



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 16, 2013

Mr. John R. Batoon  
Assistant City Attorney  
City of El Paso  
P.O. Box 1890  
El Paso, Texas 79950-1890

OR2013-14357

Dear Mr. Batoon:

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# 496502.

The El Paso Police Department (the "department") received a request for information concerning a specified case report. You indicate the department does not maintain information responsive to a portion of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed 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. This section encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent

---

<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990).

with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

...

(h) This section does not apply to an investigation of child abuse or neglect in a home or facility regulated under Chapter 42, Human Resources Code.

Fam. Code § 261.201(a), (h). You state the submitted information was used or developed in an investigation of alleged or suspected abuse or neglect of a child. However, we note the incident at issue occurred at a child care facility that is regulated by the Texas Department of Family and Protective Services under chapter 42 of the Human Resources Code. Thus, in accordance with section 261.201(h), we find section 261.201 is not applicable and the department may not withhold the submitted information under section 552.101 on that basis. *See id.* § 261.201(h).

Section 552.101 of the Government Code also encompasses the common-law right of 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 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 some types of medical information and information indicating specific illnesses or disabilities are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490

(5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual’s privacy interests against the public’s need to know information of public concern. *See* ORD 455 at 5–7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)).

Privacy is a personal right that lapses at death; therefore a deceased individual has no common-law or constitutional right of privacy. *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.); Open Records Decision No. 272 at 1 (1981). Accordingly, the department may not withhold the submitted information under section 552.101 of the Government Code based solely on the deceased individual’s right to privacy. However, upon review, we find the information we have marked concerning a living individual is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information pertaining to living individuals is not highly intimate or embarrassing, so the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. Further, you have not demonstrated the applicability of constitutional privacy, so the remaining information pertaining to living individuals may not be withheld under section 552.101 of the Government Code on that basis.

However, we note the United States Supreme Court has determined a living family member of a deceased individual can have a privacy interest in information relating to the deceased relative. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). But as of the date of this letter, we have not received any correspondence from the family member of the deceased individual asserting any privacy interest. Thus, we have no basis for determining a family member’s privacy interest in the submitted information. Therefore, the remaining information may not be withheld under section 552.101 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or another state or country.<sup>2</sup> Gov’t Code § 552.130(a)(1). Accordingly, the department must withhold the driver’s license information we marked under section 552.130 of the Government Code.

---

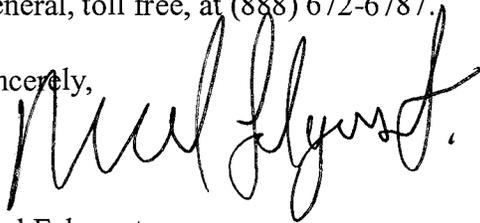
<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

In summary, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the driver's license information we marked under section 552.130 of the Government Code. The remaining information must be released.<sup>3</sup>

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/ag

Ref: ID# 496502

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>3</sup>Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See Gov't Code § 552.147(b).