



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2011

Mr. Michael M. Kelly
Assistant District Attorney
Victoria County District Attorney
205 North Bridge Street, Suite 301
Victoria, Texas 77901

OR2011-12173

Dear Mr. Kelly:

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# 427658.

The Victoria County Sheriff's Office (the "sheriff") received a request for information pertaining to the criminal investigation of the murder of a named victim. You indicate you have released some of the requested information to the requestor, but claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have also received correspondence from a representative of the deceased victim's family objecting to the release of the submitted information. *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 representative sample of information.¹

As noted above, the sheriff asserts the submitted information is excepted from disclosure under section 552.108(a) of the Government Code, which reads as follows:

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;
- (3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or
- (4) it is information that:
 - (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
 - (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a). The sheriff asserts the submitted information is excepted from disclosure under section 552.108(a) of the Government Code as interpreted by *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). In the *Holmes* decision, the Texas Supreme Court held the plain language of section 552.108 did not require a governmental body to show that release of the information would unduly interfere with law enforcement. *Holmes*, 924 S.W.2d at 925. The *Holmes* decision further held that “[the predecessor of] section 552.108’s plain language makes no distinction between a prosecutor’s ‘open’ and ‘closed’ criminal litigation files” and concluded the Harris County District Attorney may withhold his closed criminal litigation files under that exception. *Id.* Subsequent to the interpretation of the predecessor of section 552.108 in the *Holmes* decision, the Seventy-fifth Legislature amended section 552.108 extensively. See Act of June 1, 1997, 75th Leg., R.S., ch. 1231, § 1, 1997 Tex. Gen. Laws 4697. As amended, section 552.108 now expressly requires a governmental body to explain, among other things, how release of the information would interfere with law enforcement. Accordingly, the court’s ruling in *Holmes*, which construed former section 552.108, is superseded by the amended section.

A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You do not inform us the submitted information pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. In fact, you

specifically state the requested information pertains to a concluded case in which the defendant pleaded guilty and was sentenced. Thus, you have not met your burden under section 552.108(a)(1). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. As previously noted, you inform us the requested information pertains to a concluded case in which the defendant pleaded guilty and was sentenced. Thus, you have not met your burden under section 552.108(a)(2). Section 552.108(a)(3) is also inapplicable as the submitted information does not relate to a threat against a police officer. See Gov't Code § 552.108(a)(3). Lastly, you do not assert the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. See *id.* § 552.108(a)(4). Therefore, the sheriff has not established the submitted information is excepted from disclosure under section 552.108(a). Accordingly, the sheriff may not withhold any portion of the submitted information pursuant to section 552.108(a) of the Government Code.

The sheriff and the representative of the victim's family assert the submitted information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 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 *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). The right to privacy, however, is a personal right that lapses at death and, therefore, does not encompass information that relates 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.); Attorney General Opinions JM-229 at 3 (1984), H-917 at 2 (1976); Open Records Decision No. 272 at 1 (1981). However, the United States Supreme Court has determined 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).

The sheriff may not withhold any of the submitted information based on the privacy interests of the victim, who is deceased. See *Moore*, 589 S.W.2d at 491; ORD 272 at 1. However, a representative of the victim's family asserts a privacy interest based on the privacy of the victim's family. Upon review, we find the privacy interests of the victim's family in some of the information outweigh the public's interest in the disclosure of this information.

Therefore, the sheriff must withhold files IMG_0050.JPG, IMG_0054.JPG through IMG_0069.JPG, IMG_0083.JPG, IMG_0087.JPG and IMG_0090.JPG through IMG_0146.JPG on the CD we have labeled CD #2 under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. However, upon review, we conclude neither the sheriff nor the representative of the deceased victim's family has established any of the remaining information is excepted from disclosure under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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. This office has some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *E.g.*, Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps). 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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted individual has significant privacy interest in compilation of one's criminal history). However, as noted above, the right to privacy is a personal right that lapses at death. See *Moore*, 589 S.W.2d at 491; ORD 272 at 1.

