



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 4, 2015

Ms. Jennifer Matte
Assistant County Attorney
County of Harris
1019 Congress, 15th Floor
Houston, Texas 77002

OR2015-04238

Dear Ms. Matte:

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# 553696 (C.A. File Nos. 14PIA0338, 14PIA0340, 14PIA0341, 14PIA0342, 14PIA0343, 14PIA0344, 14PIA0345, 14PIA0353, and 15PIA0001).

The Harris County Fire Marshal's Office (the "fire marshal's office") received several requests for information regarding a specified incident.¹ You state the fire marshal's office has released information to some of the requestors. You claim the submitted information is

¹We note you have withdrawn your request for a ruling for File Nos. 14PIA0342, 14PIA0353, and 15PIA0001 because the fire marshal's office has released the responsive information to those requestors. Additionally, you have withdrawn your request for a ruling for File No. 14PIA0343 because you state the fire marshal's office does not have information responsive to that request for information. The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Because you have withdrawn your request for a ruling in File Nos. 14PIA0342 and 14PIA0343, we need not address comments submitted to this office by the requestor in those files.

excepted from disclosure under sections 552.101 and 552.1085 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 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. We 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); *see* 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”). Accordingly, the fire marshal’s office may not withhold any portion of the submitted video recordings based solely on the privacy rights of a deceased individual. Upon review, we find no portion of the submitted video recordings is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the fire marshal’s office may not withhold any portion of the submitted video recordings under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy, which 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. 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); ORD 455 at 3-7. The second

²Although you initially raised section 552.108 of the Government Code for the information at issue, you inform our office that you wish to withdraw your claim under that section. Accordingly, we do not address your argument under section 552.108. Additionally, you acknowledge, and we agree, the fire marshal’s office did not comply with section 552.301 of the Government Code in raising sections 552.101 and 552.1085. *See* Gov’t Code § 552.301(b), (e). Nevertheless, because these exceptions can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these exceptions to the information at issue. *See id.* §§ 552.007, .302, .352.

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). However, 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*, 541 U.S. 157 (2004).

The submitted information includes video recordings of four deceased individuals. You inform us a family member of two of the deceased individuals asserts a privacy interest in the video recordings depicting those individuals. Upon review, we find the family's privacy interests in the portions of the video recordings depicting those individuals outweigh the public's interest in the disclosure of this information. You inform us the fire marshal's office does not have the technological capability to redact this information from the video recordings at issue. Therefore, we find the fire marshal's office must withhold the video recordings depicting those two deceased individuals in their entireties under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. However, we have not received a representation from any family member asserting a privacy interest in the remaining video recordings depicting the other two deceased individuals. Additionally, some of the remaining video recordings do not depict a deceased individual or otherwise implicate a living individual's privacy interests for the purposes of constitutional privacy. As such, the fire marshal's office may not withhold any of the remaining video recordings under section 552.101 on this basis.

Section 552.1085 of the Government Code provides, in pertinent part, the following:

(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). You state the remaining video recordings consist of sensitive crime scene images pertaining to a concluded investigation. Upon review, however, we find the information at issue does not consist of sensitive crime scene images for purposes of

section 552.1085 of the Government Code, and the fire marshal's office may not withhold any of the remaining video recordings on that basis.

In summary, the fire marshal's office must withhold in their entirety the video recordings depicting the two deceased individuals whose family member asserted a privacy interest under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The fire marshal's office must release the remaining video recordings.

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,



Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/som

Ref: ID# 553696

Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)