



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 13, 2006

Sheriff Charles L. West
Milam County
103 South Fannin
Cameron, Texas 76520

OR2006-02491

Dear Sheriff West:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 243035.

The Milam County Sheriff's Office (the "sheriff") received a request for a specified incident report relating to a fatality. You claim that the requested information is excepted from disclosure under section 552.108 of the Government Code and Rule 615 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted information. We have also considered arguments submitted by a surviving family member. See Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we note that you inform this office that the sheriff provided a copy of the incident report, including photographs, to the victim's family. Information that a governmental body has previously released to the public may not be withheld by the governmental body unless it is able to demonstrate that the information is confidential by law. Gov't Code § 552.007. Although you assert that this information is protected under section 552.108 of the Government Code, this exception is discretionary and may be waived. As such, section 552.108 does not make information confidential for purposes of section 552.007. See *id.* (prohibiting selective disclosure of information that governmental body has voluntarily made available to any member of the public); Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive

exceptions to disclosure under the Act, but it may not disclose information made confidential by law).

We also understand you to assert that the submitted information is confidential under Rule 615 of the Texas Rules of Evidence. 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. This exception encompasses information that other statutes make confidential. Rule 615 provides, in relevant part, that "[a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified." TEX.R.EVID. 615(a). This office has determined that to fall within section 552.101, a statute must explicitly require confidentiality; confidentiality will not be inferred. *See* Open Records Decision No. 465 (1987). *See also* Open Records Decision Nos. 575 (1990), 574 (1990) (discovery privileges do not make information confidential for purposes of statutory predecessor to section 552.101). *But see In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (the Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" that may make information confidential for purposes of section 552.022 of the Government Code). Rule 615 does not make information expressly confidential. Accordingly, the sheriff may not withhold any of the submitted information under section 552.101 in conjunction with Rule 615 of the Texas Rules of Evidence or section 552.108 of the Government Code. We note, however, that some of the submitted information may be confidential under sections 552.101, 552.130, 552.137, and 552.147 of the Government Code.¹ Accordingly, we will address the applicability of these exceptions.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates 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 addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: 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), personal financial information not relating to the financial transaction between

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we conclude that the photographs of the injuries of the surviving individual are confidential under common-law privacy, and must be withheld under section 552.101 on that basis.

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). In this instance, a surviving family member has asserted a privacy interest in the release of the death-scene photographs of the individual. After reviewing the surviving family member's comments and the submitted information, we find that the family's privacy interest in the photographs of the deceased outweighs the public's interest in the disclosure of this information. Thus, the sheriff must withhold the photographs of the deceased under section 552.101 of the Government Code.

Next, we note that some of the submitted information is excepted under section 552.130 of the Government Code, which in relevant part:

(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). The sheriff must withhold the Texas motor vehicle record information we have marked under section 552.130.

We also note that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that members of the public have affirmatively consented to their release. Therefore, the sheriff must withhold the e-mail addresses we have marked under section 552.137.

Finally, the remaining information includes social security numbers. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act.² Therefore, the sheriff must withhold the social security numbers in the submitted information under section 552.147.

In summary, the sheriff must withhold 1) the photographs of the surviving individual under section 552.101 in conjunction with common-law privacy, 2) the photographs of the deceased individual under section 552.101 in conjunction with constitutional privacy, 3) the information we have marked under sections 552.130 and 552.137 of the Government Code, and 4) the social security numbers in the submitted information under section 552.147 of the Government Code. The remaining submitted information must be released pursuant to section 552.007 of the Government Code.

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).

²We note that 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 under the Act.

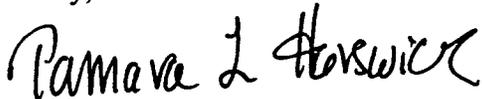
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 243035

Enc. Submitted documents

c: Ms. Melissa McGuire
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(w/o enclosures)