



February 12, 2015

Ms. Mary Ann Powell
Counsel for the City of Waller
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2015-02869

Dear Ms. Powell:

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# 553418 (Ref. No. COW14-005).

The City of Waller (the "city"), which you represent, received a request for records related to the investigation of a specified incident. You state you will release some information to the requestor. You inform us you will redact information pursuant to sections 552.130, 552.136 and 552.147 of the Government Code, and fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.101

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). 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. *Id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general opinion.

and 552.1085 of the Government Code. Additionally, you contend some of the submitted information is protected by copyright. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses federal law, including section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Attorney General Op. MW-372 (1981). Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find you have failed to demonstrate any of the submitted information consists of a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by a physician or someone under the supervision of a physician. Therefore, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that 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. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We also note Federal Bureau of Investigation ("FBI") numbers constitute CHRI generated by the FBI. We further note records relating to routine traffic violations are not considered criminal history information. *Id.* § 411.082 (2)(B) (criminal history record information does not include driving record information). Additionally, section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we find some of the submitted information, which we have marked, consists of CHRI that is confidential under section 411.083. Thus, the city must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. However, no portion of the remaining information constitutes CHRI for purposes of chapter 411 of the Government Code. Accordingly, the city may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states, except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. The submitted information contains a CR-3 Texas Peace Officer's Crash Report. In this instance, the requestor has not provided the city with

two of the three pieces of required information pursuant to section 550.065(c)(4). Accordingly, the city must withhold the submitted CR-3 report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code also encompasses information protected by chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Chapter 772 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. You inform us the city is part of an emergency communication district established under chapter 772 of the Health and Safety Code. However, we note the telephone number and address contained within the audio recording at issue were provided directly by the 9-1-1 caller at issue. Thus, we find you have failed to demonstrate how any portion of the audio recording at issue consists of the originating telephone number or address of a 9-1-1 caller that was furnished by a 9-1-1 service supplier so as to be subject to chapter 772 of the Health and Safety Code. Accordingly, no portion of the audio recording at issue may be withheld under section 552.101 in conjunction with chapter 772 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the report does not already know their identities. Open Records Decision Nos. 515 at 2-3 (1988), 434 at 1-2 (1986), 208 at 1-2 (1978). For the informer's privilege to apply, the report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at (1990), 515 at 3-4. The privilege affords protection to individuals who report violations of statutes to criminal law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)).

You claim one of the submitted audio recordings reveals the identity of a confidential informant for the city's police department who detailed alleged violations of state law, including delivery of a controlled substance and prostitution. You inform us that, in the audio recording, information such as the name, telephone number, and address of the informant, as well as a detailed narrative of events given by the informant, would reveal the identity of the informant. Further, we note in some circumstances, where an oral statement is captured on tape and the voice of the informant is recognizable, it may be necessary to withhold the entire audio statement to protect the informant's identity. Open Records

Decision No. 434 at 2 (1986). You do not indicate, nor does it appear, the subject of the complaint knows the identity of the complainant. Based on these representations and our review, we conclude the city may withhold the audio recording we have indicated under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.²

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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 also note, because "the right of privacy is purely personal," that right "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 *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d); 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 (1981) ("the right of privacy is personal and lapses 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.

Upon review, we find some of the remaining submitted documentation satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. You also argue some of the remaining video and audio recordings contain information subject to the doctrine of common-law privacy. Upon review, we agree the audio portion of one of the submitted video recordings contains information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. We note the audio portion of the recording at issue is intertwined with the video portion of the recording. You state the city does not have the technological capability to redact such information contained in the video recording at issue. Therefore, we conclude the city must withhold the video recording we have indicated in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy. See

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

Open Records Decision No. 364 (1983). Nevertheless, because the city had the ability to copy the submitted audio-only recordings in order to submit the requested information for our review, we believe the city has the capacity to produce a copy of only the non-confidential portions of the recordings. Therefore, the city must withhold only the information we have indicated in the remaining audio recordings under section 552.101 of the Government Code in conjunction with common-law privacy. *See* ORD 364. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the city may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy, which 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)). However, as noted above, because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore*, 589 S.W.2d at 491; *Justice*, 472 F. Supp. at 146-47; Attorney General Opinions JM-229, H-917; ORD 272 at 1. Nevertheless, the United States Supreme Court has determined surviving family members can have a privacy interest in information relating to their deceased relatives. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (surviving family members have right to personal privacy with respect to their close relative's death-scene images and such privacy interests outweigh public interest in disclosure). The remaining information contains photographs and a video recording of deceased individuals. You inform us, and provide documentation showing, the decedent's family asserts a privacy interest in the information at issue. Upon review, we find the family's privacy interests in these photographs and the video recording outweigh the public's interest in the disclosure of this information. Therefore, the city must withhold the photographs we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. Furthermore, as noted above, you state the city does not have the technological capability to redact information subject to the doctrine of constitutional privacy that is contained within a portion of the remaining video recording. Therefore, we conclude the city must withhold the video recording we have indicated in its entirety under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.³ Moreover, we find an additional

