



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 8, 2017

Mr. Phillip J. Smith
Assistant District Attorney
Civil Division
County of Smith
100 North Broadway, 4th Floor
Tyler, Texas 75702

OR2017-25552

Dear Mr. Smith:

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# 684622.

The Smith County Sheriff's Office (the "sheriff's office") received a request for photographs and video recordings related to case number 2017-14213. The sheriff's office claims the submitted information is excepted from disclosure under section 552.1085 of the Government Code. We have considered the exception the sheriff's office claims and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S.589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th

Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). We note 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 v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); 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).

Because the submitted photographs and video recordings relate to deceased individuals, they may not be withheld from disclosure based on the deceased individuals' privacy interests. However, the sheriff's office states it notified one of the deceased individuals' family of the request for information and of the family's right to assert a privacy interest in the submitted information. The sheriff's office informs us a member of the family of the deceased individual at issue asserts a privacy interest in the submitted information and objects to its release. After reviewing the submitted comments and the information at issue, we find the family's privacy interest in the photographs at issue outweighs the public's interest in the disclosure of this information. Therefore, the sheriff's office must withhold the portions of the submitted photographs and video recordings portraying the deceased individual at issue under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.¹

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

(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.*

¹As our ruling is dispositive for this information, we need not address the sheriff's office's argument against its disclosure.

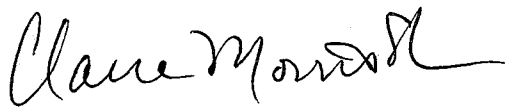
§ 552.1085(a)(6). Upon review, we find the remaining portions of the submitted photographs and video recordings do not consist of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the sheriff's office may not withhold the remaining information under section 552.1085(c) of the Government Code.

In summary, the sheriff's office must withhold the portions of the submitted photographs and video recordings portraying the deceased individual at issue under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The sheriff's office must release the remaining information to this requestor.²

The sheriff's office also asks this office to issue a previous determination that would permit it to withhold information under section 552.1085 of the Government Code without requesting a ruling from this office. Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

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²We note the requestor has a right of access to some of the information being released. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, if the sheriff's office receives another request for the same information from a different requestor, the sheriff's office must again seek a decision from this office.

Ref: ID# 684622

Enc. Submitted documents

c: Requestor
(w/o enclosures)