



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 17, 2015

Mr. Steven M. Kean
Deputy City Attorney
City of Tyler
P.O. Box 2039
Tyler, Texas 75710

OR2015-07490

Dear Mr. Kean:

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# 558858 (LegalDesk #FLC-154238).

The Tyler Police Department (the "department") received a request for specified types of information pertaining to officer-involved shooting incidents during a specified time period. You state the department will provide some of the requested information to the requestor. You also state the department will redact social security numbers of living individuals under section 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.1175 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹Section 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 under the Act. Gov't Code § 552.147(b).

²Although you also raise section 552.117 of the Government Code, we note section 552.1175 of the Government Code is the proper exception to raise for information not held by the department in an employment context.

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note the requestor specifically excluded from his request any crime scene photographs depicting victims. Accordingly, this type of information is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release such information in response to this request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). Case number 1-13-000003 consists of a completed investigation subject to section 552.022(a)(1). The department must release the completed investigation information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you assert the information subject to section 552.022(a)(1) is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold any of the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. However, you claim some of the information subject to section 552.022(a)(1) is subject to section 552.101 of the Government Code. Furthermore, we note portions of the information subject to section 552.022(a)(1), as well as the remaining information, are subject to section 552.130 of the Government Code.⁴ As sections 552.101 and 552.130 make information confidential under the Act, we will consider their applicability to the information subject to section 552.022(a)(1), along with the remaining information.

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. This section encompasses information protected by other statutes, such as section 58.007 of the Family Code, which provides, in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise,

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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.

...

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

...

(j) Before a child or a child's parent or guardian may inspect or copy a record or file concerning the child under Subsection (e), the custodian of the record or file shall redact:

(1) any personally identifiable information about a juvenile suspect, offender, victim, or witness who is not the child[.]

Fam. Code § 58.007(c), (e), (j)(1). Section 58.007 is applicable to law enforcement records of juvenile delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997. *See id.* § 51.03(a)-(b) (defining "delinquent conduct" and "conduct indicating a need for supervision" for purposes of section 58.007). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2).

Section 58.007(e) allows for access to juvenile law enforcement records subject to section 58.007(c) by a child's parent or guardian. *Id.* § 58.007(e). However, any personally identifiable information concerning another juvenile suspect, offender, victim, or witness must be redacted from documents subject to release under section 58.007(e). *Id.* § 58.007(j)(1). We note section 58.007(c) does not apply to law enforcement records that relate to a juvenile only as a complainant, victim, witness, or other involved party; rather the juvenile must be involved as a suspect, offender, or defendant for purposes of section 58.007.

See id. § 58.007(c). Although you assert some of the information subject to section 552.022 is confidential under section 58.007(j)(1), that information does not depict a juvenile as a suspect, offender, or defendant. Therefore, we find you have failed to demonstrate the applicability of section 58.007(c) to the information at issue. Because section 58.007(c) is not applicable to the information, the department may not withhold any of the information subject to section 552.022 under section 552.101 of the Government Code in conjunction with section 58.007(j)(1) of the Family Code.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Id. § 261.201(a). You generally contend portions of the information subject to section 552.022 are confidential under section 261.201. Upon review, however, we find you have failed to demonstrate any of the information subject to section 552.022 was used or developed in an investigation of alleged or suspected child abuse or consists of a report of alleged or suspected abuse or neglect under chapter 261 of the Family Code. *See also id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code ch. 261). Therefore, none of the information subject to section 552.022 is confidential under section 261.201 of the Family Code, and none of it may be withheld under section 552.101 of the Government Code on that basis.

We now address your arguments for the remaining information not subject to section 552.022. 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 or 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. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977)); 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”). Therefore, 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 the information we have marked in the remaining information 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.⁵ However, we find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional 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. ORD 455 at 4. 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)). Upon review, we find you have failed to demonstrate how any of the remaining information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family

⁵As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175(a) provides "[t]his section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department;

...

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters;

(6) officers and employees of a community supervision and corrections department established under Chapter 76 who perform a duty described by Section 76.004(b); [and]

...

(9) current and former employees of the office of the attorney general who are or were assigned to a division of that office the duties of which involve law enforcement[.]

Id. § 552.1175(a)(1), (3), (5), (6), (9). The remaining information contains personal information of individuals who may be subject to section 552.1175(a)(1), section 552.1175(a)(3), section 552.1175(a)(5), section 552.1175(a)(6), or section 552.1175(a)(9). Thus, the department must withhold the information we have marked under section 552.1175 of the Government Code if it pertains to an individual who is subject to section 552.1175(a)(1), section 552.1175(a)(3), section 552.1175(a)(5), section 552.1175(a)(6), or section 552.1175(a)(9), and the individual elects to restrict access to this information in accordance with section 552.1175(b). However, if an individual is not subject to section 552.1175(a)(1), section 552.1175(a)(3), section 552.1175(a)(5), section 552.1175(a)(6), or section 552.1175(a)(9), or does not elect to restrict access to this information in accordance with section 552.1175(b), then the department may not withhold this information under section 552.1175 of the Government Code.

You state you will redact the information you have marked under section 552.130 of the Government Code.⁶ Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130(a). We note the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, driver's license information that pertains solely to deceased individuals may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also Belo*, 472 F. Supp. at 147; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. Upon review, we find the department must withhold the additional information we have marked and indicated under section 552.130 of the Government Code.

We note a portion of the remaining information may be subject to Section 552.136 of the Government Code, which states "notwithstanding 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"). We note the purpose of section 552.136 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, information that pertains solely to deceased individuals may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also Belo*, 472 F. Supp. at 147; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. We have indicated information that is generally subject to section 552.136. However, we note the information we have indicated consists of a credit card number and expiration date that belong to a deceased individual. To the extent the information we have indicated pertains to a credit card in which a living individual has an interest, the department must withhold it under section 552.136 of the Government Code. However, if the information we have indicated pertains solely to the deceased individual, the department may not withhold it under section 552.136 of the Government Code.

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 withhold the information we have marked under section 552.1175 of the Government Code if it pertains to an individual who is subject to section 552.1175(a)(1), section 552.1175(a)(3), section 552.1175(a)(5), section 552.1175(a)(6), or section 552.1175(a)(9) of the Government Code, and the individual elects to restrict access

⁶You state you will redact information subject to section 552.130 of the Government Code pursuant to the previous determination issued in Open Records Decision No. 684 (2009). However, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in section 552.130(a) of the Government Code without the necessity of seeking a decision from the attorney general. If a governmental body redacts such information, then it must notify the requestor in accordance with section 552.130(e). *See* Gov't Code § 552.130(d), (e). Thus, the statutory amendment to section 552.130 of the Government Code supercedes Open Records Decision No. 684. Therefore, a governmental body may redact information subject to section 552.130(a) only in accordance with section 552.130, not Open Records Decision No. 684.

to this information in accordance with section 552.1175(b) of the Government Code. The department must withhold the additional information we have marked and indicated under section 552.130 of the Government Code. To the extent the information we have indicated pertains to a credit card in which a living individual has an interest, the department must withhold it under section 552.136 of the Government Code. 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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 558858

Enc. Submitted documents

c: Requestor
(w/o enclosures)