



OFFICE of the ATTORNEY GENERAL
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May 28, 2003

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OR2003-3597

Dear Mr. Hegar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181128.

The Katy Police Department (the "department"), which you represent, received two requests for a videotape related to the death of a named individual who was a resident of the Krause Children's Residential Treatment Center (the "treatment center"). You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted videotape. We have also considered the comments submitted on behalf of the treatment center and the comments submitted by the requestors. See Gov't Code § 552.304 (providing for submission of public comments).

Initially, we will address the treatment center's contention that the videotape was made by the treatment center and not the department, and is therefore not "public information" subject to the Public Information Act (the "Act"). Section 552.002 of the Government Code defines "public information" as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body . . ." Gov't Code § 552.002(a)(1). Further, the holding in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), makes clear that almost all information in the physical possession of a governmental body is "public information" subject to the Act. The submitted videotape is in the possession of the city's police department for use in a criminal investigation. Therefore it is public information subject to the Act because it is information that is collected or maintained by the department in connection with the transaction of official business.

Next, we will address the argument that the submitted videotape is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and incorporates the doctrines of common-law and constitutional privacy.

Initially, we must address the question of who may assert a right to privacy. First, we point out that an individual's right to privacy lapses at death. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.) (because “the right of privacy is purely personal,” that right “terminates upon the death of the person whose privacy is invaded”); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); see 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”). Therefore, the deceased has no privacy interest in the submitted videotape.

Next, we will address the contention that the deceased's parents “may have a continuing privacy right as to information concerning their daughter.” As the first Texas court to address the question of who may assert a right to privacy noted, “the overwhelming weight of authority in other states is that an action for the invasion of privacy cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity.” *Moore*, 589 S.W.2d at 491. Following this majority rule, the court “restrict[ed] the right of recovery in cases of this type to the person about whom facts have been wrongfully published.” *Id.*; see also *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093 (5th Cir. 1984) (“Texas does not permit a plaintiff to recover for injury caused by the invasion of another's privacy.”); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990 (6th Cir. 1969) (under Tennessee law, “one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship”); *Swickard v. Wayne County Med. Exam'r*, 475 N.W.2d 304, 311-12 (Mich. 1991) (“We follow the general rule that the right of privacy is personal, and the relatives of deceased persons who are objects of publicity may not maintain actions for invasion of privacy unless their own privacy is violated.”). Thus, although we in no way discount the significant pain that a family may experience as a result of the publication of facts about a deceased family member, the family may only seek to prevent disclosures that would result in invasion of *their own* privacy interests. The family members are not depicted in the videotape. As the deceased's family members' privacy is not implicated in the submitted videotape, we find the videotape may not be withheld based on this argument.

Next, we will address the argument that the submitted videotape contains images of other residents of the treatment center, and that these “juvenile residents . . . have an expectation of privacy as to what goes on in their daily life and treatment during their stay at [the

treatment center].” After reviewing the submitted videotape, however, we find that it does not contain any images of any juvenile resident other than the deceased. The videotape therefore may not be withheld based on the privacy interests of other juvenile residents of the treatment center.

Finally, we will address the argument that the videotape violates the privacy of the persons, other than the deceased, depicted in the videotape. The only other persons depicted in the videotape are the staff members of the treatment center. The Texas Supreme Court has determined that section 552.101 of the Government Code prevents the government from disclosing items if the disclosure would give rise to a tort action for the “invasion of an individual’s freedom from the publicizing of his private affairs.” *Industrial Found.*, 540 S.W.2d at 683; *see also Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (under the Act, “the proper way to evaluate a claimed invasion of privacy is to apply the state tort law dealing with that injury”). The elements of a tort action for disclosure of private facts are: “(1) publicity was given to matters concerning one’s personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern.” *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995) (citing *Industrial Found.*, 540 S.W.2d at 682). Thus, as expressly articulated by the Texas Supreme Court, section 552.101 excepts information from mandatory disclosure under the Act if: “(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.” *Industrial Found.*, 540 S.W.2d at 685.

To demonstrate the applicability of this exception, a person must affirmatively establish *both* prongs of this test. *Id.* at 681-682. The first prong of the privacy test requires a showing that the disclosure is of highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. *Industrial Found.*, 540 S.W.2d at 683. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In determining whether the release of information would be “highly objectionable to a reasonable person,” we must look to the information itself, to determine whether it contains “highly intimate or embarrassing facts.” Having reviewed the videotape, we find that it contains no depiction or information that is in any way intimate or embarrassing to the treatment center employees. Therefore, the department may not withhold the videotape under common-law privacy.

We now turn to the second prong of the *Industrial Foundation* test, which requires that the person having a privacy interest in the information show that the information “is not of legitimate public concern.”¹ *Industrial Found.*, 540 S.W.2d at 684-5. Because the test requires an affirmative showing of both elements, “[t]here may be circumstances in which the special nature of the information makes it of legitimate concern to the public even though the information is of a highly private and embarrassing nature.” *Id.* at 685.

Whether any particular information is “of legitimate public concern” must be determined on a case-by-case basis, “considering the nature of the information and the public’s legitimate interest in its disclosure.” *Star-Telegram, Inc.*, 915 S.W.2d at 474. The courts have consistently recognized that matters of “legitimate public concern” in the common-law tort context extend “beyond subjects of political or public affairs to all matters of the kind customarily regarded as ‘news’ and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published.” *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

The submitted videotape reveals the treatment of a juvenile at a residential treatment center charged with caring for up to sixty-five children, placed by either Children’s Protective Services or the Fort Bend County Probation Department. We think there can be no doubt that the subject matter of the videotape is a matter of legitimate public concern. Accordingly, the videotape has not met either prong of the *Industrial Foundation* test because the videotape does not contain intimate details about the treatment center employees, and the public has a legitimate interest in the videotape. Thus, the videotape is not excepted under common-law privacy.

