



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 8, 2010

Ms. Leigh Tomlin  
Public Information Officer  
Texas Forensic Science Commission  
P.O. Box 2296  
Huntsville, Texas 77341-2296

OR2010-00371

Dear Ms. Tomlin:

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# 366634.

The Texas Forensic Science Commission (the "commission") received a request for (1) communications regarding the appointment of a named individual and the non-appointment of another named individual; (2) communications pertaining to three named individuals, two specified entities, a specified e-mail address, or "any other experts considered by the commission[;]" (3) all documents concerning two specified investigations; and (4) all public information requests received by the commission since January 1, 2008. You state that the commission will make some of the requested information available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.115, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the information in Exhibits 2, 3, 4, and 10 was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2009-18224 (2009). In that decision, we ruled that the commission must withhold a portion of the information at issue under section 552.107(1) of the Government Code and release the remaining information. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the commission may continue to rely on Open Records Letter No. 2009-18224 as a previous determination and

withhold or release the same information in accordance with the previous determination.<sup>1</sup> *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).

Next, we must address the commission's procedural obligations under the Act. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). We note that the commission received the request for information on October 16, 2009. Accordingly, the fifteen-business-day deadline was November 6, 2009. However, the commission did not submit the responsive information until November 9, 2009. Consequently, we conclude that the commission failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because sections 552.101, 552.115, 552.136 and 552.137 of the Government Code can provide compelling reasons to withhold

---

<sup>1</sup>As we are able to make this determination, we need not address your arguments against disclosure of the information in Exhibits 2, 3, 4, and 10.

information, we will consider whether any of the submitted information must be withheld under these exceptions.<sup>2</sup>

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 exception encompasses information other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in 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.

(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.

*Id.* § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). This office has determined when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). We note that section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a "patient" under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the diagnosis, evaluation, or treatment. We

---

<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

further note that medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we find that the marked medical records must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 159.002(b) of the MPA, unless the commission receives the required written consent for their release.<sup>3</sup>

Section 552.101 of the Government Code also encompasses section 1703.306(a) of the Occupations Code, which provides "[a] polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]" Occ. Code § 1703.306(a). It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, we conclude the commission must withhold the information acquired from a polygraph examination, which we have marked, under section 552.101 in conjunction with section 1703.306 of the Occupations Code.<sup>4</sup>

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy and excepts from public disclosure private information about an individual if the information (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). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Additionally, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, we note that information relating to an investigation of criminal conduct is generally a matter of legitimate public interest. *See Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case). Further, privacy is a personal right that lapses at death; thus, information may not be withheld on the basis of the privacy interests of a deceased individual. *See*

---

<sup>3</sup>As our ruling is dispositive of this information, we need not address your remaining argument against its disclosure.

<sup>4</sup>As our ruling is dispositive of this information, we need not address your remaining argument against its disclosure.

*Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

Upon review, we find that the information we have marked is highly intimate or embarrassing and of no legitimate public interest, and it relates to living individuals. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information you seek to withhold on the basis of common-law privacy is either not highly intimate or embarrassing, is of legitimate public concern, or relates to a deceased individual. Therefore, the commission may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.115(a) of the Government Code provides that “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]” Gov’t Code § 552.115(a). Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official, and not to information held by the commission. See Open Records Decision No. 338 (1982). Therefore, none of the information at issue may be withheld under section 552.115.

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, 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). Accordingly, the commission must withhold the insurance policy numbers we have marked under section 552.136.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See *id.* § 552.137(a), (b). We note that section 552.137 is not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). See *id.* § 552.137(c). Therefore, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release. However, the remaining e-mail addresses you have marked are maintained by a governmental entity. Therefore, the commission may not withhold any of the remaining information you have marked under section 552.137.

In summary, (1) the commission may continue to rely on Open Records Letter No. 2009-18224 as a previous determination and withhold or release the information in

Exhibits 2, 3, 4, and 10 in accordance with that ruling; (2) the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 159.002(b) of the MPA, unless the commission receives the required written consent for its release; (3) the commission must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code; (4) the commission must withhold the information we have marked under section 552.101 in conjunction with common-law privacy; (5) the commission must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code; and (6) the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release.<sup>5</sup> The remaining information must be released to the requestor.<sup>6</sup>

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

---

<sup>5</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an insurance policy number under section 552.136 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>6</sup>We note the remaining information contains the social security number of a living individual. Section 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.

Ref: ID# 366634

Enc. Submitted documents

c: Requestor  
(w/o enclosures)