P.O. Box 1758  
Victoria, Texas 77902-1758

OR2011-08913

Dear Ms. Champion:

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# 422018.

The City of Victoria (the "city") received a request for records pertaining to a specified homicide investigation. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You further state the requested information may implicate the privacy interests of the family of the deceased individual who is at issue in the investigation. We have received and considered comments from one of the deceased individual's family members and from the family member's attorney. *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Initially, we address the family member's contention the request for information has been withdrawn by operation of law because the requestor has failed to respond to the itemized cost estimate for copies of the requested information. Under section 552.2615 of the Government Code, a governmental body is required to provide a requestor with an estimate of charges when a request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See id.* § 552.2615. The relevant portion of section 552.2615 provides:

(a) . . . If an alternative less costly method of viewing the records is available, the statement must include a notice that the requestor may contact the governmental body regarding the alternative method. The governmental

body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request ... is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 business days after the date the statement is sent to the requestor that

(1) the requestor will accept the estimated charge;

(2) the requestor is modifying the request in response to the itemized statement; or

(3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of the public information.

*Id.* § 552.2615(a), (b). You provide documentation showing you provided the requestor with an itemized cost estimate for information responsive to the request. *See id.* §§ 552.2615(a), 552.263(f). You further inform us the requestor has not responded to the cost estimate. *See id.* § 552.2615(a)(2) (request automatically withdrawn if requestor does not respond to itemized estimate of charges). However, we have examined the cost estimate at issue and have determined it does not comply with the provisions of section 552.2615. Specifically, the estimate did not inform the requestor that inspection of the records would be a less costly method of obtaining the information or that she could make a complaint to our office alleging that she has been overcharged. *See id.* § 552.2615(a). Accordingly, we conclude the requestor's public information request has not been withdrawn by operation of law, and we will address the arguments against disclosure of the submitted information.

Next, we note you have not submitted the photographs, audio cassettes, and videotapes you state are responsive to the request.<sup>1</sup> We further note you have submitted only sixty-nine pages of the nine hundred and seventy-seven pages of documents you state are responsive to the request, and you do not indicate the submitted information constitutes a sample that is representative of the requested records as a whole. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy or representative sample of specific information requested). Although the family member objects to the release of any images responsive to the request, because you have not submitted such information to this office for our review, we have no basis for finding it confidential. Thus, we have no choice but to order the city to release the photographs, audio cassettes, videotapes, and unsubmitted documents in accordance with section 552.302 of the Government Code. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible). If you believe the information at issue is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

We will now address the arguments against disclosure of 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. Section 552.101 encompasses other statutes that make information confidential, such as section 261.201(a) of the Family Code, which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

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<sup>1</sup>You inform us the compact discs on which the photographs are stored have been corrupted and the city's police department, which is the custodian of the information, is unable to reproduce most of the photographs. The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). You also inform us the audio cassettes and videotapes contain interviews with suspects and would be releasable.

Fam. Code § 261.201(a). We note a portion of the submitted information was used or developed in an investigation of alleged abuse or neglect of a child. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code ch. 261); *see also id.* § 101.003(a) (defining “child” for purposes of this section). Upon review, we find this information, which we have marked, is confidential under section 261.201 of the Family Code. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute). However, none of the remaining information is confidential for purposes of section 261.201, and the city may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. The type of information considered intimate or 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision No. 545 (1990). In addition, a compilation of an individual’s criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. 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 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984), H-917 (1976); Open Records Decision No. 272 (1981). Upon review, we find a portion of the remaining information relating to living individuals, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information is either not

highly intimate or embarrassing, or it is of legitimate public interest, and the city may not withhold it under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy, which 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 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). 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.

The United States Supreme Court has determined, however, 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 right to personal privacy with respect to their close relative's death-scene images and such privacy interests outweigh public interest in disclosure). In this instance, a family member of the deceased individual has asserted a privacy interest in some of the requested information. Upon review, we find the city and the family member have failed to demonstrate any portion of the remaining submitted information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Thus, none of the remaining submitted information may be withheld from disclosure under section 552.101 of the Government Code on the basis of constitutional privacy.

The family member's attorney raises section 552.130 of the Government Code, which excepts from disclosure information that "relates to ... a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1)-(2). Thus, the city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.<sup>2</sup>

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<sup>2</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number and a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The city must release the remaining submitted information.<sup>3</sup>

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](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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 422018

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Terry B. Gamble  
P.O. Box 9173  
Austin, Texas 78766  
(w/o enclosures)

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<sup>3</sup>We note the information being released contains a social security number. 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.