We now turn to the argument that the treatment center employees have a constitutional right to privacy to prevent the disclosure of the videotape. The Texas Supreme Court has explained that

the United States Supreme Court has recognized that at least two different kinds of privacy interests are protected by the United States Constitution. The first type of privacy protects an individual’s interest in avoiding the

¹We ordinarily would not need to address the legitimate public concern requirement since we have determined that the videotape does not meet the first prong under common-law privacy. However, under these circumstances, we believe it is important to address the public interest in all of the circumstances surrounding the incident at the treatment center.

disclosure of personal information. This is the “right to be let alone,” which has been characterized as “the right most valued by civilized men.”

City of Sherman v. Henry, 928 S.W.2d 464, 467 (Tex. 1996) (citing and quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)); *see also Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985) (“The Constitution protects individuals against invasion of their privacy by the government. The liberty interest in privacy encompasses two notions: the freedom from being required to disclose personal matters to the government and the freedom to make certain kinds of decisions without government interference. The disclosure strand of the privacy interest in turn includes the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern.” (citations omitted)).

Under the federal constitution, “in the context of governmental disclosure of personal matters, an individual’s right to privacy is violated if: (1) the person had a legitimate expectation of privacy; and (2) that privacy interest outweighs the public need for disclosure.” *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir 1996); *see also Abdeljalil v. City of Fort Worth*, 55 F. Supp.2d 614 (N.D. Tex. 1999). The constitutional test requires a balancing of these two elements. This balancing test considers a number of factors, including the potential for harm in any subsequent non-consensual disclosure of the information, and “whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.” *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980)). We will apply the balancing test to the videotape to determine whether the department must withhold it under the constitutional right to privacy. First, we conclude that the staff members do not have a legitimate expectation of privacy because they know they are being taped and that the tape will be viewed by others. Furthermore, as we discussed above, there is substantial public interest in knowing how juveniles placed by the state into the treatment center are cared for and treated. Therefore, the department may not withhold the videotape under constitutional privacy.

The department asks whether the videotape is confidential under section 464.010(e) of the Health and Safety Code. That section provides in pertinent part:

All records made by the commission during its investigation of alleged abuse or neglect are confidential and may not be released except that the release may be made:

- (1) on court order;
- (2) on written request and consent of the person under investigation or that person's authorized attorney; or
- (3) as provided by Section 464.011.

Health & Safety Code § 464.010(e). Section 464.011 states that “[u]nless prohibited or limited by federal or other state law, the commission may make its licensing and investigatory records that identify a client available to a state or federal agency or law enforcement authority on request and for official purposes”. Health & Safety Code § 464.011. We find, however, that these sections only apply to records made by the “commission,” which is defined as “the Texas Commission on Alcohol and Drug Abuse.” Health & Safety Code § 464.001(2). Section 464.010(e) does not apply in this instance and therefore does not make the submitted videotape confidential.

Next, we will address the argument that the videotape “shows what may be considered actions of the staff and determined to be a part of the Krause Center records for review of staff, which may be privileged, and its release would cause irreparable harm.” You cite to *Ebony Lake Healthcare Center v. Texas Department of Human Services*, 62 S.W.3d 867 (Tex. App.—Austin 2001, no pet.), in support of this argument. Ebony Lake claimed that the information sought was created by a medical peer review committee and was therefore made confidential by the medical peer review committee privilege of the Medical Practice Act, which provides that “[e]ach proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” Occ. Code § 160.007. A “medical peer review committee” is defined as a

committee of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians.

Ebony Lake, 62 S.W.2d at 971-72; Occ. Code § 151.002(8)). The documents at issue in this case detailed, among other things, investigations and reviews of some of the facility’s medical staff. The court agreed that Ebony Lake demonstrated that the requested documents would be protected by the medical peer review committee privilege. The videotape at issue in the present ruling was not created as part of a medical peer review committee proceeding

and was not made by a medical peer review committee. Moreover, documents made in the regular course of business are not confidential under the medical peer review privilege. *In re Osteopathic Med. Ctr. Of Tex.*, 16 S.W.3d 881 (Tex. App.—Fort Worth 2000, no pet.) The videotape was made in the regular course of business and therefore may not be withheld based on section 160.007 of the Occupations Code.

Finally, we address the argument that the videotape is protected under section 58.007 of the Family Code.² Both parties who submitted briefing to this office claim the videotape is confidential under this section because the tape shows images of the deceased, and other juvenile residents of the facility. First, as noted above, the videotape does not contain images of other juvenile residents of the facility. Furthermore, section 58.007 of the Family Code applies to juvenile law enforcement records and files and does not apply where the information in question involves only a juvenile complainant or witness and not a juvenile suspect or offender. The submitted videotape is not a juvenile law enforcement record pertaining to a juvenile suspect or offender engaging in delinquent conduct or conduct indicating a need for supervision. Therefore, it is not confidential under section 58.007.

In summary, we find that the submitted videotape may not be withheld from required public disclosure, and must be released to the requestors.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

²Although both parties cite to section 55.007, no such section exists in the Family Code. Section 58.007(c) applies to records or files related to juvenile offenders.

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

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Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 181128

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