



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2013

Ms. Molly Cost
Assistant General Counsel
Office of General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2013-07645

Dear Ms. Cost:

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# 486688 (PIR # 13-0766).

The Texas Department of Public Safety (the "department") received a request for all records related to two specified incidents. You indicate the department is releasing some of the requested information with certain information redacted pursuant to section 552.136(c) of the Government Code and the previous determination issued to the department in Open Records Letter No. 2001-2047 (2001).¹ You claim some of the submitted information is exempted from disclosure under sections 552.101 and 552.130 of the Government Code.²

¹Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Letter No. 2001-2047 authorizes the department to withhold criminal history record information maintained under section 411.083 of the Government Code without the necessity of requesting an attorney general decision. *See id.* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)).

²Although you do not raise section 552.130 of the Government Code in your brief, we understand you to claim this exception based on your markings in the submitted information.

We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information that other statutes make confidential, such as section 1703.306 of the Occupations Code. This section 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;
- (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 agree the information you 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 information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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. 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 No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, 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. Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department has failed to demonstrate, however, how any of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code 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. 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 Fajjo 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." *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. 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). Upon review, we find you have failed to demonstrate any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.1175 of the Government Code protects information related to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, or a county jailer, as defined by section 1701.001 of the Occupations Code.³ *See* Gov't Code § 552.1175(a)(1)-(2). Section 552.1175 provides in part:

(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.

Id. § 552.1175(b). Upon review, we find the department must withhold the information we have marked under section 552.1175 if the individuals whose information is at issue are individuals described by section 552.1175(a)(1) or (a)(2), and they elect to restrict access to their information in accordance with section 552.1175(b). If these individuals are not

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).

individuals described by section 552.1175(a)(1) or (a)(2), or no elections are made, the department may not withhold the individuals' information under section 552.1175.

You indicate you have redacted certain motor vehicle record information from the information the department has released. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas, another state, or country is excepted from public release. *Id.* § 552.130(a). On September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in section 552.130(a)(1) and (a)(3), such as a driver's license number and government identification number, without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). Thus, the department may redact driver's license numbers and government identification numbers under section 552.130(a)(1) or (a)(3), respectively. *Id.* However, license plate numbers and vehicle identification numbers are subject to section 552.130(a)(2), not section 552.130(a)(1) or (a)(3); therefore, this information may not be redacted under subsection 552.130(c). We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including Texas license plate numbers, under section 552.130, without the necessity of requesting an attorney general decision. Thus, the department may redact Texas license plate numbers in accordance with Open Records Decision No. 684. However, we note vehicle identification numbers are also not subject to Open Records Decision No. 684 and thus may not be redacted without requesting an attorney general decision. Upon review, however, we agree the department must withhold the motor vehicle record information you have marked under section 552.130(a)(2) of the Government Code.

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.1175 of the Government Code if the individuals whose information is at issue are individuals described by section 552.1175(a)(1) or (a)(2) of the Government Code, and they elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code. If these individuals are not individuals described by section 552.1175(a)(1) or (a)(2) of the Government Code, or no elections are made, the department may not withhold the individuals' information under section 552.1175 of the Government Code. The department must withhold the motor vehicle record information you have marked under section 552.130(a)(2) 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 486688

Enc. Submitted documents

c: Requestor
(w/o enclosures)