



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 22, 2022

Ms. Sarah E. Alexander  
Open Records Coordinator  
Texas Military Department  
P.O. Box 5218  
Austin, Texas 78763-5218

OR2022-29303

Dear Ms. Alexander:

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# 970826 (Reference No. T22-115).

The Texas Military Department (the "department") received a request for information regarding investigations into the deaths of eight named individuals.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.117, and 552.152 of the Government Code.<sup>2</sup> Additionally, you state the department notified interested third parties of the 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

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<sup>1</sup> You state the department sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup> Although you raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held in an employment context.

have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note the submitted information may have been the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2022-10911 (2022). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, to the extent the requested information is identical to the information previously requested and ruled upon, the department must continue to rely on Open Records Letter No. 2022-10911 as a previous determination and release or withhold the information at issue in accordance with that ruling.<sup>4</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by the prior ruling, we will consider your arguments.

Next, we note the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of completed reports that are subject to section 552.022(a)(1). The department must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* Although the department seeks to withhold the information at issue under section 552.111 of the Government Code, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver. Therefore, the department may not withhold any portion of the information at issue under section 552.111. However, because sections 552.101, 552.117, and 552.152 can make information

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<sup>3</sup> We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>4</sup> In this instance, as our ruling is dispositive, we need not address your arguments against disclosure of the submitted information.

confidential under the Act, we will address the applicability of these exceptions to the information at issue.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 437.232 of the Government Code, which provides, as follows:

(a) In this section, “military personnel information” means a service member’s name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.

(b) A service member’s military personnel information is confidential and not subject to disclosure under Chapter 552.

*Id.* § 437.232. Upon review, we find the submitted information contains military personnel information maintained by the Texas military forces. *See id.* § 437.001(8) (providing “service member” for purposes of chapter 437 means a member or former member of the state military forces or a component of the United States armed forces, including a reserve component), (13) (providing the department is the state agency charged with administrative activities in support of the Texas military forces), (14) (providing that “Texas military forces” for purposes of chapter 437 means the Texas National Guard, the Texas State Guard, and any other military forces under state law). Accordingly, the department must withhold the names of the service members at issue, their home addresses, ranks, official titles, pay rates or grades, deployment locations, military duty addresses, awards and decorations, and lengths of military service under section 552.101 in conjunction with section 437.232.<sup>5</sup> However, we find you have failed to demonstrate the remaining information consists of military personnel information that is subject to section 437.232. Therefore, the department may not withhold the remaining information under section 552.101 on that basis.

Section 552.117(a)(11) of the Government Code applies to records a governmental body holds in an employment capacity and, in relevant part, excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former member of the Texas military forces who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(11). Section 552.117(a)(11) applies, in part, to the Texas military forces as that term is defined by section 437.001 of the Government Code. *Id.* § 437.001. We note, for purposes of section 552.117, “family member” means a spouse, minor child, or adult child who resides in the person’s home. *Id.* § 552.117(c) (providing “family member” has meaning assigned by Fin. Code § 31.006(d)). Whether a particular piece of information is protected by section 552.117(a)(11) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department must withhold information under section 552.117 on behalf of a current or

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<sup>5</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

former member of the Texas military forces only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

Most of the information at issue pertains to deceased individuals. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the department must withhold the information we have marked under section 552.117(a)(11).<sup>6</sup> We note the protection afforded by section 552.117 generally does not lapse at death, as it is intended to protect the privacy of both the individual and the individual's family members. However, because the protection of social security numbers under section 552.117 is intended solely to protect the privacy of the individual, we note this protection lapses at death and that information may not be withheld under section 552.117. *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). Additionally, we find the remaining information is not information subject to section 552.117. Thus, the department may not withhold the remaining information on that basis.

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 “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 489; *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145; Attorney General Opinions JM-229, H-917; ORD 272. Upon review, we find no portion of the remaining information is highly intimate or embarrassing information of a living individual and of no legitimate public concern. Therefore, the department 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 (citing *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

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<sup>6</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of the submitted information.

therefore may not be asserted solely on behalf of a deceased individual. *See Moore*, 589 S.W.2d at 491; ORD 272. 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).

We note most of the submitted information relates to deceased individuals, and the department may not withhold this information at issue based on the deceased individuals' privacy interests. Further, 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 a family member has a privacy interest in the information at issue. Therefore, upon review, we find you have failed to demonstrate how any portion of the information at issue falls within the zones of privacy or implicates a living individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the requested information under section 552.101 on the basis of constitutional privacy

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You generally raise section 552.152 of the Government Code for the remaining information. Upon review, we find you have failed to demonstrate the release of the remaining information would subject an employee or officer to a substantial risk of physical harm. Accordingly, the department may not withhold any of the remaining information under section 552.152 of the Government Code.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the department must continue to rely on Open Records Letter No. 2022-10911 as a previous determination and release or withhold the information at issue in accordance with that ruling. The department must withhold the names of the service members at issue, their home addresses, ranks, official titles, pay rates or grades, deployment locations, military duty addresses, awards and decorations, and lengths of military service under section 552.101 in conjunction with section 437.232 of the Government Code. The department must withhold the information we have marked under section 552.117(a)(11) of the Government Code. The department 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,

Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/jm

Ref: ID# 970826

Enc. Submitted documents

c: Requestor  
(w/o enclosures)