



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 6, 2019

Mr. Bill Delmore  
Assistant District Attorney  
9th Judicial District  
Montgomery County  
207 West Phillips Street, 2<sup>nd</sup> Floor  
Conroe, Texas 77301

OR2019-06230

Dear Mr. Delmore:

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# 753659.

The Montgomery County District Attorney's Office (the "district attorney's office") received a request for information pertaining to a specified investigation. You state the district attorney's office will release some information. You state the district attorney's office will redact information pursuant to sections 552.130(c), 552.136(c), and 552.147(b) of the Government Code.<sup>1</sup> You also state the district attorney's office will redact the dates of birth

---

<sup>1</sup>Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* 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 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b).

of public citizens pursuant to Open Records Letter No. 2016-19908 (2016).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.1085 of the Government Code. We have considered the exceptions you claim and reviewed 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. This section encompasses information protected by other statutes, such as 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 [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 some of the photographs at issue consist of photographs of a body taken during an autopsy. We have no indication either of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the district attorney’s office must withhold the submitted autopsy photographs, which you indicated, under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses information protected by other statutes, including section 1703.306 of the Occupations Code, which provides:

- (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:

---

<sup>2</sup>Open Records Decision No. 2016-19908 allows the district attorney’s office to withhold the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy without seeking a ruling from this office.

- (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. Upon review, we find the information you indicated constitutes information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the district attorney's office must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also 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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). 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).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a “first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found that “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” *Id.* Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 428, 430. We have determined the same principles apply to an inmate’s recorded conversations from a telephone at a jail. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The rights of those individuals to anonymity was found to outweigh the public’s interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). 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. *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 (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.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses 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). Upon review, we find some of the remaining information is confidential under constitutional privacy. Accordingly, the district attorney’s office must withhold the information we indicated under section 552.101 of the Government Code in conjunction with

the constitutional right to privacy.<sup>3</sup> Additionally, you seek to withhold some of the submitted photographs to protect the deceased's family members' rights to privacy. You state, and provide documentation demonstrating, the decedent's family objects to disclosure of the information at issue. Upon review, we find the family's privacy interest in the information at issue outweighs the public's interest in the disclosure of this information. Therefore, we conclude the district attorney's office must withhold the information we indicated under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.<sup>4</sup>

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* ORD 455. Upon review, we find the information we indicated satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we indicated under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(a)(2) of the Government Code exempts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The district attorney's office states the audio recording you indicated relates to a closed criminal investigation by the Department of Public Safety ("DPS") that did not result in conviction or deferred adjudication. Further, DPS objects to release of the information. Based on your representation and our review, we agree the district attorney's office may withhold the information you indicated under section 552.108(a)(2) of the Government Code.

---

<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

<sup>4</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

In summary, the district attorney's office must withhold the submitted autopsy photographs you 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 district attorney's office must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The district attorney's office must withhold the information we indicated under section 552.101 of the Government Code in conjunction with the constitutional right to privacy, and the information we indicated under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The district attorney's office must withhold the information we indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office may withhold the information you indicated under section 552.108(a)(2) of the Government Code. The district attorney's office 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](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 black ink, appearing to read "D. Michelle Case", followed by a horizontal line extending to the right.

D. Michelle Case  
Assistant Attorney General  
Open Records Division

DMC/jxd

Ref: ID# 753659

Enc. Submitted documents

c: Requestor  
(w/o enclosures)