January 25, 2017

Ms. Diana Shearer
Assistant County Attorney
El Paso County Attorney’s Office
500 East San Antonio Avenue, Room 503
El Paso, Texas 79901

Dear Ms. Shearer:

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# 642695 (County File No. OP-16-337).

The El Paso County Medical Examiner’s Office (the “medical examiner’s office”) received a request for all information related to the death of a named individual. You state you have released some information to the requestor with redactions pursuant to section 552.130 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note Exhibits C-1 and C-2 were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-17741

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¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 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).

²We note you failed to comply with your procedural obligations under the Act. See Gov’t Code § 552.301(b). However, because sections 552.101 and 552.130 of the Government Code can provide compelling reasons to withhold information, we will address the applicability of these exceptions to the information at issue. Id. § 552.302.
In that ruling, we determined the medical examiner’s office must: (1) withhold certain information under section 552.101 of the Government Code in conjunction with the Medical Practice Act; (2) withhold certain information under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code; and (3) release the remaining information. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, we conclude the medical examiner’s office must continue to rely on Open Records Letter No. 2016-17741 as a previous determination and withhold or release Exhibits C-1 and C-2 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 information is or is not excepted from disclosure). We will address your arguments for the remaining submitted information not subject to Open Records Letter No. 2016-17741.

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, including 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 [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], 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.

Crim. Proc. Code art. 49.25, § 11(a). You state the submitted photographs are confidential pursuant to section 11 of article 49.25. Upon review, we agree some of the photographs at issue consist of photographs of a body taken during an autopsy. We understand neither of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the medical examiner’s office must withhold the autopsy photographs depicting a body under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. However, we note the remaining photographs, including photographs taken at the hospital, do not consist of photographs of a body taken during an
autopsy. These remaining photographs are not confidential under article 49.25, and the medical examiner’s office may not withhold them under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, under which an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex. 1976). 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.3 Texas Comptroller, 354 S.W.3d at 347-48. Based on Texas Comptroller, the court of appeals concluded the public 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. Thus, the medical examiner’s office must withhold the public citizen’s date of birth you have marked in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country. Gov’t Code § 552.130(a). Accordingly, the medical examiner’s office must withhold Exhibits D-2 and D-3 under section 552.130 of the Government Code.

In summary, the medical examiner’s office must continue to rely on Open Records Letter No. 2016-17741 as a previous determination and withhold or release Exhibits C-1 and C-2 in accordance with that ruling. The medical examiner’s office must withhold: (1) the autopsy photographs depicting a body under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure; (2) the public citizen’s date of birth you have marked in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) Exhibits D-2 and D-3 under section 552.130 of the Government Code. The medical examiner’s office must release the remaining information.

You ask this office to issue a previous determination permitting the medical examiner’s office to withhold public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. See id. § 552.301(a) (allowing

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3Section 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).
governmental body to withhold information subject to previous determination); ORD 673. After due consideration, we have decided to grant your request on this matter. Therefore, this letter ruling authorizes the medical examiner’s office to withhold the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy. We note common-law privacy is a personal right that lapses at an individual’s death. See 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 Open Records Decision Nos. 620 (1993), 272 (1981), 192 (1978). Therefore, this previous determination authorizes the medical examiner’s office to withhold dates of birth of living individuals. This previous determination is not applicable to dates of birth belonging to deceased individuals. We also note a person or a person’s authorized representative has a special right of access under section 552.023 of the Government Code to information that is protected from public disclosure by laws intended to protect the person’s privacy interests. See Gov’t Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, this previous determination is not applicable to dates of birth requested by a person or the authorized representative of a person whose date of birth is at issue. Furthermore, information filed with a court is not protected by common-law privacy. See Gov’t Code § 552.022(a)(17); Star-Telegram v. Walker, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Accordingly, this previous determination is not applicable to dates of birth contained in court-filed documents. So long as the elements of law, fact, and circumstances do not change so as to no longer support the findings set forth above, the medical examiner’s office need not ask for a decision from this office again with respect to this type of information. See ORD 673 at 7-8 (listing elements of second type of previous determination under Gov’t Code § 552.301(a)).

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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/sdk
Ref: ID# 642695

Enc. Submitted documents

c: Requestor
   (w/o enclosures)