



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2014

Mr. Steven E. Arellano
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2014-15817

Dear Mr. Arellano:

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# 535809 (El Paso ID# OP-14-310).

The El Paso Office of the Medical Examiner (the "medical examiner's office") received a request for information pertaining to an autopsy of a named individual. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.1085 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested 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. 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:

- (a) 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:

- (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). You state some of the submitted photographs are confidential pursuant to section 11 of article 49.25. Upon review, we agree some of the photographs at issue consist of photographs of a body taken during an autopsy. We understand neither of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the medical examiner's office must withhold the autopsy photographs depicting a body under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.¹ However, we note the remaining photographs do not consist of photographs of a body taken during an autopsy. These remaining photographs are not confidential under article 49.25, and the medical examiner's office may not withhold them under section 552.101 on that basis.

Section 552.1085 of the Government Code provides, in pertinent part, the following:

- (c) A sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section. This section applies to any sensitive crime scene image regardless of the date that the image was taken or recorded.

Gov't Code § 552.1085(c). For purposes of section 552.1085, "sensitive crime scene image" means "a photograph or video recording taken at a crime scene, contained in or part of a closed criminal case, that depicts a deceased person in a state of dismemberment, decapitation, or similar mutilation or that depicts the deceased person's genitalia." *See id.* § 552.1085(a)(6). Upon review, we find the remaining information does not consist of sensitive crime scene images for purposes of section 552.1085 of the Government Code, and none of it may be withheld on that basis.

Section 552.101 of the Government Code also encompasses constitutional 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

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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. 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). 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. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); 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).

In this instance, the common-law spouse of the decedent asserts a privacy interest in some of the submitted photographs based on the privacy of the named individual’s family. 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. Therefore, the medical examiner’s office must withhold the remaining photographs that depict a deceased individual under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.

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 personal identification document issued by an agency of this state or another state or country is excepted from public release.² See Gov’t Code § 552.130. Upon review, we find the remaining information contains motor vehicle record information. 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. Thus, section 552.130 is not applicable to the deceased individual’s driver’s license, and the medical examiner’s office may not withhold it on that basis. However, the medical examiner’s office must withhold the visually discernible license plates within the remaining photographs under section 552.130 of the Government Code.

²The 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).

In summary, the medical examiner's office must withhold the autopsy photographs depicting a body under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure, the remaining photographs that depict a deceased individual under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*, and the visually discernible license plates within the remaining photographs under section 552.130 of the Government Code. The medical examiner's office 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.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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 535809

Enc. Submitted documents

c: Requestor
(w/o enclosures)