



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 20, 2020

Ms. Amy L. Sims
Deputy City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2020-11308

Dear Ms. Sims:

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# 823111 (Ref. No. 2694).

The City of Lubbock (the "city") received a request for certain photographs and video footage from a specified case. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.1085 of the Government Code. Additionally, you indicate release of portions of the submitted information may implicate the privacy interests of deceased individuals' family members. We understand the city notified the deceased individuals' next of kin of the request for information and of their right to submit comments to this office explaining why the information at issue 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 comments from one of the notified parties. We have considered the submitted arguments and reviewed the submitted information.

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.

Id. § 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.* § 552.1085(a)(6). You inform us the submitted information pertains to a closed criminal case. Upon review, we find some of the submitted photographs, which we indicated, consist of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the city must withhold the photographs we indicated under section 552.1085 of the Government Code.¹ However, none of the remaining information consists of sensitive crime scene images for the purposes of section 552.1085. Therefore, the city may not withhold any of the remaining information under section 552.1085(c) of the Government Code.

Section 552.101 of the Government Code exempts from public 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 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.); *see also* 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). Some of the remaining information consists of photographs of deceased individuals. This information may not be withheld based on the deceased individuals’ privacy interests. However, we have received comments from an attorney who represents the next of kin of one of the deceased individuals and asserts a privacy interest in the photographs related to this individual on behalf of his client. Therefore, the city must withhold this information, which we indicated, under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.²

¹ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. However, because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. *See Moore*, 589 S.W.2d at 491; *see also* General Opinions JM-229 (1984), H-917 (1976); ORD 272. Upon review, we find the city has failed to demonstrate any of the remaining information pertains to a living individual and is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

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.³ *See* Gov't Code § 552.130. Accordingly, the city must withhold discernible license plates and registration stickers under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We note the purpose of section 552.136 is to protect privacy. Because the right of privacy lapses at death, access device numbers that pertain solely to a deceased individual may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229; H-917; ORD 272. Accordingly, to the extent a living individual has an interest in the accounts at issue, the city must withhold the information we indicated under section 552.136 of the Government Code.

In summary, the city must withhold the photographs we indicated under section 552.1085 of the Government Code. The city 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 city must withhold discernible license plates and registration stickers under section 552.130 of the Government Code. To the extent a living individual has an interest in the accounts at issue, the city must withhold the information we indicated under section 552.136 of the Government Code. The city must release the remaining information.

³ 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 (1987), 480 (1987), 470 (1987).

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,

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/jlbm

Ref: ID# 823111

Enc. Submitted documents

c: Requestor
(w/o enclosures)