



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 12, 2016

Ms. Diana Spiller
Public Information Coordinator
Texas Commission on Jail Standards
P.O. Box 12985
Austin, Texas 78711

OR2016-03507

Dear Ms. Spiller:

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# 598231.

The Texas Commission on Jail Standards (the "commission") received a request for specified complaints, specified investigations, and specified inspections pertaining to the Montgomery County Jail.¹ You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.130 and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state some of the requested information was the subject of previous rulings from this office. In Open Records Letter No. 2014-13009 (2014), this office ruled the commission must withhold some information under section 552.101 of the Government Code in conjunction with common-law privacy, but must release the remaining information.

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²Although you do not raise sections 552.130 and 552.137 of the Government Code in your brief, we understand you to raise these exceptions based on your markings in the documents.

In Open Records Letter No. 2014-14601 (2014), this office ruled the commission must withhold medical records under section 552.101 in conjunction with the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code; an FBI number under section 552.101 in conjunction with section 411.083 of the Government Code and federal law; driver’s license information under section 552.130, and e-mail addresses under section 552.137; but must release the remaining information. We have no indication the law, facts, or circumstances upon which the prior rulings were based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, the commission must continue to rely on Open Records Letter Nos. 2014-13009 and 2014-14601 as previous determinations, and withhold or release the previously ruled upon information in accordance with those rulings. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by the prior rulings, we will consider the exceptions you raise.

We note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for the required public disclosure of “information that is also contained in a public court record,” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(17). The court-filed document we have marked is subject to section 552.022(a)(17) and must be released unless confidential under the Act or other law. You seek to withhold the marked court-filed document under section 552.101 of the Government Code in conjunction with common-law privacy. We note that information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). As you raise no further exceptions to disclosure for this information, the commission must release the marked court-filed document pursuant to section 552.022(a)(17) of the Government Code.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. Access to medical records is governed by the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in part:

³We note the commission did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov’t Code § 552.301(e). Nonetheless, because sections 552.101, 552.130, and 552.137 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

(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 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). We have also found when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Upon review, we find some of the submitted information constitutes confidential medical records subject to the MPA. Therefore, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. Additionally, we find some of the submitted information was created by a nurse. The commission must withhold these documents only if they were created under the supervision of a physician under section 552.101 of the Government Code in conjunction with the MPA. If the documents created by a nurse were not created under the supervision of a physician, they are not subject to the MPA and the commission may not withhold them under section 552.101 on that basis. Further, the commission has failed to demonstrate any of the remaining information you have marked consists of medical records subject to the MPA. Therefore, the commission may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as chapter 611 of the Health and Safety Code. Section 611.002 pertains to mental health records and provides, in pertinent part.

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). Upon review, we find portions of the submitted information consist of mental health records that are subject to chapter 611 of the Health & Safety Code. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health & Safety Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). 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. *Indus. Found.*, 540 S.W.2d 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.⁴ *Tex. 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.

⁴Section 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).

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the commission has failed to demonstrate the remaining information it marked is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the commission may not withhold the remaining information it marked under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by this state or another state or country. Gov't Code § 552.130(a)(1), (2). However, we find the commission has failed to demonstrate any of the remaining information consists of motor vehicle record information. Therefore, the commission may not withhold any of the remaining information under section 552.130 of the Government Code.

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)-(c). Accordingly, the commission must withhold the personal e-mail addresses we marked under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, we find the commission has failed to demonstrate the remaining information consists of personal e-mail addresses. Therefore, the commission may not withhold any of the remaining information under section 552.137 of the Government Code.

In summary, to the extent the instant request includes information subject to Open Records Letter Nos. 2014-13009 and 2014-14601, the commission must rely on these rulings as previous determinations and withhold or release the identical information. The commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The commission must withhold the information created by a nurse under section 552.101 of the Government Code in conjunction with the MPA only if the documents were created under the supervision of a physician. If the documents were not created under the supervision of a physician, the commission may not withhold them under section 552.101 of the Government Code on that basis. The commission must also withhold the information we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health & Safety Code. The commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the individuals

to whom the e-mail addresses belong affirmatively consent to their release. The commission must release the remaining information.⁵

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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 598231

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the remaining information contains social security numbers. 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. *See* Gov't Code § 552.147(b).