



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2013

Mr. Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2013-21028

Dear Mr. Bowman:

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# 507555 (TDLR ID# 9664 & 9665).

The Texas Department of Licensing and Regulation (the "department") received two requests from different requestors for information relating to a specified incident. You state the department has released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also inform us you have notified an interested third party of its right to submit comments to this office as to why their information should not be released. *See Gov't Code* § 552.304 (interested part may submit written comments regarding availability of requested information). We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, the department did not fully comply with section 552.301 of the Government Code in raising its argument under section 552.101 of the Government Code. *See id.* § 552.301(b). Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See Gov't Code* § 552.352; Open Records Decision No. 574 at 3 n.4 (2001) (mandatory exceptions). Because section 552.101 is a mandatory exception, we

will consider the department's argument under section 552.101 notwithstanding its violation of section 552.301(b) in raising that exception.

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 other statutes make confidential, such as section 672.009 of the Health and Safety Code, which provides in relevant part:

(a) Information and records acquired by [an unexpected fatality review team] in the exercise of its purpose and duties under this chapter are confidential and exempt from disclosure under [the Act], and may only be disclosed as necessary to carry out the review team's purpose and duties.

Health & Safety Code § 672.009(a). An "unexpected fatality review team" may be established for a county to conduct reviews of unexpected deaths that occur within the county. *See id.* § 672.002. A "review" for purposes of chapter 672 means "a reexamination of information regarding a deceased adult from relevant agencies, professionals, and health care providers." *Id.* § 672.001(5). You inform our office the department is uncertain whether the submitted information resulted from a review performed by an unexpected fatality review team. You state the department is unable "to determine the origin and nature of the documents." Thus, you have not explained, and the submitted information does not indicate, how the submitted information consists of information or records acquired by an unexpected fatality review team for the purposes of section 672.009(a) of the Health and Safety Code. Accordingly, the department may not withhold any portion of the submitted information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy and constitutional privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note the common-law right to privacy is a personal right that "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* 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 at 1 (1981) (privacy rights lapse upon death). Thus, information pertaining solely to a deceased individual may not be withheld under

section 552.101 of the Government Code in conjunction with common-law privacy. Further, we note the names, home addresses, and telephone numbers of living members of the public are generally not highly intimate or embarrassing. *See* Open Records Decision Nos. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not invasion of privacy), 455 at 7 (home addresses and telephone numbers not protected under privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law 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. *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 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. ORD 455 at 4. 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.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). 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. 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). You state you have notified the deceased individual's family of the request for information and of their right to assert a privacy interest in the information at issue. As of the date of this decision, we have not received any correspondence from the deceased individual's family. Thus, we have no basis for determining the family's privacy interest in the submitted information. Therefore, this information may not be withheld under section 552.101 in conjunction with constitutional privacy.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/akg

Ref: ID# 507555

Enc. Submitted documents

c: Requestors
(w/o enclosures)