Upon review, we find some of the submitted information is highly intimate or embarrassing and is not of legitimate concern to the public. Therefore, the sheriff must withhold the following information under section 552.101 in conjunction with common-law privacy: (1) the information we have marked under common-law privacy; (2) the portions of the recording at 3:20, 4:21-4:29, 4:37, 4:47, 5:02, 5:12-5:22, 7:04-7:15, and 9:50-11:25, 12:00-12:45, and 35:00-35:06 on the CD we have labeled CD# 6; (3) the portion of the recording at 2:21 on the CD we have labeled CD# 7; (4) the portions of the recording at 9:31-9:35 and 20:15 of the CD we have labeled CD #8; (5) the portion of the recording at 32:41 of the CD we have labeled CD #9; and (6) the information we have marked on the CDs we have labeled CDs # 10, 11, and 13. However, we find neither the sheriff nor the representative of the deceased victim's family has established the remaining information is confidential under common-law privacy. Therefore, the sheriff may not withhold the remaining information under section 552.101 of the Government Code on that ground.

Section 552.101 also encompasses information protected by other statutes. Section 1703.306 of the Occupations Code provides the following:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The submitted information contains polygraph information that is confidential under section 1703.306, and the requestor does not appear to have a right of access to the information under that section. Accordingly, the sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

We note some of the information at issue may be excepted under section 552.1175 of the Government Code.² Section 552.1175(b) provides in part the following:

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

Information that relates to the home address, home telephone number, emergency contact information, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). The sheriff must withhold the following information under section 552.1175 of the Government Code if it relates to a peace officer who elects to restrict access to the information in accordance with section 552.1175(b): (1) the information we have marked under section 552.1175; (2) files 161_161.JPG and 165_165.JPG on the CD we have labeled CD #4; (3) the portions of the recording at 6:22; 9:24; 26:17-25:25; 30:56-31:05; 31:43; 32:53; 33:56-34:05; 36:56-37:00; 39:31 on the CD we have labeled CD# 6; (4) the portion of the recording at 4:31-4:46 on the CD we have labeled CD #7; (5) the portions of the recordings at 1:00-1:09, 7:30, 11:45, 12:45-13:00, 17:08, 18:56, 19:40 on the CD we have labeled CD #8; and (6) the information we have marked on the CD we have labeled CD #12. However, if the individuals to whom the information pertains are no longer licensed peace officers or do not elect to restrict access to their information in accordance with section 552.1175(b), the sheriff may not withhold this information under section 552.1175 of the Government Code.

The remaining documents contain motor vehicle record information. Section 552.130(a) of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). Section 552.130 is applicable to the following information pertaining to living individuals in the submitted documents: (1) the information we have marked under section 552.130; (2) the vehicle identification number in the files 05750026.jpg and 05750027.jpg on the CD we have labeled CD #1; (2) the Texas license plates numbers in the files 05750011.jpg, 05750019.jpg, 05750020.jpg, 05750021.jpg, 05750023.jpg, 05750024.jpg, 05750047.jpg, 05750048.jpg, 05750058.jpg, 05750059.jpg, 05750062.jpg, 05750065.jpg, IMG_0658.JPG, IMG_0659.JPG, IMG_0662.JPG, IMG_0665.JPG, IMG_0666.JPG and IMG_0667 on the CD we have labeled CD #1; (3) the Texas license plates numbers in the files IMG_0047.JPG, IMG_0048.JPG, IMG_1510.JPG, IMG_1516.JPG, and IMG_1524.JPG on the CDs we have labeled CD #2 and CD #3; (4) the Texas license plate numbers in the files 120_120.JPG, 121_121.JPG, and 137_137.JPG on the CD we have labeled CD #4; (5) the Texas driver's license number at the portion of the recording 00:52 on the CD we have labeled CD #6; and (6) the Texas license plate numbers that are visible within the recording on the CD we have labeled CD #10. Thus, the sheriff must withhold this information under section 552.130.

