



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2012

Ms. Amy L. Currier
Public Information Officer
Texas Funeral Service Commission
P.O. Box 12217
Capitol Station
Austin, Texas 78711

OR2012-09821

Dear Ms. Currier:

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# 457378.

The Texas Funeral Service Commission (the "commission") received two requests for information about a specified mortuary, including whether it is an officially licensed mortuary and the registered agent for service. You state you will release most of the requested information to the requestors. You claim the submitted information is excepted from disclosure under sections 552.101, 552.115, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state you will redact social security numbers pursuant to section 552.147(b) of the Government Code.¹ You further state you will redact driver's license numbers under section 552.130 of the Government Code and will redact bank account numbers and routing numbers under section 552.136 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009). However, on September 1, 2011, the Texas Legislature amended section 552.130 of the Government Code to allow a governmental body to redact the information described in

¹Section 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 under the Act. See Gov't Code § 552.147(b).

subsection 552.130(a)(1), such as driver's license numbers, without the necessity of requesting a decision from this office. *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). Further, the Texas Legislature also amended section 552.136 on September 1, 2011 to allow a governmental body to redact the information described in section 552.136(b) without the necessity of requesting a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Accordingly, a governmental body may only redact information subject to sections 552.130(a)(1) and 552.136(b) in accordance with sections 552.130 and 552.136 respectively, not Open Records Decision No. 684.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which pertains to medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in part:

(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(b), (c). Information 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). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked medical records that are subject to the MPA. The commission must withhold this information under section 552.101 of the Government Code in conjunction with

section 159.002 of the Occupations Code unless it receives written consent for the release of the records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 also encompasses 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We find the information we have marked is highly intimate or embarrassing information and of no legitimate public concern. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.115(a) of the Government Code provides “[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. You seek to withhold page 1 of the submitted information on the basis of section 552.115. However, section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official. The commission is not the Bureau of Vital Statistics or a local registration official; therefore, the commission may not withhold the submitted birth certificate under section 552.115. *See* Open Records Decision No. 338 (1982).

Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. *See* Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee’s overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8. You seek to withhold pages 4 through 9 of the submitted information on the basis of section 552.122 and state these pages reveal all aspects of certain test items developed by the commission, which is a licensing agency. Upon review, we find the test

questions on pages 5 through 9 qualify as test items under section 552.122 of the Government Code. Accordingly, the commission may withhold pages 5 through 9 under section 552.122 of the Government Code. However, we find the answer sheet on page 4 does not reveal the test questions themselves. Therefore, we find the commission may not withhold the answer sheet on page 4 under section 552.122 of the Government Code.

In summary, the commission may only release the medical records we have marked in accordance with the MPA. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission may withhold pages 5 through 9 of the submitted information under section 552.122 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.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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 457378

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)