



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2022

Ms. T. Shaina Primeaux
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6724 Frankford Road
Dallas, Texas 75252

OR2022-24747

Dear Ms. Primeaux:

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# 966793.

The Wills Point Police Department (the "department"), which you represent, received four requests from different requestors for information pertaining to a specified incident. You state the department is redacting certain motor vehicle record information pursuant to section 552.130(c) of the Government Code and social security numbers pursuant to section 552.147(b) of the Government Code.¹ You also state you released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.1085 of the Government Code. You also state you notified the deceased individual's next of kin of the request for information and of their right to submit arguments to this office as to why this 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 the notified party. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the requests received by the department differ in the types of information sought pertaining to the incident specified in the requests. Thus, the

¹ Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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 id.* § 552.147(b).

department need not release information to any of the requestors that is not responsive to their respective requests.

Next, we must address the department's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). The department received the first request for information on May 20, 2022. The department received the second request for information on May 24, 2022. We understand the department was closed on May 30, 2022, in observance of Memorial Day. This office does not count the date the request was received or holidays, including skeleton crew days observed by a governmental body, for purposes of calculating a governmental body's deadlines under the Act. The department does not inform us it was closed for any other business days between May 20, 2022, and June 8, 2022. Accordingly, the department was required to provide the information required by section 552.301(b) in response to the first request by June 6, 2022, and the information required by section 552.301(b) in response to the second request by June 8, 2022. We note the envelope in which the department provided the information required by section 552.301(b) was postmarked June 9, 2022. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we conclude the department failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

However, we note some of the submitted information consists of 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 provides, in relevant part, the following:

(a) 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 third requestor does not give the requisite information under section 1701.661(a) for the submitted body worn camera recording. As the third requestor did not properly request the body worn camera recording pursuant to chapter 1701 of the Occupations Code, our ruling does not reach this information and it

need not be released to the third requestor.² However, pursuant to section 1701.661(b), a “failure to provide all the information required by Subsection (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). Further, we note the second requestor provided the requisite information under section 1701.661(a) for the submitted body worn camera recording. Accordingly, the second requestor properly requested the submitted body worn camera recording. Section 1701.662(a) of the Occupations Code provides as follows:

Notwithstanding [s]ection 552.301(b) of the Government Code, a governmental body’s request for a decision from the attorney general about whether a requested body worn camera recording falls within an exception to public disclosure is considered timely if made not later than the *20th business day* after the date of the receipt of the written request.

Id. § 1701.662(a) (emphasis added). Accordingly, the 20-business-day deadline for the body worn camera recording, as it pertains to the second requestor, was June 22, 2022. Thus, notwithstanding the department’s failure to comply with section 552.301(b), we find the department timely requested a decision to withhold the submitted body worn camera recording in accordance with section 1701.662(a) as it relates to the second requestor. Accordingly, we will address your arguments against disclosure of the body worn camera recording. However, with respect to the remaining information responsive to the first and second requests, pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See* Gov’t Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Because sections 552.101 and 552.1085 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these exceptions for the remaining information. However, we find you have failed to establish a compelling reason to address your claim under section 552.108 of the Government Code for the remaining information. We will also address your argument under section 552.108 of the Government Code for the remaining responsive information that was timely submitted.

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 of the Government Code encompasses section 58.008 of the Family Code, which provides, in part, as follows:

(b) Except as provided by Subsection (c), law enforcement records concerning a child and information concerning a child that are stored by

² As we are able to make this determination, we need not address your arguments against disclosure of this information to the third requestor.

electronic means or otherwise and from which a record could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult records;
- (2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subsection (c) or Subchapter B, D, or E.

Fam. Code § 58.008(b); *see also id.* § 51.03(a)-(b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of Family Code). Section 58.008(b) is applicable to records of juvenile conduct that occurred before, on, or after September 1, 2017. *See* Act of May 28, 2017, 85th Leg., R.S., ch. 746, § 22. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining “child” for purposes of title 3 of Family Code). Upon review, we find you have failed to demonstrate any of the information at issue identifies an individual who is ten years of age or older or under the age of seventeen as a suspect or offender of delinquent conduct or conduct indicating a need for supervision. Therefore, the department may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with section 58.008 of the Family Code.

Section 552.108(a)(2) of the Government Code exempts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The department states the remaining responsive information relates to a closed criminal investigation that did not result in a conviction or deferred adjudication. Based on this representation and our review, we agree section 552.108(a)(2) is applicable to the information at issue. Accordingly, the department may withhold the information we have marked and indicated under section 552.108(a)(2) of the Government Code.³

Section 552.101 of the Government Code also 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

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

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 Fadlo 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.); 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).

Because the remaining information relates to a deceased individual, it may not be withheld from disclosure based on the deceased individual’s privacy interests. However, we have received a statement from a member of the deceased individual’s family asserting a privacy interest in the submitted photographs and objecting to its release. After reviewing the submitted comments and the information at issue, we find the family’s privacy interest in the information at issue outweighs the public’s interest in the disclosure of this information. Therefore, the department must withhold the submitted photographs we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.⁴

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. The Third 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.). We note the some of the requestors have a right of access to the dates of birth of their clients or minor children pursuant to section 552.023 of the Government Code and that information may not be withheld from the respective requestor under section 552.101 on the basis of common-law privacy. *See* Gov’t Code § 552.023(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

⁴ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Because “the right of privacy is purely personal[,]” that right “terminates upon the death of the person whose privacy is invaded[.]” *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 § 6521)); 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”). Thus, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. Accordingly, with the exception of the dates of birth to which each requestor has a right of access, the department must withhold 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 department has not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the department may not withhold any portion of the remaining information under section 552.101 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.* § 552.1085(a)(6). Upon review, we find none of the remaining photographs consist of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the department may not withhold the remaining photographs under section 552.1085(c) of the Government Code.

In summary, as the third requestor did not properly request the body worn camera recording, our ruling does not reach this information and it need not be released to the third requestor. The department may withhold the information we have marked and indicated under section 552.108(a)(2) of the Government Code. The department must withhold the submitted photographs we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. With the exception of the dates of birth to which each requestor has a right of access, the department must withhold all living public citizens’ dates of birth under section 552.101 of the Government

Code in conjunction with common-law privacy. The department 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 <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,

Pearlie Gault
Assistant Attorney General
Open Records Division

PG/jm

Ref: ID# 966793

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

⁵ We note the requestors have a right of access to some of the information being released in this instance. *See* Transp. Code § 550.065(c); *see also* Gov't Code § 552.023(a); ORD 481 at 4. Thus, if the department receives another request for the same information from a different requestor, the department must again seek a decision from this office.