



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 12, 2019

Ms. Amy M. Casey
City Clerk
Mr. Scott Rickert
Police Records
City of Belton
P.O. Box 120
Belton, Texas 76513

OR2019-35046

Dear Ms. Casey and Mr. Rickert:

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# 798591.

The Belton Police Department (the "department") received a request for six categories of information pertaining to a specified motor vehicle accident. You state the department released some of the requested information. You state the department does not have a portion of the requested information.¹ You claim some of the submitted information was not properly requested pursuant to section 1701.661 of the Occupations Code. You also claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.1085 of the Government Code.² Additionally, you indicate release of the submitted information may implicate the privacy interests of deceased individuals' family members. Accordingly, you state the department notified the deceased individuals' next of kin of the request for information and of their right to submit arguments to this office as to

¹ The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

² We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting this decision with regards to some of the submitted information. *See Gov't Code* § 552.301(e). Nevertheless, because sections 552.101 and 552.1085 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider whether these exceptions apply to the submitted information. *See id.* § § 552.007, .302, .352.

why the information at issue should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information consists of department officers' body worn camera recordings. Body worn cameras are subject to chapter 1701 of the Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661(a) provides:

A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). In this instance, the requestor does not provide the requisite information under section 1701.661(a) for a portion of one of the submitted body worn camera recordings. As the portion of the body worn camera recording we indicated was not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach this information and the department does not need to release it.³ However, pursuant to section 1701.661(b), a "failure to provide all the information required by [s]ubsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information." *Id.* § 1701.661(b). We find the instant request includes the information required by section 1701.661(a) for the remaining portions of the submitted body worn camera recordings. *Id.* Accordingly, we conclude the requestor properly requested the remaining portions of the submitted body worn camera recordings and we will address the department's arguments against their disclosure.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of constitutional privacy, which 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

³ As we are able to make this determination, we need not address the arguments against disclosure of this information.

information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). 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.); *see also* Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). 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).

The submitted information relates to deceased individuals. Therefore, it may not be withheld from disclosure based on the deceased individuals’ privacy interests. However, as noted above, you inform us the department notified the deceased individuals’ families of the request for information and of their right to assert a privacy interest in the information at issue. As of this date, we have not received correspondence from any member of the deceased individuals’ families asserting a privacy interest in the information. Thus, we have no basis for determining any family member has a privacy interest in the information at issue. Therefore, the department may not withhold any of the submitted 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 made confidential by the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Upon review, we find a portion of the remaining information, which we marked, constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient's medical records. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA.⁴

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third 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.). However, because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *See Moore*, 589 S.W.2d at 491; ORD 272. 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. We also note the requestor has a right of access to his client's date of birth and it may not be withheld from him on the basis of common-law privacy. *See Gov't Code* § 552.023(a) ("person or a person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is 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). Accordingly, with the exception of the date of birth of the requestor's client, the department must withhold all living individuals' dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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.*

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information. We note this ruling does not affect an individual's right of access to his or her own medical records from the physician who provided treatment under the MPA, subtitle B of title 3 of the Occupations Code. *See Occ. Code* §§ 159.004, .005, .006; *cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (MPA does not provide general right of access to medical records from governmental body responding to a request for information under the Public Information Act).

§ 552.1085(a)(6). Upon review, we find none of the remaining information consists of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the department may not withhold any portion of the remaining information under section 552.1085(c) of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.⁵ *See id.* § 552.1175. Section 552.1175 applies, in part, to “peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Upon review, we find some of the remaining information consists of personal information of an individual who may be a licensed peace officer, which the city holds in a non-employment capacity. Accordingly, the department must withhold the cellular telephone number we marked under section 552.1175 of the Government Code if the individual at issue is a peace officer as defined by article 2.12 who elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code and the cellular telephone service is not paid for by a governmental body.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov’t Code § 552.130. Accordingly, the department must withhold the information we marked and indicated under section 552.130 of the Government Code.

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 id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, as the portion of the body worn camera recording we indicated was not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach this information and the department does not need to release it. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. With the exception of the date of birth of the requestor’s client, the department must withhold all living individuals’ dates of birth and the information we

⁵ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481, 480 (1987), 470 (1987).

marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the cellular telephone number we marked under section 552.1175 of the Government Code if the individual at issue is a peace officer as defined by article 2.12 of the Code of Criminal Procedure who elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code and the cellular telephone service is not paid for by a governmental body. The department must withhold the information we marked and indicated under section 552.130 of the Government Code. The department must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department must release the remaining information.⁶

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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/be

Ref: ID# 798591

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶ We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023(a); ORD 481 at 4. Because such information is confidential with respect to the general public, if the department receives another request for this information from a different requestor, the city must again seek a ruling from this office. We also note the information being released 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. See Gov't Code § 552.147(b).