



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2020

Ms. Casey Stracener
Administrative Assistant/Records
Upshur County Sheriff's Office
405 North Titus Street
Gilmer, Texas 75644

OR2020-20006

Dear Ms. Stracener:

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# 839116.

The Upshur County Sheriff's Office (the "sheriff's office") received a request for information related to a specified incident.¹ We understand the sheriff's office does not possess some of the requested information.² You state the sheriff's office has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.1085 of the Government Code.³ You also stated you have notified an interested party of the request for information and the right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.304* (providing that interested party may submit written comments

¹ Because you have not submitted a copy of the original written request for information, we take our description of the request from a copy provided to this office by the interested party.

² The Act does not require a governmental body to create or release information that did not exist when a request for information was received. *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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

³ We note the sheriff's office did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See Gov't Code § 552.301(e)*. Nonetheless, because sections 552.101 and 552.1085 of the Government Code and third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider the arguments against disclosure of the submitted information. *See id.* § 552.007, .302, .352.

regarding why information should or should not be released). We have received comments from the interested party. We have considered the submitted arguments 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.” *Id.* § 552.101. This section encompasses information made confidential by other statutes. We note the submitted information includes a peace officer’s body worn camera recording. 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) of the Occupations Code provides the following:

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). As the body worn camera recording at issue was not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach this information and it need not be released.⁴ 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). In addition, we also note section 1701.661(f) of the Occupations Code provides, in part, the following:

A law enforcement agency may not release any portion of a recording made in a private space, or of a recording involving the investigation of conduct that constitutes a misdemeanor punishable by fine only and does not result in arrest, without written authorization from the person who is the subject of that portion of the recording or, if the person is deceased, from the person’s authorized representative.

Id. § 1701.661(f). You claim a portion of the remaining information is subject to chapter 1701 of the Occupations Code. However, the remaining information consists of photographs, none of which are subject to chapter 1701 of the Occupations Code. Therefore, the sheriff’s office may not withhold any portion of the remaining information

⁴ As we are able to make this determination, we need not address the arguments against disclosure of this information.

under section 552.101 of the Government Code on the basis of section 1701.661(f) 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 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (5th Cir. 1985)). However, because privacy is a personal right that lapses at death, the constitutional right to privacy does not encompass information that relates only to 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). Nevertheless, 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). We have received correspondence from a member of the decedent's family informing us she 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 sheriff's office must withhold the photographs we indicated under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.⁵

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 some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, we conclude the sheriff's office must withhold the photographs we indicated under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1085 of the Government Code provides, in part, the following:

⁵ As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

(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.* § 552.1085(a)(6). You state some of the remaining photographs consist of sensitive crime scene images. Upon review, we find none of the remaining photographs consist of sensitive crime scene images for the purposes of section 552.1085. Therefore, the sheriff's office may not withhold any of the remaining photographs under section 552.1085(c) of the Government Code.

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.⁶ *See id.* § 552.130. Accordingly, the sheriff's office must withhold the visible license plates in the remaining photographs under section 552.130 of the Government Code.

In summary, as the body worn camera recording at issue was not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach this information and it need not be released. The sheriff's office must withhold the photographs 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 photographs we indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the visible license plates in the remaining photographs under section 552.130 of the Government Code. The sheriff'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

⁶ The 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).

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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/rm

Ref: ID# 839116

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Interested Party
(w/o enclosures)