



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 7, 2016

Ms. Amy L. Sims
Deputy City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2016-00521

Dear Ms. Sims:

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# 593545 (Lubbock File No. 1233).

The City of Lubbock (the "city") received a request for information pertaining to a specified case. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.1085, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from an interested third party. *See* Gov't Code § 552.304 (interested party may submit comments stating why 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 section 1703.306 of the Occupations Code, which provides the following:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The information we have marked consists of polygraph information that is confidential under section 1703.306, and the requestor does not appear to have a right of access to the information under that section. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. However, we find none of the remaining information consists of polygraph information for purposes of section 1703.306. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses 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. The information we have indicated consists of photographs taken during an autopsy. We note neither of the statutory exceptions to confidentiality is applicable in this instance. Upon review, we find the city must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. However, none of the remaining information consists of photographs taken during an autopsy. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 411.153 of the Government Code, which provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under [the Act].
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6)-(7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) (providing that "forensic analysis" has meaning assigned by article 38.35). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director of [the Department of Public Safety ("DPS")]." Gov't Code § 411.141(5); *see id.* § 411.001(3).

The director of DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.142(h) (requiring director establish standards for DNA analysis), .144(a). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b).

Upon review, we find the information we have marked consists of records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. We further note this information is the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code. *See City of Fort Worth v. Abbott*, 258 S.W.3d 320, 328 (Tex. App.—Austin 2008, no pet.) (section 411.153 of the Government Code prohibits release of DNA records held by city forensic science laboratory regardless of whether that record has been forwarded to DPS state DNA database). However, we find none of the remaining information consists of records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to this information under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, the city must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. However, we find none of the remaining information consists of a biometric identifier for purposes of section 560.003. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code on that 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. 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987).

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 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.¹ *Tex. 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. 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. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded" (quoting RESTATEMENT (SECOND) OF TORTS § 652I)); 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").

Upon review, the city must withhold all living public citizens' dates of birth under section 552.101 of the Government Code. Further, we find the information we have marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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

¹Section 552.102(a) excepts 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).

(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 information we have indicated consists of sensitive crime scene images that must generally be withheld under section 552.1085 of the Government Code.

However, in this instance, the requestor is a member of the media and may be seeking the information in connection with or in support of the creation of an expressive work.² *See id.* § 552.1085(a)(3)(B) (defining "expressive work" to include "a work the primary function of which is the delivery of news, information, current events, or other matters of public interest or concern"); *see also id.* § 552.1085(b) ("an Internet website, the primary function of which is not the delivery of news, information, current events, or other matters of public interest or concern, is not an expressive work"). Section 552.1085(d)(4) provides if the requestor establishes to the city she has an interest in the information at issue that is based on, connected with, or in support of the creation, in any medium, of an expressive work, then the city may not use section 552.1085(c) to withhold the information at issue from this requestor. *See id.* § 552.1085(d)(4). Further, we have received comments from the deceased person's family authorizing the requestor to view or copy the information at issue. Section 552.1085(d)(2) provides that if the requestor has written authorization from the deceased person's next of kin to view or copy the information at issue, then the city may not withhold it from this requestor under section 552.1085(c). *See id.* § 552.1085(d)(2). Accordingly, the city may not withhold the information we have indicated under section 552.1085 from this requestor if (1) the requestor establishes her interest in the information under section 552.1085 in accordance with section 552.1085(d)(4); or (2) the requestor has written authorization from the deceased person's next of kin to view or copy the information in accordance with section 552.1085(d)(2). Otherwise, the city must withhold the information we have indicated under section 552.1085 of the Government Code. Further, we find none of the remaining information consists of sensitive crime scene

²We note section 552.1085(f) provides that a governmental body that receives a request for a sensitive crime scene image from a person described by section 552.1085(d)(4) must notify the deceased person's next of kin in writing at the next of kin's last known address within ten business days of receiving the request. *See* Gov't Code § 552.1085(f). You inform us, and provide documentation showing, the city has notified the deceased's next of kin.

images for purposes of section 552.1085. Therefore, the city may not withhold any of the remaining information under section 552.1085 of the Government Code.

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. *See id.* § 552.130(a). Accordingly, the city must withhold the discernible license plate information in the submitted video, as well as the motor vehicle record information we have marked in the submitted documents, under section 552.130 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code. The city must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. The city must withhold all living public citizens' dates of birth and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city may not withhold the information we have indicated under section 552.1085 of the Government Code from this requestor if (1) the requestor establishes her interest in the information under section 552.1085 in accordance with section 552.1085(d)(4); or (2) the requestor has written authorization from the deceased person's next of kin to view or copy the information in accordance with section 552.1085(d)(2).³ Otherwise, the city must withhold the information we have indicated under section 552.1085 of the Government Code. The city must withhold the discernible license plate information in the submitted video, as well as the motor vehicle record information we have marked in the submitted documents, under section 552.130 of the Government Code. The remaining information must be released.

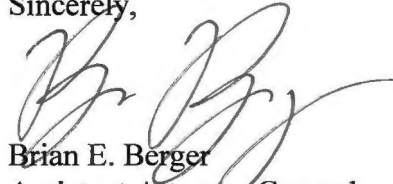
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

³In this event, the requestor has a right of access beyond that of the general public to the information being released. *See* Gov't Code § 552.1085(d)(2), (4). Accordingly, if the city receives another request for this information from an individual other than this requestor, the city must again seek a ruling from this office.

[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 'B. Berger', written over the printed name.

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 593545

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)