



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2012

Ms. Kyle G. Thomas
Assistant City Attorney
City of Sugar Land
2700 Town Center Boulevard North
Sugar Land, Texas 77479-0110

OR2012-16617

Dear Ms. Thomas:

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# 468278.

The Sugar Land Police Department (the "department") received a request for information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.130, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. You contend the information you have marked in Exhibit B-4 is confidential

¹Although you do not cite section 552.130 of the Government Code, based on the substance of your arguments, we understand you to raise this exception. Additionally, you did not raise section 552.130 within ten business days of the date the department received the request. *See* Gov't Code §§ 552.301(b), .302. However, because section 552.130 is a mandatory exception that can provide a compelling reason to withhold information from disclosure, we will address the applicability of this exception to the submitted information. *See id.* § 552.302. Furthermore, although you timely raised sections 552.102, 552.103, 552.108, 552.117, and 552.1175 of the Government Code in your initial brief to this office, you make no arguments to support these exceptions. Therefore, you waived the discretionary exceptions and we presume you no longer assert the remaining exceptions. *See id.* §§ 552.301(e)(1)(A) (governmental body must submit comments demonstrating the applicability of each exception it claims), .302.

under chapter 730 of the Transportation Code. We understand you to raise section 730.004, which provides:

Notwithstanding any other provisions of law to the contrary, including chapter 552, Government Code, except as provided by Sections 730.005–730.007, an agency may not disclose personal information about any person obtained by the agency in connection with a motor vehicle record.

Transp. Code § 730.004. Section 730.004 applies only to an “agency” that compiles or maintains motor vehicle records. *See id.* § 730.003(1). You have not established the department compiles or maintains motor vehicle records; therefore, section 730.004 does not apply to the department. Accordingly, the department may not withhold the information at issue under section 552.101 in conjunction with section 730.004 of the Transportation Code. *See Open Records Decision No. 478 at 2 (1987)* (language of confidentiality statute controls scope of protection).

We also understand you to contend portions of Exhibit B-4 are confidential criminal history record information (“CHRI”). Section 552.101 of the Government Code also encompasses laws that make CHRI confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Open Records Decision No. 565 at 7 (1990)*. *See generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, we note the term CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find none of the information you have marked constitutes confidential CHRI for the purposes of chapter 411. As such, the department may not withhold any of the information at issue under section 552.101 on this basis.

Section 552.101 of the Government Code also encompasses constitutional and common-law rights 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 relating to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. 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” and the scope of information protected is narrower than that under the common-law doctrine of privacy. *Id.* at 5 (internal quotations omitted) (quoting *Ramie*, 765 F.2d at 492).

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)). As you acknowledge, however, the right to privacy is a personal right that “terminates upon the death of the person whose privacy is invaded”; therefore, it may not be asserted solely on behalf of a deceased individual. *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). However, the United States Supreme Court has determined 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) (holding surviving family members have a right to personal privacy with respect to their close relative’s death-scene images and such privacy interests outweigh public interest in disclosure).

Upon review, we find that the images pertaining to a living individual we have indicated in Exhibit B-1 must be withheld under section 552.101 in conjunction with constitutional privacy. The remaining photographs at issue pertain solely to a deceased individual and may not be withheld from disclosure based on his privacy interests. Additionally, you state you have contacted the decedent’s surviving widow and she does not object to release of the crime scene photographs on the basis of constitutional privacy and the holding in *Favish*. Having considered your arguments and reviewed the remaining information you contend is

private, we find none of the remaining information implicates a living individual's privacy interests for the purposes of constitutional privacy. As such, none of the remaining information may be withheld under section 552.101 on this basis.

Common-law privacy 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 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. 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* ORD 455 (prescription drugs, illnesses, operations, and physical handicaps). As previously noted, the right to privacy is a personal right that lapses upon death and may not be asserted solely on behalf of a deceased individual. *Moore*, 589 S.W.2d at 491; *see also* ORD 272 at 1. You raise common-law privacy for some of the remaining information that does not pertain to the deceased individual. Upon review, we find that the information we have marked and indicated pertains to a living individual and is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked and indicated under section 552.101 in conjunction with common-law privacy. However, we find you have failed to demonstrate that any of the remaining information pertaining to living individuals you seek to withhold is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

We understand you to raise section 552.130 of the Government Code for the driver's license and license plate numbers in the submitted information. Section 552.130 excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country and information related to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130. We note the remaining information includes the decedent's motor vehicle record information. Section 552.130 is designed to protect the privacy of individuals, and, as previously noted, the right to privacy expires at death. *See Moore*, 589 S.W.2d at 491; *see also* ORD 272 at 1. Accordingly, the department may not withhold the decedent's motor vehicle record information on the basis of section 552.130. Additionally, we note the remaining information includes the requestor's motor vehicle record information. Section 552.130 is based on privacy principles; thus, the requestor has a right of access to her own information and the department may not withhold it from her on this basis. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy

interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Upon review, we conclude the department must withhold the information we have marked under section 552.130.

We note portions of the remaining information are subject to section 552.137 of the Government Code.² Section 552.137 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). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). The department must generally withhold the e-mail addresses pertaining to living individuals we have marked under section 552.137 unless the owners of the addresses affirmatively consent to their release.³ However, we note one of the e-mail addresses we have marked is associated with a public university. If this individual is an employee of the university, then his e-mail address is not excepted under section 552.137 and must be released. If this individual is a student of the university, then his e-mail address is excepted from disclosure under section 552.137 and must be withheld, unless the owner consents to its release.

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. *Id.* § 552.147. Upon review, we find none of the remaining information is subject to section 552.147; thus, the department may not withhold any of the remaining information on this basis.

In summary, the department must withhold: (1) the images we have indicated in Exhibit B-1 under section 552.101 of the Government Code in conjunction with constitutional privacy; (2) the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the information we have marked under section 552.130 of the Government Code; and (4) the e-mail addresses we have marked under section 552.137 of the Government Code unless their owners consent to release. However, if the public university e-mail address we have marked belongs to an

²The 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).

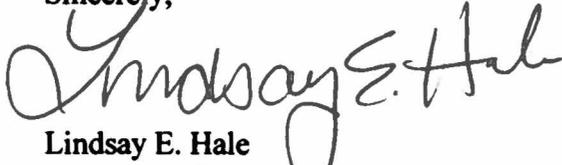
³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

employee of the university, then this e-mail address is not excepted under section 552.137 and must be released. The department must release the remaining information.⁴

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 468278

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the information to be released includes the requestor's driver's license number and personal e-mail address, to which the requestor has a right of access under section 552.023 of the Government Code. See Gov't Code § 552.023(a). We note section 552.130(c) of the Government Code authorizes a governmental body to redact information protected by section 552.130(a)(1) without the necessity of requesting a decision under the Act. See *id.* § 552.130(c). Additionally, as previously noted, Open Records Decision No. 684 is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code. Thus, if the department receives another request for this same information from a person who would not have a right of access, section 552.130(c) and Open Records Decision No. 684 authorize the department to redact the requestor's driver's license number and e-mail address, respectively.