



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2009

Ms. Vivian J. Harvey
Assistant County Attorney
Henderson County
100 East Tyler Street
Athens, Texas 75751

OR2009-15563

Dear Ms. Harvey:

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# 360109.

The Henderson County Sheriff's Office (the "sheriff") received a request for "how many times police officers have been called out to [a specified address], the dates of each callout, [a]nd what each call was for." You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ You state you have notified the residents at the specified address pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the attorney of the residents.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as the

¹Although you also cite to section 552.110 of the Government Code, you have provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume that you no longer assert this section. *See* Gov't Code §§ 552.301, .302.

confidentiality provisions of Family Code section 58.007. Section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from 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 Subchapters B, D, and E.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007, “child” means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). Case number C05-24606 pertains to a juvenile runaway. Thus, we find that this report involves a juvenile engaged in conduct indicating a need for supervision. *See id.* § 51.03(b) (defining “conduct indicating a need for supervision” to include “the voluntary absence of a child from the child’s home without the consent of the child’s parent or guardian for a substantial length of time or without intent to return”). It does not appear that any of the exceptions in section 58.007 apply. Therefore, we find case number C05-24606 is confidential pursuant to section 58.007(c) of the Family Code and must be withheld under section 552.101 of the Government Code.² However, none of the remaining reports pertain to a juvenile as a suspect, arrestee, or offender. Thus, we find you have failed to demonstrate how the remaining reports involve juvenile delinquent conduct or conduct in need of supervision as defined by the Family Code. *See id.* § 51.03(a), (b). Thus, none of the remaining reports may be withheld under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

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

²As our ruling is dispositive of this information, we need not address your remaining arguments for this report.

important decisions 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); Open Records Decision No. 455 at 3-7 (1987). 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).

You argue the remaining reports should be excepted from disclosure based upon the privacy rights of the family of a deceased individual. In this instance, you state that you have notified the deceased individuals’ family members, the residents of the specified address, of the request. We have received comments from the residents’ attorney who requests that the requested information be withheld. However, after reviewing the information at issue, we find that its release would not implicate any of the surviving family members’ privacy rights. Thus, the remaining information may not be withheld on the basis of constitutional privacy.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of the common-law privacy exception under section 552.101, a person must establish both prongs of the test articulated in *Industrial Foundation*. 540 S.W.2d at 681-82. The types 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We note that common-law privacy is a personal right that lapses at death and does not encompass information that relates only to a deceased individual. *See Moore*, 589 S.W.2d at 489; *see also Justice v. Belo Broadcasting*

Corp., 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984), H-917 (1976); ORD 272 at 1.

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the sheriff must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate how any portion of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

You specifically raise section 552.108(a)(2) of the Act, which provides in relevant part that “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body that claims an exception to disclosure under section 552.108 must sufficiently explain how and why section 552.108 is applicable. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) protects law enforcement records that pertain to a concluded criminal investigation or prosecution that did not result in a conviction or a deferred adjudication. You state that the remaining information “relates to cases that *has* [sic] *not resulted* in a conviction or deferred adjudication” (emphasis added). We note that section 552.108(a)(2) is applicable only if the information at issue is related to a concluded criminal case “that *did not result* in conviction or deferred adjudication.” Gov’t Code § 552.108(a)(2) (emphasis added). Further, you inform this office that “there is a pending case of terrorist[ic] threat, which has not been disposed of.” Because of this contradictory argument, we find that you have failed to demonstrate that the information at issue pertains to a criminal investigation that concluded in a final outcome other than a conviction or a deferred adjudication. Thus, having considered your representations, we find that you have not demonstrated that the remaining information falls within the scope of section 552.108(a)(2). *See id.* § 552.301(e)(1)(A). Accordingly, none of the remaining information may be withheld under section 552.108(a)(2).

In summary, case number C05-24606 must be withheld under section 552.101 in conjunction with section 58.007(c) of the Family Code. The sheriff must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. As you raise no further arguments against the disclosure of the remaining information, it must be released.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 360109

Enc. Submitted documents

cc: Requestor
(w/o enclosures)