



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 19, 2016

Ms. Elizabeth Dorsey  
Assistant District Attorney  
Waller County District Attorney's Office  
645 12th Street  
Hempstead, Texas 77445

OR2016-08813

Dear Ms. Dorsey:

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# 606340.

The Waller County District Attorney's Office (the "district attorney's office") received a request for photographs and documentation related to the autopsy of a named individual. You state the district attorney's office will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state you have notified the family of the named individual of the request and of their right to submit arguments as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted 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." *Id.* § 552.101. This section encompasses information protected by other statutes. You claim the submitted information is subject to section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

- (a) The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is

investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

(1) under a subpoena or authority of other law; or

(2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

(b) Under the exception to public disclosure provided by Subsection (a), a governmental body . . . may withhold a photograph or x-ray described by Subsection (a) without requesting a decision from the attorney general under Subchapter G, Chapter 552, Government Code. This subsection does not affect the required disclosure of a photograph or x-ray under Subsection (a)(1) or (2).

Crim. Proc. Code art. 49.25, § 11. You state the submitted information, consisting of autopsy photographs, is confidential pursuant to section 11 of article 49.25. However, we note the autopsy photographs pertain to an individual who died while in custody of law enforcement. Photographs taken of the body of a person who died while in custody of law enforcement are public and not confidential. *Id.* § 11(a)(2). Therefore, the autopsy photographs at issue may not be withheld under section 552.101 in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. Therefore, none of the submitted photographs are confidential under section 552.101 in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. Accordingly, the district attorney's office may not withhold the submitted photographs on that basis.

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. However, 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. 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”). Thus, the district attorney’s office may not withhold information pertaining solely to the deceased individual under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, we find you have failed to demonstrate the submitted information is highly intimate or embarrassing to a living individual and not of legitimate public concern. Therefore, the district attorney’s office may not withhold 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 constitutional 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. 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 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (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. *Moore*, 589 S.W.2d at 491. 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). You claim the submitted information is protected by constitutional privacy. However, as of the date of this ruling, we have not received any correspondence from the family of the deceased individual whose information is at issue. Thus, we have no basis for determining the family’s privacy interests in the information at issue. Therefore, this information may not be withheld under section 552.101 in conjunction with constitutional privacy. As you raise no further exceptions to disclosure, the district attorney’s office must release the submitted 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](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 black ink, appearing to read "Tim Neal". The signature is fluid and cursive, with the first name "Tim" being more prominent than the last name "Neal".

Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bhf

Ref: ID# 606340

Enc. Submitted documents

c: Requestor  
(w/o enclosures)