



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2012

Ms. Katie Lentz
Open Records
Williamson County Sheriff's Office
508 South Rock Street
Georgetown, Texas 78626

OR2012-12547

Dear Ms. Lentz:

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# 461761.

The Williamson County Sheriff's Office (the "sheriff's office") received a request for a specified case file. You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.130, 552.136, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the requestor has excluded social security numbers and Texas driver's license, license plate, and vehicle identification numbers from the scope of his request. Thus, those types of information, which you have marked and we have additionally marked or indicated, are not responsive to the request. This request does not address the public availability of any such information, and the sheriff's office need not release any such information in response to this request.

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Next, we note the judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by Supreme Court of Texas or other applicable laws or rules). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and, therefore, is not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513.

In this instance, you state a portion of the submitted information was obtained by the sheriff's office pursuant to grand jury subpoena. We agree information obtained pursuant to a grand jury subpoena is in the custody of the sheriff's office as agent of the grand jury, and it is not subject to the Act. Therefore, based on your representation, we conclude the information we have marked and indicated is not subject to the Act, and this decision does not address its public availability.²

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 section 1703.306 of the Occupations Code, which 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;

²As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

(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's office must withhold this information, which we have marked and indicated, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. Additionally, you state the sheriff's office does not have the technological capability to redact the confidential information in the video recordings. Thus, the sheriff's office must withhold the video recordings we have indicated in their entirety under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. *See Open Records Decision No. 364 (1983).*

Section 552.101 of the Government Code also encompasses section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records are subject to required public disclosure in accordance with [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], but is subject to disclosure:

(1) under a subpoena or authority of other law; or

(2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11. You state some of the submitted information consists of autopsy photographs, and raise section 11 of article 49.25 of the Code of Criminal Procedure. You state the statutory exceptions to confidentiality are not applicable in this instance. Accordingly, based upon your representations, we find the sheriff's office must withhold the photographs we have indicated under section 552.101 in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. However, we note the remaining photographs do not consist of photographs of a body taken during an autopsy. These remaining photographs are not confidential under article 49.25, and the sheriff's office may not withhold them under section 552.101 on that basis.

Section 552.101 also encompasses section 411.153 of the Government Code.³ Section 411.153 provides:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6), (7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) (providing that "forensic analysis" has meaning assigned by Crim. Proc. Code art. 38.35). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director [of the Department of Public Safety ("DPS")]." Gov't Code § 411.141(5); *see id.* § 411.001(3).

The director of DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), .142(h) (requiring director to establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C § 28.82(a). The

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

director of DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b). The director of DPS may release a DNA record in certain instances, including to a criminal justice agency for criminal justice or law enforcement purposes. *See id.* § 411.147(c).

In this instance, some of the submitted information consists of DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. The information in question is contained in the sheriff's office's file related to a criminal case. The information we have marked appears to be the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. Thus, we conclude the sheriff's office must withhold the DNA records we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.

Section 552.101 of the Government Code encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 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 found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* 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). This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and handicaps). This office has also found common-law privacy generally protects the identifying information of juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201. We note the common-law right to privacy 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). Thus, information pertaining solely to a deceased individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Upon review, we find the information we have marked and indicated is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the sheriff's office must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. Additionally, you state the sheriff's office does not have the technological capability to redact the private information in the video recordings. Thus, the sheriff's office must withhold the video recordings we have indicated in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Open Records Decision No. 364 (1983). However, the remaining information is either not highly intimate or embarrassing or it is of legitimate public interest, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). 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; *see also* Attorney General Opinions JM-229 (1984), H-917 (1976); ORD 272 at 1.

Federal courts have recognized individuals have a constitutional right to privacy in their unclothed bodies. Quoting the United States Court of Appeals for the Ninth Circuit, which concluded, "[w]e cannot conceive of a more basic subject of privacy than the naked body[,]" the United States Court of Appeals for the Second Circuit has found "there is a right to privacy in one's unclothed or partially unclothed body, regardless [of] whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment." *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)).

We note the submitted information contains images of individuals, who all appear to be adults, in various states of undress, some of who are identifiable and others who are not. For the images that depict identifiable unclothed individuals, we find that if these pictures were obtained from publicly available websites, the individuals depicted are not afforded protection under constitutional privacy. If the sheriff's office determines that these photographs are in the public domain, we believe that the individuals depicted have no reasonable expectation of privacy and the sheriff's office must release the information. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where

information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W 2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain), *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990). However, should the sheriff's office determine that the identifiable images were not obtained from publicly available websites, we find that the images of the identifiable individuals who are partially or completely nude are excepted from disclosure under section 552.101 based on the constitutional right to privacy. In either instance, the sheriff's office must release the images of the unidentifiable individuals.

