



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2016

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2016-19167

Dear Ms. Harden:

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# 623804 (PIR No. 16-44397).

The Office of the Attorney General (the "OAG") received a request for information pertaining to a specified case. The OAG states it does not have information responsive to portions of the request.¹ The OAG states it will release some of the requested photographs. The OAG claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.² We have received and considered comments from an interested third party. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

The third party argues the requestor has requested a large amount of information because she asked for everything with respect to the specified case. The third party contends the OAG

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 assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

should seek clarification and narrowing of the request pursuant to section 552.222 of the Government Code. Section 552.222 permits a governmental body to communicate with a requestor for the purpose of clarifying or narrowing a request for information. *Id.* § 552.222. In this instance, the OAG does not inform us it sought clarification or narrowing from the requestor. Thus, we assume the OAG has made a good-faith effort to relate this request to information it holds. *See* Open Records Decision No. 561 (1990). Therefore, we will consider the OAG's arguments and the third party's remaining arguments for the submitted information.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). The OAG informs us Exhibit C pertains to a case that resulted in a conviction. However, the OAG states, and provides documentation showing, the defendant filed a motion for new trial prior to the receipt of the instant request. Therefore, the OAG asserts Exhibit C pertains to an active criminal prosecution being conducted by the OAG’s Criminal Prosecutions Division and release of the information at issue would interfere with the pending prosecution. Based on this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) is applicable to the information at issue, and the OAG may withhold Exhibit C on that basis.

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. This section encompasses the doctrine of 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. 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 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (5th Cir. 1985)). However, because privacy is a personal right that lapses at death, the constitutional right to privacy does not encompass information that relates only to a deceased individual. *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* Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). 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). The family of the deceased individual at issue asserts a privacy interest in the information that relates to their deceased relative. A representative of the decedent's family has submitted correspondence to this office stating the decedent's family objects to disclosure of the information at issue. Upon review, we find the family's privacy interest in the information we have indicated outweighs the public's interest in the disclosure of this information. Therefore, we conclude the OAG must withhold the information we have indicated under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*.³ However, we find the remaining information at issue either does not fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy, or the public interest in the information at issue outweighs any remaining privacy interests.

Section 552.101 of the Government Code also encompasses section 11(a) 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 [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], 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). Upon review, we find the remaining photograph is not a photograph or x-ray of a body taken during an autopsy. Thus, the remaining information is not confidential under section 11(a) of article 49.25, and the OAG may not withhold it under section 552.101 on that ground.

Section 552.101 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

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

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. However, as previously noted, privacy is a personal right that lapses at death. *Moore*, 589 S.W.2d at 491; *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 (1977))); 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.”); ORD 272. Thus, as with constitutional privacy, information pertaining solely to a deceased individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, we find the third party failed to demonstrate the remaining information is not information that is highly intimate or embarrassing and of no legitimate public interest. Thus, the OAG may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the OAG may withhold Exhibit C under section 552.108(a)(1) of the Government Code. The OAG must withhold the information we have indicated in Exhibit B under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The OAG must release the remaining information in Exhibit B.

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 cursive script, appearing to read "Paige Thompson".

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 623804

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)