



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 1, 2016

Mr. Andrew Wipke  
Assistant District Attorney  
Wichita County  
900 Seventh Street  
Wichita Falls, Texas 76301

OR2016-24351

Dear Mr. Wipke:

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# 632613 (Wichita County Reference ORR.1040).

Wichita County (the "county") received a request for information pertaining to specified cause numbers involving the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.101, 552.1085, 552.111, 552.130, 552.1325, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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[.]

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<sup>1</sup>Although you marked some information under section 552.108 of the Government Code, you have provided no arguments explaining how this exception is applicable to the marked information. Therefore, we assume you no longer assert this exception. See Gov't Code §§ 552.301(e)(1)(A), .302.

Gov't Code § 552.022(a)(1). The submitted information consists of information from a completed criminal investigation subject to section 552.022(a)(1). The county must release the submitted information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code for the submitted information, we note section 552.111 is a discretionary exception and does not make information confidential under the Act. *See Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111).* As such, the county may not withhold any portion of the submitted information under section 552.111. The attorney work product privilege, which is encompassed by section 552.111, is also found in rule 192.5 of the Texas Rules of Civil Procedure. *See TEX. R. CIV. P. 192.5.* The Texas Supreme Court has held “[t]he Texas Rules of Civil Procedure . . . are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We note, however, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” *See TEX. R. CIV. P. 2.* Thus, because the submitted information relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply, and the submitted information may not be withheld on that basis. However, because sections 552.101, 552.1085, 552.130, and 552.1325 of the Government Code can make information confidential, we will consider your arguments under these sections for the submitted information. Further, because section 552.1175 of the Government Code can make information confidential under the Act, we will consider its applicability to the submitted information.<sup>2</sup>

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. Section 552.101 encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F or subchapter E-1 of the Government Code. *See Gov't Code § 411.083(a).* Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). Upon review, we find the information we have marked constitutes confidential CHRI. This information must be

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.<sup>3</sup>

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We note the purpose of sections 560.001, 560.002, and 560.003 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, biometric identifiers that pertain to a deceased individual may not be withheld under section 552.101 of the Government Code on that basis. *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.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). We note the individual whose information is at issue is deceased. Therefore, this information is not confidential under section 560.003 of the Government Code, and the county may not withhold it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the common-law right to 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 met. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). However, the public has a legitimate interest in knowing the details of a crime. *See Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Determinations under common-law privacy must be made on a case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983); *see also Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case). Further, under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found.*, 540 S.W.2d at 682. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.<sup>4</sup> *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at \*3.

As noted above, the common-law right to privacy is a personal right that "terminates upon the death of the person whose privacy is invaded." *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272. We note some of the information you have marked pertains to a deceased individual. Thus, the information at issue pertaining solely to a deceased individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. We also note this requestor has a special right of access to her client's information under section 552.023 of the Government Code to information that would otherwise be withheld to protect his privacy. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, the county may not withhold the requestor's client's information from her. Upon review, we find some of the information you have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, with the exception of the requestor's client's date of birth, the county must withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, the county has failed to demonstrate the remaining information it has marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the county may not withhold the remaining information it has marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses constitutional privacy. Constitutional privacy 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. *See* ORD 455 at 4. 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 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)).

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<sup>4</sup>Section 552.102(a) exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

However, we note the right to privacy is a personal right that “terminates upon the death of the person whose privacy is invaded[;]” therefore, it may not be asserted solely on behalf of a deceased individual. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272. The United States Supreme Court, however, 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). We understand you have notified the deceased individual’s family of the request for information and of their right to assert a privacy interest in the information at issue. As of the date of this decision, we have not received any correspondence from the deceased individual’s family. Thus, we have no basis for determining the family’s privacy interest in the remaining information. Therefore, this information may not be withheld under section 552.101 in conjunction with constitutional privacy.

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

(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 a sensitive crime scene image for the purposes of section 552.1085. Thus, the county may not withhold the remaining information under section 552.1085 of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See id.* § 552.1175. Section 552.1175 applies, in part, to “employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters[.]” *Id.* § 552.1175(a)(5). The submitted information contains personal information of an individual who is subject to section 552.1175(a)(5). Thus, if the individual elects to restrict access to this information in accordance with section 552.1175(b), the county must withhold the information we have marked under section 552.1175 of the Government Code. If no election is made, the county may not withhold this information under section 552.1175 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s or 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. *Id.* § 552.130(a). Upon review, we find the county must withhold the motor vehicle record information you have marked, and the additional information we have marked, under section 552.130 of the Government Code.

Section 552.1325 of the Government Code provides the following:

(a) In this section:

(1) “Crime victim” means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) “Victim impact statement” means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

*Id.* § 552.1325. The definition of a victim under article 56.32 of the Code of Criminal Procedure includes an individual who suffers physical or mental harm as a result of criminally injurious conduct. Crim. Proc. Code § 56.32(a)(10), (11). We note that the crime victim to whom this information pertains is deceased. Section 552.1325 protects personal privacy interests, and the victim’s right to privacy lapsed at his death. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272. However, the remaining information includes a victim impact statement as defined by article 56.03 of the Code of Criminal Procedure that was completed by a close relative of the deceased victim. *See* Crim. Proc. Code § 56.03. The information at issue reflects the relative suffered mental harm as a result of the criminally injurious conduct that led to the victim’s death. Thus, we find the individual who completed the impact statement is a victim for purposes of article 56.32, and thus, is a crime victim for purposes of section 552.1325. *See id.* § 56.32(a)(2)(D). Therefore, with the exception of the information pertaining solely to the deceased crime victim, which we have marked for release, the county must withhold the information you have marked under section 552.1325 of the Government Code.

In summary, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. With the exception of the requestor’s client’s date of birth, the county must withhold all living public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual at issue elects

to restrict access to the information we have marked in accordance with section 552.1175(b), the county must withhold the information we have marked under section 552.1175 of the Government Code. The county must withhold the motor vehicle record information you have marked, and the additional information we have marked, under section 552.130 of the Government Code. With the exception of the information pertaining solely to the deceased crime victim, which we have marked for release, the county must withhold the information you have marked under section 552.1325 of the Government Code. The county must release the remaining information.<sup>5</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,



Cristian Rosas-Grillet  
Assistant Attorney General  
Open Records Division

CRG/bw

Ref: ID# 632613

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note the requestor has a right of access to some of the information being released. *See* Gov't Code § 552.023(a); ORD 481 at 4. Thus, the county must again seek a decision from this office if it receives another request for the same information from another requestor.