



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2011

Ms. Jennifer C. Cohen
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2011-15801

Dear Ms. Cohen:

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# 434439 (DPD PIR #11-1906).

The Texas Department of Public Safety (the "department") received a request for the reports for a specified incident. You indicate you have released some of the requested information. You state you are withholding the social security numbers of living individuals under section 552.147 of the Government Code.¹ You also state you are withholding information under sections 552.130 and 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).² Further, you state you are withholding e-mail addresses under

¹Section 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. Gov't Code § 552.147(b).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code and certain access device numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1), 552.130(a)(3), and 552.136(b), without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22 (to be codified at Gov't Code § 552.130(c)), 27 (to be codified at Gov't Code § 552.136(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e) or section 552.136(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22 (to be codified at Gov't Code § 552.130(d), (e)), 27 (to be codified at Gov't Code § 552.136(d), (e)). Thus, the statutory amendments to sections 552.130 and 552.136

section 552.137 of the Government Code pursuant to Open Records Decision No. 684.³ You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you acknowledge, and we agree, that the department did not comply with its ten-business-day deadline under section 552.301 of the Government Code in requesting this decision. Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *see also Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, orig. proceeding); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, orig. proceeding). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because the department's claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure under section 552.302, we will address your arguments under this exception.

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 protected by other statutes, such as section 1703.306 of the Occupations Code, which provides:

(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;

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22 (to be codified at Gov't Code § 552.130(d), (e)), 27 (to be codified at Gov't Code § 552.136(d), (e)). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1), 552.130(a)(3), or 552.136(b) in accordance with section 552.130 or section 552.136, not Open Records Decision No. 684.

³Open Records Decision No. 684 authorizes all governmental bodies to withhold an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

(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. Upon review we find the information we have marked constitutes information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the department must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. However, we find you have failed to demonstrate how any of the remaining information you seek to withhold was acquired from a polygraph examination. Thus, the department may not withhold any of the remaining information under section 552.101 on this basis.

You contend some of the remaining information is protected under common-law privacy. Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types 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. Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary

investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). This office has also 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). Additionally, information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We note, however, the common-law right to privacy, however, is a personal right that “terminates upon the death of the person whose privacy is invaded.” *Moore v. Charles B. Pierce Film Enters.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); *see also* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate that any of the remaining information you have marked under common-law privacy is highly intimate or embarrassing and not of legitimate public concern, or the information you have marked pertains to a deceased individual. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s or driver’s license or permit, motor vehicle title, or registration issued by an agency of Texas, another state, or another country is excepted from public release. 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(a)). However, we note the purpose of section 552.130 is to protect the privacy interests of individuals. As discussed above, the right of privacy lapses at death. As such, motor vehicle record information that pertains solely to a deceased individual may not be withheld under section 552.130. *See Charles B. Pierce Film Enters.*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. We note some of the information you have marked pertains to a deceased individual’s vehicle. The department must withhold this information under section 552.130 if a living individual owns an interest in the vehicle. However, if a living individual does not own an interest in the deceased individual’s vehicle, then the department may not withhold this information, which we have marked, under section 552.130. The department must withhold the remaining information you have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, in pertinent part:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

Gov’t Code § 552.136(a)-(b). You assert the cellular telephone passcode you have marked is subject to section 552.136. Upon review, however, we find you have not explained how this information consists of an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, you have failed to demonstrate the applicability of section 552.136 to this information; thus, the department may not withhold any of the information you have marked on this ground.

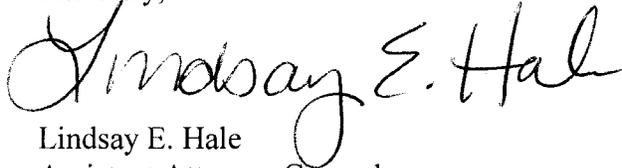
In summary, the department must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code and the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. If a living individual owns an interest in the deceased individual’s vehicle, the department must withhold the information pertaining to the deceased individual’s vehicle we have marked under section 552.130 of the Government Code. The department must withhold the remaining information you have marked under section 552.130 of the Government Code. The department must release the remaining information.

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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 434439

Enc: Submitted documents

c: Requestor
(w/o enclosures)