This office has also applied constitutional privacy to protect certain information related to incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). This office has held that those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure," and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185 at 2; see *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976). The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. In that decision, our office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." ORD 185 at 2. Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 430, 428. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. ORD 185; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). We have determined the same principles apply to an inmate's recorded conversations from a telephone at a jail. Accordingly, the sheriff's office must withhold the identities of individuals who have corresponded with inmates, which we have marked, and the audio recordings of an inmate's telephone conversations, which we have indicated, under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code. *Id.* § 552.117(a)(2). "Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. See Open Records Decision No. 506 at 5–7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid

for by governmental body and intended for official use). You seek to withhold the telephone number of a peace officer employed by the sheriff's office. We are unable to determine whether the telephone number in the audio recording is a personal home or cellular telephone number of the officer at issue. Accordingly, if the telephone number we have indicated is the officer's personal home or cellular telephone number, the sheriff's office must withhold it under section 552.117(a)(2) of the Government Code. However, if the telephone number is a cellular telephone number, the sheriff's office may only withhold it if the cellular telephone service is not paid for with sheriff's office funds. If the marked telephone number is not the officer's home or cellular telephone number, or if it is the officer's cellular telephone number but its service is paid for with sheriff's office funds, then the sheriff's office may not withhold the telephone number we have indicated under section 552.117(a)(2).

Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, 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.

Gov't Code § 552.1175(a)(1), (b). You seek to withhold the personal information of an employee of the Round Rock Police Department under section 552.1175. To the extent the information at issue, which we have marked, relates to a peace officer who elects to restrict access to her information in accordance with section 552.1175(b), it must be withheld from disclosure under section 552.1175 of the Government Code. However, if the individual whose information is at issue is not a currently licensed peace officer or does not elect to restrict access to her information in accordance with section 552.1175(b), the marked information may not be withheld under section 552.1175.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. Gov't Code

§ 552.130(a)(1)-(2). Accordingly, the sheriff's office must withhold the motor vehicle information we have marked in the submitted information under section 552.130 of the Government Code.

Section 552.136 of the Government Code states 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." *Id.* § 552.136(b). Section 552.136(a) defines "access device" as "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 . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find the sheriff's office must generally withhold the information we have marked under section 552.136 of the Government Code. However, section 552.136 protects the privacy interests of individuals, and, as previously noted, the right to privacy lapses at death. *See Moore*, 589 S.W.2d at 491. Therefore, if the account numbers we have marked pertain solely to a deceased individual, they may not be withheld under section 552.136. To the extent the account numbers we have marked pertain to accounts in which a living individual has an interest, the sheriff's office must withhold them under section 552.136.

Section 552.152 of the Government Code provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't. Code § 552.152. You seek to withhold the name and other identifying information of an undercover narcotics deputy of the sheriff's office from the submitted information under section 552.152. You represent to this office that the release of the deputy's identifying information would subject the officer to a substantial threat of physical harm. Based on your representations, we find the sheriff's office has demonstrated that release of the information at issue would subject the officer to a substantial threat of physical harm. Therefore, we conclude the sheriff's office must withhold the deputy's identifying information, which we have marked, under section 552.152 of the Government Code.

In summary, the grand jury records we have marked and indicated are not subject to the Act, and the sheriff's office need not release them to the requestor. The sheriff's office must withhold 1) the information we have marked and indicated under section 552.101 in conjunction with section 1703.306 of the Occupations Code; 2) the photographs we have indicated under section 552.101 in conjunction with section 11 of article 49.25 of the Code

of Criminal Procedure; 3) the information we have marked under section 552.101 in conjunction with section 411.153 of the Government Code; 4) the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy, and 5) the identities of individuals who have corresponded with inmates, which we have marked, and the audio recordings of an inmate's telephone conversations, which we have indicated, under section 552.101 of the Government Code in conjunction with constitutional privacy. To the extent the images were not obtained from publicly available websites, the sheriff's office must withhold the images of the identifiable individuals who are partially or completely nude under section 552.101 in conjunction with constitutional privacy. To the extent the telephone number we have indicated is the officer's personal home or cellular telephone number, the sheriff's office must withhold it under section 552.117(a)(2) of the Government Code. To the extent the information relates to a peace officer who elects to restrict access to her information in accordance with section 552.1175(b), the sheriff's office must withhold the information we have marked under section 552.1175 of the Government Code. The sheriff's office must withhold the motor vehicle information we have marked under section 552.130 of the Government Code. To the extent the account numbers we have marked pertain to accounts in which a living individual has an interest, the sheriff's office must withhold them under section 552.136 of the Government Code. The sheriff's office must withhold the information we have marked under section 552.152 of the Government Code. 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 461761

Enc. Submitted documents

c: Requestor
(w/o enclosures)