



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2014

Ms. Janet L. Kellogg
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2014-15821

Dear Ms. Kellogg:

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# 536114 (CCPD File No. KHar1).

The Corpus Christi Police Department (the "department") received a request for information pertaining to a specified incident. You state some of the requested information is no longer available pursuant to the department's records retention policy.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.1085 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We note the department did not timely raise section 552.101 of the Government Code in accordance with section 552.301(b) of the Government Code. *See Gov't Code* § 552.301(b). Nonetheless, because section 552.101 can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .301, .302, .352.

Initially, we note portions of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-18024 (2009). In Open Records Letter No. 2009-18024, we concluded the department must (1) withhold certain information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (2) withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy; (3) withhold certain information under section 552.130 of the Government Code; and (4) release the remaining information. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter No. 2009-18024 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Next, we address your arguments against the disclosure of the submitted information that is not subject to that prior ruling.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). However, because “the right of privacy is purely personal,” that right “terminates upon the death of the person whose privacy is invaded.” *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 Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *See* 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 (1981) (“the right of privacy is personal and lapses upon death”). Nevertheless, the United States Supreme Court has determined surviving family members

can have a privacy interest in information relating to their deceased relatives. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (surviving family members have right to personal privacy with respect to their close relative's death-scene images and such privacy interests outweigh public interest in disclosure). The submitted information contains photographs of a deceased individual. We have received comments from the decedent's family asserting a privacy interest in the photographs at issue. Upon review, we find the family's privacy interests in these photographs outweigh the public's interest in the disclosure of this information. Therefore, the department must withhold the submitted photographs that depict a deceased individual, which we have indicated, under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.³ None of the remaining photographs 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.

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. Upon review, we find none of the remaining information is highly intimate or embarrassing information of no legitimate public interest, and it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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.⁴ See Gov't Code § 552.130. Accordingly, the department must withhold the discernable license plates under section 552.130 of the Government Code.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter No. 2009-18024 as a previous determination and withhold or release

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁴The 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).

the identical information in accordance with that ruling. The department must withhold the submitted photographs that depict a deceased individual, which 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 discernable license plates under section 552.130 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.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# 536114

Enc. Submitted documents

c: Requestor
(w/o enclosures)