



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2011

Mr. David M. Douglas
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR2011-01430

Dear Mr. Douglas:

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# 407246.

The Austin Police Department (the "department") received a request for all information pertaining to a specified murder/suicide case.¹ You claim that the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.1175 of the Government Code. We also understand you to raise sections 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the deceased individuals' families. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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. Section 552.101 encompasses information made confidential by statute, such as section 773.091 of the Health and Safety Code, which provides in relevant part as follows:

¹You inform this office that the requestor modified his request to exclude photographs. Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), EMS records are deemed confidential and may be released only in accordance with chapter 773 of the Health & Safety Code. *See id.* §§ 773.091-.094. You have marked records created by EMS personnel. Upon review, we find section 773.091 is applicable to the information you have marked. We note records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information[.]” *Id.* §§ 773.092(e)(4), .093. Among the individuals authorized to act on the patient’s behalf in providing written consent is a “personal representative” if the patient is deceased. *Id.* Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Thus, the department must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, the department must release this information on receipt of proper consent under section 773.093(a). *See id.* §§ 773.092, .093.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Id. § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes

is authorized, licensed, or certified. *Id.* § 611.001(2). Section 611.001 defines a “patient” as a person who consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. *Id.* § 611.001(1). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990).

Upon review, we agree a portion of the submitted information you have marked consists of mental health records. We have marked portions of the information that constitute communications between a patient and a professional that are subject to chapter 611 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. However, the remaining information you have marked is not a record of the identity, diagnosis, evaluation, or treatment of a patient created or maintained by a professional. It is instead the documentation of communications which is contained within a department police report. You have failed to demonstrate section 611.002 of the Health and Safety Code is applicable to this information. Thus, we conclude the department may not withhold any of the remaining information at issue under section 552.101 in conjunction with section 611.002.

Section 552.101 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 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 Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7. 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*, 124 S. Ct. 1570 (2004).

Thus, because the submitted information relates to deceased individuals, it may not be withheld from disclosure based on their privacy interests. However, the decedents’ parents have asserted a privacy interest in the submitted information. Upon review, we find the parents’ privacy interests in some of the information outweigh the public’s interest in the

disclosure of this information. We therefore conclude the department must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. We conclude none of the remaining information may be withheld from disclosure under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy 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 common-law privacy, both prongs of this test must be established. *See id.* at 681-82. 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. As noted above, 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*, 589 S.W.2d at 491; ORD 272 at 1. Upon review, we find that neither the department nor the decedent's family have demonstrated how the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Next, we note that you have marked information pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code* § 552.130(a)(1)-(2). We note that the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, the Texas driver's license and motor vehicle record information that pertains to a deceased individual may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); ORD 272 at 1. Thus, the information you have marked may not be withheld pursuant to section 552.130 of the Government Code.

Section 552.137 of the Government Code 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). *Gov't Code* § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of types specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code, unless their owners affirmatively consent to their disclosure.

Next, you claim that a portion of the remaining information is subject to section 552.1175 of the Government Code, which provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(b). You have marked a home telephone number of a peace officer who is employed by another law enforcement agency. If this individual is currently a peace officer and elects to restrict access to this information in accordance with section 552.1175, the department must withhold the information you have marked. Otherwise, this information must be released.

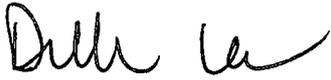
Finally, we note that you have marked a social security number under section 552.147 of the Government Code. The social security number of a living person is excepted from disclosure pursuant to section 552.147 of the Government Code. *Id.* § 552.147(b). However, section 552.147(b) does not apply to the social security number of a deceased individual. *Id.* Therefore, the department may not withhold the social security number of the deceased individual that you have marked under section 552.147.

In summary, the department must withhold the marked EMS information under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the department receives the required consent for release of that information. The department must also withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code and constitutional privacy. The marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless their owners consent to their disclosure. The department must withhold the home telephone number you have marked under section 552.1175 of the Government Code if the individual to whom this information pertains is still a licensed peace officer and elects to restrict access to his information. The remaining submitted information 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/dls

Ref: ID# 407246

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Families of Deceased Individuals
(w/o enclosures)