



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 5, 2017

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

OR2017-20173

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# 674778 (File Nos. OP-17-239, OP-17-240, & OP-17-241).

The El Paso County Medical Examiner's Office (the "medical examiner's office") received three requests from the same requestor for information pertaining to a specified incident, including the entire autopsy reports of three named individuals. We understand the medical examiner's office will release some information to the requestor upon receipt of payment. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. Additionally, you state, and provide documentation showing, the medical examiner's office notified the next of kin of deceased individuals of their right to submit comments to this office why some of the submitted information should not be released. *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.

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, 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 medical examiner's office will withhold the responsive autopsy photographs without requesting a decision from our office pursuant to section 11(b) of article 49.25 of the Code of Criminal Procedure.¹ Upon review, we find some of the photographs at issue, which we indicated, consist of photographs of a decedent's body taken during an autopsy. We further find neither of the statutory exceptions to confidentiality are applicable in this instance. Accordingly, the medical examiner's office must withhold the autopsy photographs we indicated 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 find the remaining photographs at issue 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 information made confidential by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

¹Section 11(b) of article 49.25 of the Code of Criminal Procedure permits a governmental body to withhold a photograph or x-ray taken during an autopsy without requesting a ruling from this office. Crim. Proc. Code art. 49.25, § 11(b).

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).* Upon review, we find the information we marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient's medical records. Accordingly, the medical examiner's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA.

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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We note 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 v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Open Records Decision No. 272 at 1 (1981)* (privacy rights lapse upon death). 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).

As previously noted, the medical examiner's office states it has notified the next of kin of the deceased individuals of the request for information and of their right to assert a privacy interest in the information at issue. You inform us the medical examiner's office has received correspondence from representatives of two of the deceased individuals' next of kin. We note the families of these deceased individuals do not object to the release of the information at issue with respect to the deceased individuals. As of the date of this letter, we have not received any correspondence from the next of kin of the remaining deceased

individual. Thus, we have no basis for determining the remaining individual's family's privacy interest in the information at issue. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *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. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). You state the medical examiner's office is withholding the dates of birth of members of the public pursuant to the previous determination issued in Open Records Letter No. 2017-01706 (2017).² However, we note the remaining information includes the dates of birth of deceased individuals. As noted above, the right to privacy is a personal right that lapses at death. *Moore*, 589 S.W.2d at 491; *see also Justice*, 472 F. Supp. at 147; Attorney General Opinions JM-229, H-917; ORD 272. Accordingly, the medical examiner's office may not withhold the dates of birth of the deceased individuals pursuant to the previous determination issued to the medical examiner's office in Open Records Letter No. 2017-01706.

You state the medical examiner's office will redact motor vehicle record information pursuant to section 552.130(c) of the Government Code.³ However, we note the information at issue includes motor record vehicle record information that pertains to a deceased individual. Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. We note section 552.130 protects privacy, which is a personal right that lapses at death. *See Moore*, 589 S.W.2d at 491; Attorney General Opinions JM-229, H-917; ORD 272. Thus, section 552.130 is not applicable to motor vehicle record information pertaining to a deceased individual, and the medical examiner's office may not withhold the information pertaining to the deceased individual. Accordingly, the medical examiner's office must withhold the motor vehicle record information we indicated under section 552.130 of the Government Code. However, we find none of the

²Open Records Letter No. 2017-01706 authorizes the medical examiner's office to withhold dates of birth of members of the public under section 552.101 of the Government Code in conjunction with common-law privacy without the necessity of requesting an attorney general's decision.

³Section 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).

remaining information is subject to section 552.130, and none of it may be withheld on that basis.

In summary, the medical examiner's office must withhold the autopsy photographs we indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The medical examiner's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The medical examiner's office must withhold the motor vehicle record information we indicated under section 552.130 of the Government Code. The remaining information must be released.

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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 674778

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)