



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 15, 2015

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

OR2015-26308

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# 590615 (LegalDesk Nos. TIS-514330 and XTB-225793).

The City of Tyler (the "city") received two requests from the same requestor for information pertaining to a specified incident involving the named officer, the internal investigation resulting from the named officer's involvement in the specified incident, and all e-mails sent to and from the named officer between December 1, 2012 and May 1, 2013. You state the city does not have information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.130, and 552.147 of the Government Code. You have notified individuals whose personal information is at issue pursuant to section 552.304 of the Government Code. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

You state the city asked the requestor to clarify portions of the request. *See id.* § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request). We understand the requestor has not responded to the request for clarification. Nonetheless,

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8 (1990). Because you have submitted information for our review and raised exceptions to disclosure for this information, we understand the city has made a good-faith effort to determine the submitted information is responsive to the request. Therefore, we will address the applicability of the claimed exceptions to the submitted information.

Next, you inform us some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-17389 (2015). In that ruling, we determined the city must: (1) withhold the information the city marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) withhold the information we marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (3) withhold the photograph we marked under section 552.101 of the Government Code in conjunction with section 143.090 of the Local Government Code; (4) withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (5) withhold the date of birth the city marked under section 552.102(a) of the Government Code; (6) withhold the information the city marked under section 552.117(a)(2) of the Government Code; (7) withhold the motor vehicle record information the city marked and the information we marked under section 552.130 of the Government Code; (8) withhold the information we marked under section 552.136 of the Government Code; and (9) release the remaining information at issue. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the city must rely on Open Records Letter No. 2015-17389 as a previous determination and withhold or release the identical information, which you have marked, in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments for the remaining information, which was not subject to Open Records Letter No. 2015-17389.

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 the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App. Austin May 22,

2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.² *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. 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.); 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. Accordingly, except for the information we have marked for release, the city must withhold the dates of birth you have marked, as well as the additional date of birth we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

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 a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Upon review, we find the city must withhold the motor vehicle record information you have marked, and the additional information we have marked, under section 552.130 of the Government Code.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a). Upon review, we agree the city may withhold the social security number you have marked under section 552.147(a) of the Government Code.

In summary, the city must rely on Open Records Letter No. 2015-17389 as a previous determination and withhold or release the identical information you have marked in accordance with that ruling. Except for the information we have marked for release, the city must withhold the dates of birth you have marked and we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information you have marked and we have marked under section 552.130 of the Government Code. The city may withhold the information you have marked under section 552.147(a) of the Government Code. The remaining information must be released.

²Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

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,



Britni Ramirez
Assistant Attorney General
Open Records Division

BR/bhf

Ref: ID# 590615

Enc. Submitted documents

c: Requestor
(w/o enclosures)