³As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

video recording and additional photographs contain information that falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the city must withhold the additional video recording and photographs we have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.1085 provides, in part:

(c) A sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section. This section applies to any sensitive crime scene image regardless of the date that the image was taken or recorded.

Gov't Code § 552.1085(c). For purposes of section 552.1085, "sensitive crime scene image" means "a photograph or video recording taken at a crime scene, contained in or part of a closed criminal case, that depicts a deceased person in a state of dismemberment, decapitation, or similar mutilation or that depicts the deceased person's genitalia." *See id.* § 552.1085(a)(6). Upon review, we find none of the remaining submitted photographs consist of sensitive crime scene images for the purposes of section 552.1085. Accordingly, the city may not withhold any of the remaining photographs under section 552.1085(c) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See Gov't Code § 552.130.* We note section 552.130 protects privacy, which is a personal right that lapses at death. *Moore*, 589 S.W.2d at 491; *Justice*, 472 F. Supp. at 146-47; Attorney General Opinions JM-229, H-917; ORD 272 at 1. Thus, section 552.130 is not applicable to the driver's license of a deceased individual. As noted above, you state the city will withhold some of the submitted motor vehicle record information pursuant to section 552.130(c) of the Government Code. However, upon review, we find additional portions of the remaining information you have not marked contain motor vehicle record information. Accordingly, the city must withhold the motor vehicle record information you marked, and the additional information we have marked, under section 552.130 of the Government Code. Additionally, we agree some of the remaining audio and video recordings contain information subject to section 552.130. As noted above, you state the city does not have the technological capability to redact the motor vehicle record information contained on the submitted video recordings. Therefore, we conclude the city must withhold the video recordings we have indicated in their entirety under section 552.130 of the Government Code. *See ORD 364.* However, as also noted above, because the city had the ability to copy the submitted audio recordings in order to submit the requested information for our review, we believe the city has the capacity to produce a copy

of only the non-confidential portions of the recording. Therefore, the city must withhold the information we have indicated in the submitted audio recordings under section 552.130 of the Government Code. *See* ORD 364. However, no portion of the remaining information contains information subject to section 552.130 of the Government Code and may not be withheld on that basis.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining “access device”). As noted above, you state you have withheld certain information under section 552.136 of the Government Code. Upon review, the city must withhold the information we have marked under section 552.136 of the Government Code. However, we find the remaining information you have withheld under section 552.136 is not subject to section 552.136 of the Government code, and it may not be withheld on that basis.

Although you state you will withhold social security numbers under section 552.147 of the Government Code, we note you seek to withhold social security numbers of deceased individuals. Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living individual from public release without the necessity of requesting a decision from this office under the Act. Therefore, the deceased individuals’ social security numbers may not be withheld under section 552.147 of the Government Code and must be released. However, the city may withhold the social security numbers of living individuals under section 552.147 of the Government Code.

You state, and we agree, some of the information being released is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

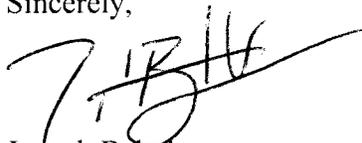
In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The city must withhold the submitted CR-3 report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The city may withhold the audio recording we have indicated in its entirety under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The city must withhold the

information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The city must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy. The city must withhold the information you have marked, and the additional information we have marked and indicated, under section 552.130 of the Government Code. The city must withhold the information we have marked under section 552.136 of the Government Code. The city may withhold the social security numbers of living individuals under section 552.147 of the Government Code. The remaining information must be released; however, any information that is subject to copyright may be released only in accordance with copyright law.

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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 553418

Enc. Submitted documents

c: Requestor
(w/o enclosures)