



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2005

Mr. John T. Patterson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2005-09007

Dear Mr. Patterson:

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# 233520.

The Waco Police Department (the "department") received a request for all information related to the "Patrick Dennehy/Carlton Dotson investigation." You state that the department will release some information to the requestor, with social security numbers redacted pursuant to section 552.147 of the Government Code.¹ See Gov't Code § 552.147(b) (governmental body may redact social security number of living person from public release without necessity of requesting decision from this office under the Act). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information appears to have been obtained by the department pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. Open Records Decision No. 411 (1984). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is

¹We have marked for release one "system person number" that you have highlighted that is not a social security number and is not, therefore, confidential under section 552.147.

within the grand jury's constructive possession and is not subject to the Act. Open Records Decision No. 513 at 3 (1988). Thus, to the extent that the information at issue was obtained pursuant to a grand jury subpoena and is held by the department as agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. To the extent the submitted information does not consist of records of the judiciary, it is subject to the remainder of this ruling as discussed below.

You claim that criminal history record information ("CHRI") is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses laws that make CHRI confidential. CHRI "means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions" but does not include "driving record information maintained by [the Department of Public Safety ("DPS")] under Subchapter C, Chapter 521, Transportation Code." Gov't Code § 411.082(2).

CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Section 411.083 of the Government Code deems confidential CHRI that the DPS maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. After reviewing the information at issue, we find that some of it consists of CHRI. Accordingly, we have marked the CHRI that must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306(a) provides the following:

A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;

- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306(a). We agree that some of the information you have marked is confidential under section 1703.306. We have marked the information accordingly, and we have also marked additional information that is confidential under section 1703.306 and that must be withheld under section 552.101 in conjunction with this statute.

You next claim that certain pawnbroker information must be withheld under section 552.101 of the Government Code in conjunction with chapter 371 of the Finance Code. Section 371.206 of the Finance Code reads as follows:

Information obtained during an examination or inspection authorized by this subchapter is confidential and privileged except for use by the [consumer credit] commissioner or in a criminal investigation or prosecution.

Fin. Code § 371.206. Additionally, section 371.204 of the Finance Code requires a pawnbroker to allow a peace officer to inspect the pawnbroker's books, accounts, papers, correspondence, or other records that relate to the business of the pawnbroker at any reasonable time without judicial writ or other process. You represent that the department obtained the information at issue during an inspection authorized by section 371.204. Upon review, we agree that some of the information you have marked is confidential pursuant to section 371.206 of the Finance Code, and it must be withheld under section 552.101 of the Government Code. We have marked this information, as well as additional information that is also confidential under section 371.206 and that must, therefore, be withheld under section 552.101.

You also argue that some of the submitted information is protected from disclosure pursuant to the doctrine of common-law privacy. Section 552.101 also encompasses the common-law right to privacy, which protects information if it: (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. 540 S.W.2d at 683. In addition,

this office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (1990) (*citing U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)). We have marked the information that must be withheld pursuant to section 552.101 in conjunction with common-law privacy.²

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)). The right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. *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.); Open Records Decision No. 272 at 1 (1981). 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*, 124 S. Ct. 1570 (2004). Here, you state, and provide documentation showing, that Patrick Dennehy's family has contacted you and asserted a privacy interest in the release of the death-scene images of their son, Mr. Dennehy. After reviewing your comments, the family's correspondence and the submitted information, we find, in this instance, that the family's privacy interest in the photographs of the deceased and the portions of the submitted videotape that depict the body of the deceased outweighs the public's interest in the disclosure of this information. Thus, the department must withhold the photographs of the deceased and the portions of the videotape that depict the body of the deceased under section 552.101 of the Government Code.

You also raise section 552.130 of the Government Code, which provides in relevant part the following:

²As our ruling is dispositive, we need not address your remaining argument against disclosure for a portion of the information you have highlighted.

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1)-(2). We agree that the department must withhold most of the Texas motor vehicle record information that you have marked under section 552.130. We have also marked additional information that must be withheld under section 552.130. We note, however, that section 552.130 does not except out-of-state drivers' license numbers, and we have marked one out-of-state driver's license number, along with some other information that you have highlighted, that is not confidential under section 552.130 and that must be released.

You also raise section 552.137 of the Government Code for a highlighted e-mail address. Section 552.137 makes certain e-mail addresses confidential. Under section 552.137, a governmental body must generally withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b), (c). You do not inform us that a member of the public has affirmatively consented to the release of the highlighted e-mail address contained in the submitted materials. The department must, therefore, withhold the highlighted e-mail address under section 552.137.

Finally, to the extent the submitted information we have marked was not obtained pursuant to a grand jury subpoena and does not, therefore, consist of records of the judiciary, we note that this information contains an account number. Section 552.136 of the Government Code provides in part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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.

Gov't Code § 552.136. We have marked the account number that the department must withhold pursuant to section 552.136.

In summary, to the extent that the information at issue was obtained pursuant to a grand jury subpoena and is held by the department as agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. The marked CHRI must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code. We have marked information that must be withheld under section 552.101 in conjunction with sections 1703.306 of the Occupations Code and 371.206 of the Finance Code. The department must withhold the information we have marked in the documents under section 552.101 in conjunction with common-law privacy, and the photographs of the deceased and the portions of the videotape that depict the body of the deceased must be withheld under section 552.101 in conjunction with constitutional privacy. With the exception of the information we have marked for release, the department must withhold the information it has marked and that we have marked under section 552.130. The department must withhold the account number we have marked under section 552.136 and the highlighted e-mail address under section 552.137. All remaining information must be released to the requestor.

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).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

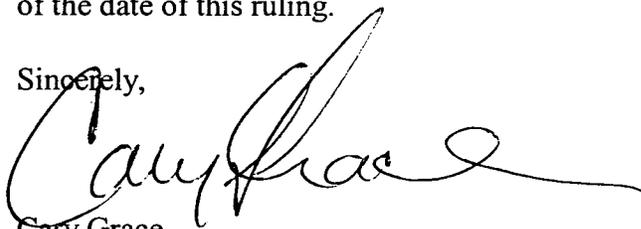
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read "Cary Grace", written over a white background.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/sdk

Ref: ID# 233520

Enc. Submitted documents

c: Mr. Stephen Iandoli
KCEN-TV/NBC News
2624 North 17th Street, Apt. A
Waco, Texas 76708
(w/o enclosures)