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ATTORNEY GENERAL OF TEXAS

July 17, 2017

Mr. Whitt L. Wyatt
Counsel for the City of Allen
Nichols, Jackson, Dillard, Hager & Smith, LLP
500 North Akard Street, Suite 1800
Dallas, Texas 75201

OR2017-15914

Dear Mr. Wyatt:

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# 666578 (File Ref. No. 85357).

The Allen Police Department (the "department"), which you represent, received a request for information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2017-14080 (2017). In Open Records Letter No. 2017-14080, we concluded the department must: (1) withhold the public citizens' dates of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) withhold the motor vehicle record information we marked under section 552.130 of the Government Code; and (3) release the remaining information. You now seek to withhold the requested information under section 552.108 of the Government Code. Section 552.007 of the Government Code, however, provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. See Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records

Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. We note section 552.108 does not prohibit the release of information or make information confidential. Because section 552.108 does not prohibit the release of information or make information confidential, the department may not now withhold any previously released information under this exception. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 586 (1991) (governmental body may waive section 552.108), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Further, the requestor in this instance has a right of access to some of the information withheld in the previous ruling. Thus, we find the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, we conclude the department may not rely on Open Records Letter No. 2017-14080 as a previous determination. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). However, we will address your arguments under sections 552.101 and 552.130, which prohibit the release of information, for the submitted information.

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 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). We note some of the information at issue includes the requestor’s date of birth. The requestor has a right of access to her date of birth, and the department may not withhold it under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Gov’t Code § 552.023(a) (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 herself). We also note portions of the remaining information pertain to a deceased individual. 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.”); ORD 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, we find the department must withhold the date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the department has failed to demonstrate any of the remaining information is highly intimate or embarrassing information of a living individual that is not of legitimate concern to the public. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure 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 this state or another state or country. Gov’t Code § 552.130(a). Section 552.130 protects personal privacy. Accordingly, the requestor has a right of access to her motor vehicle record information under section 552.023 of the Government Code, and it may not be withheld from this requestor under section 552.130. *See id.* § 552.023(a); ORD 481 at 4. Further, as noted above, the right of privacy lapses at death. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; Open Records Decision No. 272. Therefore, motor vehicle record information that pertains solely to a deceased individual may not be withheld under section 552.130. Accordingly, the department must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

In summary, the department 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. The department must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The department must release the remaining information.

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,



April Liwanag
Attorney
Open Records Division

AML/eb

Ref: ID# 666578

Enc. Submitted documents

c: Requestor
(w/o enclosures)