



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 2, 2017

Ms. Stacie S. White
Counsel for the Town of Flower Mound
Taylor, Olson, Adkins, Sralla, Elam, LLP
6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2017-04551

Dear Ms. White:

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# 647675.

The Town of Flower Mound (the "town"), which you represent, received a request for information pertaining to a specified incident. You state you will redact information under sections 552.130(c) and 552.147(b) of the Government Code and e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception 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 section 552.130(a) without the necessity of seeking a decision from the attorney general. Gov't Code § 552.130(c). 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 a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147. We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Initially, we note some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-03337 (2017). In that ruling, we determined the town must withhold (1) the public citizens' dates of birth you marked and the information we indicated under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the photographs we indicated under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*; (3) the information we indicated under section 552.1175 to the extent the information pertains to individuals who are subject to section 552.1175(a) and the individuals elect to restrict access to their information in accordance with section 552.1175; and (4) the information we marked and indicated under section 552.130 of the Government Code, to the extent the requestor does not have access to the information and release the remaining information.² We note the circumstances have changed for portions of the information the town released to the previous requestor because the present requestor does not have a right of access to such information. *See* Gov't Code § 552.023(a) (person or person's authorized representative has a special right of access to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person's privacy interests.) Thus, the town may not rely on Open Records Letter No. 2017-03337 as a previous determination for the submitted information to which the circumstances have changed. However, we have no indication the law, facts, or circumstances have changed for the remaining information at issue in Open Records Letter No. 2017-03337. Thus, the town may rely on Open Records Letter No. 2017-03337 for the remaining information to which circumstances have not changed and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Further, the submitted information contains documents not at issue in the previous ruling. Accordingly, we will address the submitted arguments against disclosure of the information for which circumstances have changed and the documents not at issue in the previous ruling.

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 the doctrine of common-law privacy, which protects information that (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). 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. *Id.*

²*See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).

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. *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. 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.); 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"). Thus, 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, the town must withhold the public citizen's date of birth we marked in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated the remaining information is highly intimate or embarrassing information of a living individual that is not of legitimate public concern. Thus, the remaining information may not be withheld 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* 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 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)). However, 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. 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 Favish*, 541 U.S. 157. We note the decedent's mother objects to disclosure of the information at issue. After reviewing the submitted information, we find you have

failed to demonstrate any of the information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the town may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

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* Gov't Code § 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). Upon review, we find portions of the remaining information pertain to individuals who may be employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes criminal law or child protective services. To the extent the individuals at issue are subject to section 552.1175(a) and the individuals elect to restrict access to their information in accordance with section 552.1175, the town must withhold the home address, home telephone number, emergency contact information, and family member information of these individuals under section 552.1175(b). To the extent the individuals are not subject to section 552.1175(a) or they do not elect to restrict access to this information in accordance with section 552.1175(b), then the town may not withhold this information under section 552.1175 of the Government Code.

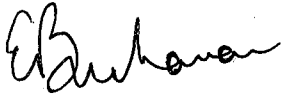
In summary, the town may rely on Open Records Letter No. 2017-03337 as a previous determination for the information to which circumstances have not changed and withhold or release the identical information in accordance with that ruling. The town must withhold the public citizen's date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals at issue are subject to section 552.1175(a) and the individuals elect to restrict access to their information in accordance with section 552.1175, the town must withhold the home address, home telephone number, emergency contact information, and family member information of the individuals under section 552.1175(b). 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/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 "Emily Buchanan".

Emily Buchanan
Assistant Attorney General
Open Records Division

EB/eb

Ref: ID# 647675

Enc. Submitted documents

c: Requestor
(w/o enclosures)