



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2014

Mr. Brendan W. Guy
Assistant Criminal District Attorney
Victoria County District Attorney's Office
205 North Bridge, Suite 301
Victoria, Texas 77901-8085

OR2014-02795

Dear Mr. Guy:

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# 512564.

The Victoria County District Attorney's Office (the "district attorney's office") received a request for information related to a specified homicide, including specified calls for service reports. We note you have redacted social security numbers of living individuals pursuant to section 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor and the victim's family. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹Section 552.147(b) 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 under the Act. Gov't Code § 552.147(b).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note the submitted information is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). The submitted information consists of a completed investigation and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. *See id.* Although you assert the submitted information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district attorney's office may not withhold the submitted information under section 552.103. However, because sections 552.101, 552.1175, and 552.130 of the Government Code make information confidential under the Act, we will address their applicability to the submitted information.³

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, including section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

The medical examiner's office shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

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).

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11. A portion of the submitted information consists of photographs and x-rays of the deceased taken during an autopsy. We note neither of the statutory exceptions to confidentiality is applicable in this instance. We find the district attorney's office must withhold Exhibit F under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.⁴

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Section 58.007 provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Law enforcement records relating to juvenile conduct, whether delinquent conduct or conduct in need of supervision, that occurred on or after September 1, 1997, are confidential under section 58.007 of the Family Code. *See id.* § 51.03 (defining "delinquent conduct" and "conduct in need of supervision" for purposes of title 3 of the Family Code). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age when the conduct occurred. *See id.* § 51.02(2). Upon review, we find the information we have marked consists of records involving allegations of juveniles engaged in delinquent conduct or conduct indicated the need for supervision occurring after September 1, 1997. You do not indicate, nor does it appear, that any of the exceptions in section 58.007 of the Family Code apply to this

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information. Thus, the information we have marked is confidential under section 58.007(c), and the district attorney's office must withhold it under section 552.101 of the Government Code.⁵

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code. Section 611.002 provides "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Upon review, we find the information we have marked in Exhibit N consists of communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional. Accordingly, the district attorney's office must withhold the information we have marked in Exhibit N under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁶

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code which pertains to criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") 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 NCIC 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 §§ 411.081-.1409. 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 id.* § 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). 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. Upon review, we agree Exhibit M consists of

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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CHRI, which the district attorney's office must withhold under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978)*. The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, Evidence in Trials at Common Law, § 2374, at 767 (J. McNaughton rev. ed. 1961))*. The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5*. The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See Open Records Decision No. 549 at 5 (1990)*.

You seek to withhold Exhibits I, J, and L under the informer's privilege. You state the information at issue identifies individuals who reported possible violations of the law to the Victoria County Sheriff's Office. We note Exhibits I and J are audio recordings. In some circumstances, where an oral statement is captured on tape and the voice of the informant is recognizable, it may be necessary to withhold the entire statement to protect the informant's identity. *Open Records Decision No. 434 at 2 (1986)*. Upon review, we find the information we have marked and indicated in Exhibits I, J, and L identifies individuals who reported possible violations of law. This information does not indicate the subject of the complaints knows the identities of the reporting parties. Thus, we conclude the district attorney's office may withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, the subject of the complaint is aware of the identities of the complainants in some of the remaining records at issue. Moreover, you have not demonstrated how any of the remaining information identifies an individual who made the initial report of a criminal violation for purposes of the informer's privilege. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code on this basis.

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* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional privacy doctrine is far narrower than that under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." *See id.* at 5 (citing *Ramie*, 765 F.2d at 492).

In Open Records Decision No. 430 (1985), our office determined a list of inmate visitors is protected by constitutional privacy because people have a First Amendment right to correspond with inmates, and that right would be threatened if their names were released. *See also* Open Records Decision Nos. 428 (1985), 185 (1978) (public's right to obtain inmate's correspondence list is not sufficient to overcome First Amendment right of inmate's correspondents to maintain communication with inmate free of threat of public exposure). We have determined the same principles apply to an inmate's recorded conversations from a telephone at a jail. Furthermore, we note, 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 v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* 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*, 541 U.S. 157 (2004).