Some of the remaining information is also excepted from disclosure under section 552.136 of the Government Code. Section 552.136(b) provides that “[n]otwithstanding any other provision of this chapter, 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.” The sheriff must withhold the account numbers we have marked under section 552.136.

The remaining information contains e-mail addresses of living members of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the sheriff must withhold the e-mail addresses we have marked under section 552.137.

Finally, we note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

To conclude, the sheriff must withhold files IMG_0050.JPG, IMG_0054.JPG through IMG_0069.JPG, IMG_0083.JPG, IMG_0087.JPG and IMG_0090.JPG through IMG_0146.JPG on the CD we have labeled CD #2 under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The sheriff must withhold the following information under section 552.101 in conjunction with common-law privacy: (1) the information we have marked under common-law privacy; (2) the portions of the recording at 3:20, 4:21-4:29, 4:37, 4:47, 5:02, 5:12-5:22, 7:04-7:15, and 9:50-11:25, 12:00-12:45, and 35:00-35:06 on the CD we have labeled CD# 6; (3) the portion of the recording at 2:21 on the CD we have labeled CD# 7; (4) the portions of the recording at 9:31-9:35 and 20:15 of the CD we have labeled CD #8; (5) the portion of the recording at 32:41 of the CD we have labeled CD #9; and (6) the information we have marked on the CDs we have labeled CDs # 10, 11, and 13. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The sheriff must withhold the following information under section 552.1175 of the Government Code if it relates to a peace officer who elects to restrict access to the information in accordance with section 552.1175(b) of the Government Code: (1) the information we have marked under section 552.1175; (2) files 161_161.JPG and 165_165.JPG on the CD we have labeled CD #4; (3) the portions of the recording at 6:22; 9:24; 26:17-25:25; 30:56-31:05; 31:43; 32:53; 33:56-34:05; 36:56-37:00; 39:31 on the CD we have labeled CD# 6; (4) the portion of the recording at 4:31-4:46 on the CD we have labeled CD #7; (5) the portions of the recordings at 1:00-1:09, 7:30, 11:45, 12:45-13:00, 17:08, 18:56, 19:40 on the CD we have labeled CD #8; and (6) the information we have marked on the CD we have labeled CD #12. However, if the individuals to whom the information pertains are no longer licensed peace officers or do not elect to restrict access to their information in accordance with section 552.1175(b), then the sheriff may not withhold this information under section 552.1175. The sheriff must withhold the following motor vehicle record information under section 552.130 of the Government Code: (1) the information we have marked under section 552.130; (2) the vehicle identification number in the files 05750026.jpg and 05750027.jpg on the CD we have labeled CD #1; (2) the Texas license plates numbers in the files 05750011.jpg, 05750019.jpg, 05750020.jpg, 05750021.jpg, 05750023.jpg, 05750024.jpg, 05750047.jpg, 05750048.jpg, 05750058.jpg, 05750059.jpg, 05750062.jpg, 05750065.jpg, IMG_0658.JPG, IMG_0659.JPG, IMG_0662.JPG, IMG_0665.JPG, IMG_0666.JPG and IMG_0667 on the CD we have labeled CD #1; (3) the Texas license plates numbers in the files IMG_0047.JPG, IMG_0048.JPG, IMG_1510.JPG, IMG_1516.JPG, and IMG_1524.JPG on the CDs we have labeled CD #2 and CD #3; (4) the Texas license plate numbers in the files 120_120.JPG, 121_121.JPG, and 137_137.JPG on the CD we have labeled CD #4; (5) the Texas driver's license number at the portion of the recording 00:52 on the CD we have labeled CD #6; and (6) the Texas license plate numbers that are visible within the recording on the CD we have labeled CD #10. Finally, the sheriff must withhold the information we have marked under sections 552.136 and 552.137 of the Government Code. The sheriff must release the

remaining information, but any copyrighted information may only be released in accordance with copyright law.³

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 427658

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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

³We note the submitted information contains social security numbers of living individuals. 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.