



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2013

Mr. Steven Meyer
Assistant City Attorney
Arlington Police Department
Mail Stop 04-0200
P.O. Box 1065
Arlington, Texas 76004-1065

OR2013-00475

Dear Mr. Meyer:

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# 475461 (Arlington PD Reference No. 9221-100312, 9735, and 9737).

The Arlington Police Department (the "department") received three requests from two requestors for information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the requests because it was created after the requests were received. This decision does not address the public availability of the non-responsive information, and that information need not be released in response to the present requests.

Next, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public

¹Although you initially raised section 552.108 of the Government Code, by letter dated January 7, 2013, you withdrew your claim under section 552.108 because the case is no longer the subject of an ongoing investigation as it has recently been closed.

disclosure. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). The department received the first request for information on October 3, 2012. Accordingly, the department's ten and fifteen-business day deadlines were October 17, 2012 and October 24, 2012, respectively. You did not, however, submit to this office a complete copy of the first written request for information or raise section 552.101 as an exception to disclosure until January 8, 2013. Therefore, we find the department failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

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 the information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. As section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address the applicability of this exception to 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 the doctrine of common-law 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 established. *Id.* at 681-82. The type of information considered highly 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. However, the common-law right to privacy is a personal right that

“terminates upon the death of the person whose privacy is invaded.” 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) (“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. Accordingly, we find the requested information may not be withheld under section 552.101 on the basis of common-law privacy.

Section 552.101 also encompasses the constitutional right 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 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 (1987). 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). However, 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*, 589 S.W.2d at 491; ORD 272 at 1 (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). In this instance, you state the deceased individual’s family asserts a privacy interest in the submitted information. Upon review, we find the privacy interests of the deceased individual’s family in the photographs we have indicated outweigh the public’s interest in the disclosure of this information. You state the department is unable to determine if both requestors have a special right of access to the requested information. We note the first requestor identifies himself as an attorney for the deceased individual’s family and, in subsequent communications with this office, you stated the second requestor is a private investigator hired by the wife of the deceased individual; thus, one or both of the requestors may be the authorized representative of the deceased individual’s family whose privacy interests are at issue, and either requestor may have a right of access under section 552.023 of the Government Code to any information relating to the deceased individual that the department might be required to withhold from

the public on privacy grounds under *Favish*. See Gov't Code § 552.023(a) (person's authorized representative has a 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 interest). Because we are unable to determine whether either requestor is the authorized representative of the deceased individual's family whose privacy interests are at issue, we must rule conditionally. Accordingly, if a requestor is not acting as the authorized representative of the deceased individual's family whose privacy interests are at issue, the department must withhold the photographs we have indicated under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. If a requestor is acting as the authorized representative of the deceased individual's family whose privacy interests are at issue, the photographs at issue may not be withheld from that requestor under section 552.101 on privacy grounds. We find none of the remaining information may be withheld from disclosure under section 552.101 of the Government Code on the basis of constitutional privacy.

We note the remaining information contains information subject to section 552.130 of the Government Code.² Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency or an agency of another state or country is excepted from public release. Gov't Code § 552.130. Upon review, we find the department must generally withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. We note, however, the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, motor vehicle record information that pertains solely to a deceased individual may not be withheld under section 552.130. See *Moore*, 589 S.W.2d at 491; see also *Justice*, 472 F. Supp. at 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229, H-917; ORD 272 at 1. We note that some of the motor vehicle record information at issue relates to a vehicle that was owned by an individual who is now deceased. Accordingly, the motor vehicle record information that pertains to the deceased individual may only be withheld under section 552.130 if a living person owns an interest in the vehicle at issue. If no living person owns an interest in the vehicle, then the motor vehicle record information relating to that vehicle is not excepted from disclosure and must be released. Furthermore, as noted above, the second requestor in this instance is a private investigator hired by the wife of the deceased individual. If the second requestor is acting as the authorized representative of any surviving owner of the deceased individual's vehicle, then he has a right of access to the surviving owner's motor vehicle record information and this information may not be withheld under section 552.130. See *id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when an individual or authorized representative asks governmental body to provide information concerning that individual).

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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(b); *see also id.* § 552.136(a) (defining “access device”). We note the purpose of section 552.136 is to protect the privacy interests of individuals. As noted above, because the right of privacy lapses at death, information that pertains solely to deceased individuals may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. Upon review, if a living person owns an interest in the insurance policy number associated with the deceased individual, the department must withhold this information under section 552.136 of the Government Code. If no living person owns an interest in the information at issue, the department may not withhold the insurance policy number registered to the deceased individual under section 552.136. Furthermore, we note the second requestor may have a right of access to his client’s insurance policy number. *See id.* § 552.023(a); ORD 481. Therefore, we must rule conditionally. If the insurance policy number we have marked pertains to the second requestor’s client, then it may not be withheld from him under section 552.136. If the insurance policy number we have marked does not pertain to the second requestor’s client, the department must withhold this information under section 552.136 of the Government Code.

In summary, if either requestor is not acting as the authorized representative of the deceased individual’s family whose privacy interests are at issue, the department must withhold the photographs we have indicated under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. The department must generally withhold the motor vehicle record information we have marked under section 552.130 of the Government Code; however, if no living person owns an interest in the deceased individual’s vehicle, then the motor vehicle record information relating to that vehicle is not excepted from disclosure and must be released. Furthermore, if the second requestor is acting as the authorized representative of any surviving owner of the deceased individual’s vehicle, then he has a right of access to the surviving owner’s motor vehicle record information and this information may not be withheld under section 552.130 of the Government Code. If a living person owns an interest in the insurance policy number that is associated with the deceased individual, the department must withhold this information under section 552.136 of the Government Code. If not, the deceased individual’s insurance policy number must be released. To the extent the remaining insurance policy number we have marked does not belong to the second requestor’s client, it must be withheld under section 552.136 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/sdk

Ref: ID# 475461

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)