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ATTORNEY GENERAL OF TEXAS

March 30, 2015

Ms. Mary Ann Powell
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OR2015-06037

Dear Ms. Powell:

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# 557961 (Ref. No. COS15-002).

The Stafford Police Department (the "department"), which you represent, received a request for five categories of information related to all incidents of department officer-involved shootings during a specified period of time. The department redacted information pursuant to section 552.130(c) and section 552.147(b) of the Government Code and Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.1085, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Section 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(e). 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). Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision.

²Although you do not raise section 552.130 of the Government Code in your brief, we understand you to raise this exception based on the substance of your argument.

Initially, we note the submitted information pertains to completed investigations that are subject to section 552.022(a)(1) of the Government Code. Section 522.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under the Act or other law. *See* Gov’t Code § 552.022(a)(1). Although you raise sections 552.103 and 552.107(1) of the Government Code for this information, we note sections 552.103 and 552.107(1) are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. Civ. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the department may not withhold any of the submitted information under section 552.103 or section 552.107(1). However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Additionally, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will consider your argument under that exception for the submitted information. Further, because sections 552.101, 552.102, 552.1085, 552.1175, and 552.130 make information confidential under the Act, we will address their applicability to the submitted information.³

Section 552.108 of the Government Code provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

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).

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a), (b)(1)-(2). A governmental body claiming section 552.108(a)(1) or section 552.108(b)(1) must reasonably explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). A governmental body claiming sections 552.108(a)(2) or 552.108(b)(2) must demonstrate the information at issue relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the criminal investigation or prosecution of alleged misconduct. *See, e.g., Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App.—Austin 2002, no pet.) (section 552.108 generally not applicable to law enforcement agency's personnel records); Open Records Decision No. 350 at 3-4 (1982). The submitted information consists of administrative investigations of department officers. However, you state this information relates to closed criminal investigations that did not result in conviction or deferred adjudication. Based on this representation and upon our review, we find section 552.108(a)(2) of the Government Code is applicable to the information we have marked. However, you also assert case number 09-0523 is "pending and still under investigation." Based on the conflicting representations regarding case number 09-0523, we are unable to determine whether the investigation relates to an ongoing criminal case or a closed case that did not result in conviction or deferred adjudication. Further, the remaining information at issue reflects it was generated as part of internal investigations conducted by the department that were purely administrative in nature. You do not provide any arguments explaining how the internal investigations resulted in a criminal investigation or prosecution. Therefore, we find the department has failed to demonstrate the applicability of sections 552.108(a)(1), 552.108(a)(2), and 552.108(b)(2) to the remaining information. We also find you have not established the release of the remaining information would interfere with law enforcement. Thus, we find the department has failed to demonstrate the applicability of section 552.108(b)(1) to the information at issue. Therefore, the department may not withhold any of the remaining information under section 552.108.

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-187; see also Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(2) of the Government Code.⁴

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance

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

of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The department claims the some of the remaining information is protected by rule 503 of the Texas Rules of Evidence. Upon review, we find you have failed to demonstrate how the remaining information at issue consists of privileged attorney-client communications. Accordingly, the department may not withhold any of the remaining information pursuant to rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code exempts 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 the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982)*. Upon review, we find none of the remaining information consists of a physician-patient communication or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Therefore, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also 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 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 portion of the submitted information consists of photographs taken during an autopsy. We note neither of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the department must withhold the submitted 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.⁵

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. The 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* Open Records Decision No. 455 (1987). However, this office has noted the public has a legitimate interest in information relating to those who are involved in law enforcement. *See, e.g.*, Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern). Further, we note 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”

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

(citing *Cinel v. Connick*, 15 F.3d 1338,1345-46 (1994)). Additionally, we note the common-law right to privacy is a personal right that “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 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 at 1 (1981) (privacy rights lapse upon death). Accordingly, the department may not withhold any of the remaining information based solely on the privacy rights of a deceased individual. Upon review, we find the information we have marked and portions of one of the submitted video recordings satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. You state the department does not have the technological capability to redact information from the recordings. Accordingly, we conclude the department must withhold the video recording we have indicated in its entirety and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁶ However, we find none of the remaining information to be highly intimate and embarrassing and of no legitimate public interest. Accordingly, the department may not withhold any of the remaining information on that basis.

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. 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)).

As noted above, 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*, 589 S.W.2d at 491; ORD 272 at 1. 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). 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 information at issue. Therefore, the department may not withhold the information at issue under section 552.101 in conjunction with constitutional privacy.

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 whose information is at issue elects to keep the information confidential. Gov't Code § 552.1175. We have marked and indicated the dates of birth of peace officers that are not held in an employment capacity by the department. To the extent the peace officers elect to restrict access to the information we have marked and indicated in accordance with section 552.1175(b), the department must withhold this information under section 552.1175 of the Government Code. To the extent the peace officers whose information is at issue do not elect to restrict access to this information in accordance with section 552.1175(b), the department may not withhold it under section 552.1175 of the Government Code. You state the department does not have the technological capability to redact this information from the video recordings at issue. Therefore, if the individuals at issue elect to keep their dates of birth confidential, we agree the department must withhold the video recordings at issue in their entirety under section 552.1175 of the Government Code.⁷

Section 552.1085 of the Government Code provides, in 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 at issue does not consist of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the department may not withhold any portion of the remaining information under section 552.1085(c) of the Government Code.

You assert the submitted recordings contain driver's license and license plate numbers that the department lacks the technological capability to redact. Consequently, you seek to withhold this information in its entirety under section 552.130 of the Government Code. Section 552.130 provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. *Id.* § 552.130(a). Upon review, we find some of the submitted video and audio recordings

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

contain information subject to section 552.130. As noted, you inform us the department does not have the technological capability to redact the motor vehicle record information from the recordings at issue. Accordingly, the department must withhold the video recordings we have indicated in their entirety under section 552.130. However, because the department had the ability to copy the submitted audio recordings for our review, we believe the department has the capability to produce a copy of only the non-confidential portions of the audio recordings. Therefore, we find the department must withhold the motor vehicle record information we have indicated in the submitted audio recordings, as well as the information we have indicated in the submitted photographs, under section 552.130 of the Government Code. However, we find the remaining portions of these audio recordings, as well as the remaining audio and video recordings in full, contain no information subject to section 552.130. Accordingly, the department may not withhold any of the remaining information under section 552.130.

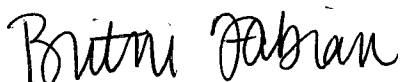
We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, with the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(2) of the Government Code. The department must withhold the submitted autopsy photographs under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The department must withhold the video recording we have indicated in its entirety and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked and indicated under section 552.1175 of the Government Code, if the individuals whose information is at issue elect to restrict access to the information in accordance with section 552.1175(b); however, if the individuals at issue elect to keep their dates of birth confidential, the department must withhold the video recordings at issue in their entirety under section 552.1175 of the Government Code. The department must withhold the video recordings we have indicated in their entirety and the motor vehicle record information we have indicated under section 552.130 of the Government Code. The department must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law.

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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 557961

Enc. Submitted documents

c: Requestor
(w/o enclosures)