



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 15, 2019

Ms. LaNetra S. Lary
Assistant County Attorney
Fort Bend County
401 Jackson Street, 3rd Floor
Richmond, Texas 77469

OR2019-10044

Dear Ms. Lary:

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# 759340.

The Fort Bend County Sheriff's Office (the "sheriff's office") received two requests from the same requestor for any photographs, audio recordings, or video recordings pertaining to a specified incident report. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ You also state you notified interested individuals of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received and considered comments submitted by the interested individual and the requestor. We have considered the submitted arguments and reviewed the submitted information.

¹We note, and you acknowledge, the sheriff's office did not comply with the requirements of section 552.301(e) of the Government Code in providing some of the information at issue. *See* Gov't Code § 552.301(e). Nonetheless, as section 552.101 of the Government Code and the interests of a third party can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

Section 552.301(e)(1)(D) states a governmental body asking for an attorney general decision must, within fifteen business days of receiving a request, provide the attorney general with “a copy of the specific information requested, *or submit representative samples of information if a voluminous amount of information was requested[.]*” *Id.* § 552.301(e)(1)(D) (emphasis added). We note you have submitted a voluminous amount of information rather than a representative sample. The information submitted includes 5 compact discs containing over fourteen hours of audio recordings. We have identified and reviewed a representative sample of the voluminous information submitted.²

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. 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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.). However, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to 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

²To the extent the sheriff’s office identifies confidential information subject to a provision not addressed in this ruling, the sheriff’s office should contact the Open Government Hotline.

privacy is personal and lapses upon death”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds.

Upon review, we find some of the information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff’s office must withhold the information we marked, and all living public citizens’ dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the sheriff’s office has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the sheriff’s office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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)). As previously noted, 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*, 589 S.W.2d at 491; ORD 272. However, the United States Supreme Court has determined 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 information at issue relates to a deceased individual, the sheriff’s office may not withhold it to protect that individual’s privacy interests. However, we have received correspondence from a member of the deceased individual’s family who asserts a privacy interest in the information at issue and objects to its release. Upon review, we find this family member’s privacy interest in the photographs we indicated outweighs the public’s interest in the disclosure of this information. Therefore, the sheriff’s office must withhold the information we 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. Thus, the sheriff’s office may not withhold the

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

remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.

Section 552.101 of the Government Code also 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 the remaining photographs do not consist of photographs of the body. Thus, none of the autopsy photographs at issue are confidential under section 11 of article 49.25 of the Code of Criminal Procedure, and the sheriff's office may not withhold any of the remaining photographs under section 552.101 of the Government Code on this basis.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by this state or another state or country.⁴ Gov't Code § 552.130(a)(1), (2). Accordingly, the sheriff's office must withhold the motor vehicle record information we marked and indicated and all audible license plate numbers under section 552.130 of the Government Code.

In summary, the sheriff's office must withhold the information we marked, and all living public citizens' dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff'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*. The sheriff's office must withhold the motor vehicle information

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

we marked and indicated and all audible license plate numbers under section 552.130 of the Government Code. The sheriff's office must release the remaining information.⁵

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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/gw

Ref: ID# 759340

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the remaining information contains social security numbers. 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. See Gov't Code § 552.147(b).