



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2014

Mr. James Kopp
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2014-18778

Dear Mr. Kopp:

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# 540342 (COSA File Nos. W029530 and W030508).

The City of San Antonio (the "city") received two requests from the same requestor for certain categories of information regarding a specified case. You state the city does not have information responsive to portions of the requests.¹ You further state the city will release or has released 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.²

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²The requestor contends, and you acknowledge, the city did not comply with section 552.301 of the Government Code in requesting this decision. *See Gov't Code* § 552.301(b), (e). Nevertheless, because the exceptions you claim can provide compelling reasons to overcome the presumption of openness, we will consider your claimed exceptions for the submitted information. *See id.* §§ 552.007, .302, .352.

Additionally, you state you notified a third party of the request for information and of her right to submit comments to this office.³ *See* Gov't Code § 552.304 (third party may submit written comments to this office stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by an attorney for the requestor. *See id.*

Initially, the requestor contends, and the city acknowledges, some of the submitted information was previously released to the public. Section 552.007 of the Government Code provides information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Accordingly, the city may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. The city claims the information at issue is excepted under section 552.1085 of the Government Code. Because section 552.1085 can make information confidential under the Act, we will consider the city's arguments under that section for the previously released information.

We understand the city to contend some of the submitted information is confidential under the doctrine of common-law privacy. 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 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. The doctrine of common-law privacy protects a compilation of an individual's criminal history, which is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note 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.

³As of the date of this letter, we have not received any comments from the third party.

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”). Accordingly, the city may not withhold any of the submitted information based solely on the privacy rights of a deceased individual. Upon review, we find no portion of the submitted information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

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). You state some of the submitted information consists of sensitive crime scene photographs pertaining to a criminal case in which the defendant was convicted. Accordingly, we understand the criminal case is now closed. Upon review, however, we find the information at issue 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. As you raise no further exceptions to disclosure, the city must release the submitted information to the requestor.

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,

A handwritten signature in black ink, appearing to read "Kristi L. Godden". The signature is fluid and cursive, with the first name "Kristi" being the most prominent.

Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/cz

Ref: ID# 540342

Enc. Submitted documents

c: Requestor
(w/o enclosures)