



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2013

Ms. Judith N. Benton
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2013-05014

Dear Ms. Benton:

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# 482443 (Waco Reference # LGL-13-026).

The Waco Police Department (the "department") received a request for information pertaining to a specified traffic accident. You indicate the department has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. 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 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).

However, we note 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). The United States Supreme Court, however, 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).

Some of the photographs at issue pertain solely to a deceased individual and may not be withheld from disclosure based on her privacy interests. However, you state the deceased individual's family has asserted a privacy interest in the information at issue. Upon review, we find the family's privacy interests in the photographs of the deceased individual outweigh the public's interest in the disclosure of this information. We therefore conclude the department must withhold the photographs we have indicated under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. None of the remaining photographs you seek to withhold pursuant to the holding in *Favish* pertain to the deceased individual or otherwise implicate a living individual's privacy interests for the purposes of constitutional privacy. As such, none of the remaining photographs 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). Additionally, 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. 600 at 9-10 (employee's withholding allowance certificate, designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. However, 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.

Upon review, we find the information we have marked 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 under section 552.101 in conjunction with common-law privacy. You seek to withhold some of the remaining photographs, which pertain to a living individual, on the basis of common-law privacy. However, we find the remaining photographs you seek to withhold on this basis are either not highly intimate or embarrassing or are 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 note a portion of the remaining information may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(2) excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the cellular telephone service is not paid for by a governmental body. Open Records Decision No. 670 at 6 (2001); *cf.* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Accordingly, if the individual whose cellular telephone number we have marked is still a licensed peace officer and the cellular telephone service is not paid for by a governmental body, the department must withhold the information we have marked under section 552.117(a)(2).²

If the individual concerned is no longer a licensed peace officer, the marked information may be protected by section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* ORD 506 at 5-6. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked under section 552.117 must be withheld under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The department may not withhold the marked information under section 552.117 if the individual did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

You contend the information you have highlighted and indicated is subject to section 552.130 of the Government Code. Section 552.130(a)(2) provides information relating to a motor vehicle title or registration issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a)(2). We note some of the information you have highlighted consists of the requestor's client's motor vehicle record information. Section 552.130 is based on privacy principles; thus, the requestor has a right of access to his client's information, which we have marked for release, and the department may not withhold it from him on this basis. *See id.* § 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)

²We note the previous determination issued in Open Records Decision No. 670 (2001) authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision.

(privacy theories not implicated when individual asks governmental body to provide him with information concerning himself).

The remaining information you have highlighted consists of the deceased individual'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. As such, 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* ORD 272 at 1. The department must withhold this information, and the additional information we have marked and indicated for withholding, under section 552.130(a)(2) only 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 under section 552.130(a)(2).

In summary, the department must withhold the photographs we have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual whose information we have marked is still a licensed peace officer and the cellular telephone service is not paid for by a governmental body, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individual whose information we have marked is no longer a licensed peace officer but timely requested confidentiality pursuant to section 552.024, the information we have marked must be withheld under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. With the exception of the information we have marked for release that pertains to the requestor's client, the department must withhold the information you have highlighted, and the additional information we have marked and indicated for withholding, under section 552.130 of the Government Code, only if a living individual owns an interest in the vehicle. The department must release the remaining information.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.

³The information being released in this instance includes information that is confidential with respect to the general public. *See* Gov't Code § 552.023(a) ORD 481 at 4. Accordingly, if the department receives another request for this information from an individual other than this requestor or his client, the department must again seek a ruling from this office.

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, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 482443

Enc. Submitted documents

c: Requestor
(w/o enclosures)