



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 21, 2019

Mr. David Fulton  
Assistant Criminal District Attorney  
Randall County Criminal District Attorney's Office  
2309 Russell Long Boulevard, Suite 120  
Canyon, Texas 79015

OR2019-29512

Dear Mr. Fulton:

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# 789966.

The Randall County Criminal District Attorney's Office (the "district attorney's office") received a request for ten categories of information pertaining to a specified incident. You argue some of the submitted information is not subject to the Act. You also claim the remaining submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted information.

The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by rules adopted by Supreme Court of Texas or other applicable laws or rules). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary and therefore is not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. You state the submitted videos consist of records of grand jury testimony. You explain this information is held by

the district attorney's office solely as an agent of a grand jury. Based on your representations, we conclude the submitted videos consist of judicial records not subject to the Act and the district attorney's office need not release them in response to this request.

Next, we note you have only submitted information responsive to item numbers five and ten of the request. To the extent any information responsive to the remaining portions of the request existed on the date the district attorney's office received the request, we assume the district attorney's office has released it. If the district attorney's office has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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. 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 Broad. 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"). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds.

The remaining information consists of digital media, some of which pertains solely to a deceased individual, and may not be withheld under common-law privacy based on the deceased individual's privacy interests. Upon review, we conclude some of the remaining information meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold Appendix C in its entirety and information in Appendix B that consists of private conversations and intimate details of living third parties who communicated with the decedent under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is information pertaining to a living individual that is highly intimate or embarrassing and of no legitimate public concern, and the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of 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 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). 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.

We note the remaining information contains images of living individuals, who all appear to be adults, in various states of undress, some of whom are identifiable and others who are not. For the images that depict identifiable unclothed individuals, we find that, if these pictures were obtained from publicly available websites, the individuals depicted are not afforded protection under constitutional privacy. If the district attorney's office determines these images are in the public domain, we believe the individuals depicted have no reasonable expectation of privacy and the district attorney's office must release the information. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain); *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990). However, should the district attorney's office determine the identifiable images were not obtained from publicly available websites, we find the images of the living, identifiable individuals who are partially or completely unclothed are excepted from disclosure under section 552.101 of the Government Code based on the constitutional right to privacy and the district attorney's office must withhold the images on that basis. In either instance, the district attorney's may not withhold the images of the unidentifiable or deceased individuals under section 552.101 in conjunction with constitutional privacy.

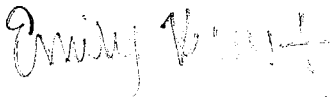
Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code* § 552.137(a)-(c). We note because the right to privacy lapses at death, the e-mail address of a deceased individual may not be withheld under section 552.137 of the Government Code. *Moore*, 589 S.W.2d at 491; *see also Belo Broad. Corp.*, 472 F. Supp. at 146-47; *see Attorney General Opinions JM-229, H-917; ORD 272.* Accordingly, the district attorney's office must withhold the e-mail addresses of living individuals in the remaining information under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the district attorney's office must withhold Appendix C in its entirety and the information in Appendix B which consists of private conversations and intimate details of third parties who communicated with the decedent under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the images were not obtained from publicly available websites, the district attorney's office must withhold the images of the living, identifiable individuals who are partially or completely unclothed under section 552.101 of the Government Code based on the constitutional right to privacy. The district attorney's office must withhold the e-mail addresses of living individuals in the remaining information under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Emily Kunst  
Assistant Attorney General  
Open Records Division

EK/be

Ref: ID# 789966

Enc. Submitted documents

c: Requestor  
(w/o enclosures)