You state, and we agree, the submitted audio recordings in Exhibits B through E consist of audio recordings of the inmate's telephone conversations which are subject to constitutional privacy. Therefore, Exhibits B through E must be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.⁷ Some of the remaining portions of the submitted information consist of photographs of the deceased individual and implicates the privacy interests of the decedent's surviving family members. However, we note the requestor is the authorized representative of the deceased individual's parents. Under section 552.023 of the Government Code, "a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023; *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself or person for whom she is authorized representative). Accordingly, the district attorney's office may not withhold the photographs at issue from this requestor under section 552.101 of the Government Code on the basis of

⁷As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

constitutional privacy. Further, we find you have failed to demonstrate how 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, the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* ORD 455. However, as noted above, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. Upon review, we find the information we have marked, which does not pertain to a deceased individual, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing information of no legitimate public concern and may not be withheld under section 552.101 of the Government Code on this basis.

Section 552.1175(b) of the Government Code provides in part the following:

Information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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.

Gov't Code § 552.1175(b). We have marked information that pertains to a peace officer formerly employed by the Victoria County Police Department that is not held in an

employment capacity. If the individual at issue is currently a licensed peace officer and elects to restrict access to his information in accordance with section 552.1175(b), the district attorney's office must withhold the information we have marked under section 552.1175. If the individual is not currently a licensed peace officer or does not elect to restrict access to his information, the district attorney's office may not withhold the information we have marked under section 552.1175 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130(a). The purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, driver's license information that pertains solely to a deceased individual may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 291; *see also* Attorney General Opinions JM-229 (1984), H-917 (1976); ORD 272 at 1. Thus, section 552.130 is not applicable to the deceased individual's driver's license information, and the district attorney's office may not withhold it on that basis. However, we note the requestor may have an ownership interest in some of the motor vehicle record information we have marked and indicated under section 552.023 of the Government Code. *See Gov't Code* § 552.023; ORD 481. Thus, to the extent the requestor has an ownership interest in any of the motor vehicle record information we have marked and indicated, the district attorney's office may not withhold this information from the requestor. However, any remaining information we have marked and indicated must be withheld under section 552.130 of the Government Code. To the extent the requestor does not have a right of access to the information we have marked and indicated under section 552.023, the district's attorney's office must withhold that information under section 552.130 of the Government Code.⁸

In summary, the district attorney's office must withhold under section 552.101 of the Government Code: (1) Exhibit F in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure; (2) the information we have marked in conjunction with section 58.007(c) of the Family Code; (3) the information we have marked in Exhibit N in conjunction with section 611.002 of the Health and Safety Code; (4) Exhibit M in conjunction with chapter 411 of the Government Code and federal law; (5) Exhibits B through E in conjunction with constitutional privacy; and (6) the information we have marked in conjunction with common-law privacy. The district attorney's office may withhold the information we have marked and indicated in Exhibits I, J, and L under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The district attorney's office must withhold the information we have marked under section 552.1175 if the individual at issue is currently a licensed peace officer and elects to

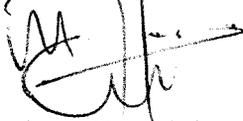
⁸We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

restrict access to his information in accordance with section 552.1175(b) of the Government Code. To the extent the requestor does not have a right of access under section 552.023 of the Government Code, the district attorney's office must withhold the information we have marked and indicated under section 552.130 of the Government Code. The district attorney's office must release the remaining information.⁹

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, 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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 512564

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁹We note the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023. Because such information may be confidential with respect to the general public, if the district attorney's office receives another request for this information from a different requestor, the district attorney's office must again seek a ruling from this office.