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ATTORNEY GENERAL OF TEXAS

April 20, 2016

Ms. Dina Powell
Legal Assistant
Texas Alcoholic Beverage Commission
P. O. Box 13127
Austin, Texas 78711-3127

OR2016-08910

Dear Ms. Powell:

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# 608164.

The Texas Alcoholic Beverage Commission (the "commission") received three requests from two requestors for information pertaining to a named business. The commission states it will provide some of the requested information to the requestors, but claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is not responsive to any of the requests for information. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release this information, which we have marked, in response to this request.

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

One of the requestors asserts the commission failed to comply with its procedural obligations under section 552.301 of the Government Code regarding his second request.² Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) 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. *Id.* § 552.301(e). The department states it received the second request on February 25, 2016, which this requestor acknowledges. The department also informs us it observed a skeleton crew day on March 2, 2016. This office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Act. Thus, the commission's ten-business-day deadline under section 552.301(b) was March 11, 2016, and its fifteen-business-day deadline under section 552.301(e) was March 18, 2016. The commission has demonstrated it placed the information required by section 552.301(b) in interagency mail on March 11, 2016, and we received the information required by section 552.301(e) on March 18, 2016. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Therefore, we find the commission complied with its procedural requirements mandated by section 552.301 regarding the second request. Accordingly, we will consider the commission's arguments under the Act to withhold the information at issue in the second request.

We next note the submitted information contains a court-filed document that is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

²The requestor at issue does not assert the commission failed to comply with section 552.301 regarding his first request, which the commission received on February 5, 2016.

Id. § 552.022(a)(17). Although the commission asserts the information subject to section 552.022, which we have marked, is excepted from disclosure under section 552.108, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). We also note common-law privacy is not applicable to information contained in public records. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). Therefore, the commission may not withhold the information subject to section 552.022 under section 552.108 or common-law privacy.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a governmental body possesses information relating to a pending case of another law enforcement agency, the governmental body may withhold the information under section 552.108(a)(1) if it demonstrates the information relates to the pending case and this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. The commission states the Ellis County & District Attorney’s Office (the “district attorney’s office”) objects to disclosure of the remaining information marked under section 552.108(a)(1) because it pertains to a pending criminal prosecution. Based on these representations, we conclude section 552.108(a)(1) is generally applicable to the remaining information marked on that ground. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Nevertheless, we note the information at issue includes a DIC-24 statutory warning and a DIC-25 notice of suspension. Because copies of these forms were provided to the arrestee, we find their release will not interfere with the detection, investigation, or prosecution of crime. Therefore, the commission may not withhold the DIC-24 statutory warning or DIC-25 notice of suspension under section 552.108(a)(1).

Additionally, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public

by *Houston Chronicle*). Thus, with the exception of the DIC-24 statutory warning, the DIC-25 notice of suspension, and basic information, the commission may withhold the remaining it has marked information under section 552.108(a)(1) of the Government Code.³

Section 552.101 of the Government Code also encompasses section 5.48 of the Alcoholic Beverage Code, which provides as follows:

(a) "Private records," as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.

(b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

Alco. Bev. Code § 5.48. This office has construed the term "privileged" in this statute to mean "confidential" for purposes of the Act. Attorney General Opinion JM-1235 at 2 (1990); Open Records Decision Nos. 186 (1978), 62 (1974). Thus, section 5.48 makes confidential any records required or obtained by the commission, with the exception of "the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license" and "a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee." Alco. Bev. Code § 5.48.

The commission states the information it has marked under section 5.48 consists of private records that permittees provided to the commission during the course of an investigation. The commission also informs us, to its knowledge, the submitted information has not been introduced in evidence in a hearing before the commission or before a court. Upon review, we find some of the submitted information, which we have marked, consists of private records under section 5.48 of the Alcoholic Beverage Code. Accordingly, with the exception of the name, proposed location, and type of permit sought in the applications at issue, which the commission must release, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 5.48 of

³We note the basic information contains the arrestee's social security number. *See* ORD 127 at 4. 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. Gov't Code § 552.147(b).

the Alcoholic Beverage Code. However, we find the commission has not established any of the remaining documents consists of “private records” of a permittee, licensee, or other person required or obtained by the commission for purposes of section 5.48. Therefore, the remaining information is not confidential under section 5.48, and the commission may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in relevant part the following:

(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 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 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find a portion of the remaining information constitutes medical records. Accordingly, the commission must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with the MPA. However, we find the commission has not established any of the remaining information consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. Thus, the remaining information is not confidential under the MPA, and the commission may not withhold it on that ground.

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. 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. Nevertheless, as noted above, common-law privacy is not applicable to information contained in public records. *See Cox Broadcasting*, 420 U.S. at 496; *Star-Telegram*, 834 S.W.2d at 57. Therefore, with the exception of the information marked under section 552.022(a)(17) of the Government Code, the commission must withhold the date of birth of a public citizen in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note section 552.130 of the Government Code is applicable to some of the remaining information.⁵ 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. The commission must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

To conclude, with the exception of the information marked under section 552.022(a)(17) of the Government Code, the DIC-24 statutory warning, the DIC-25 notice of suspension, and basic information, the commission may withhold the information it has marked under section 552.108(a)(1) of the Government Code. With the exception of the name, proposed location, and type of permit sought in the applications at issue, which the commission must release, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. The commission must also withhold the following: (1) the information we have marked under section 552.101 of the Government Code in conjunction with the MPA; (2) with the exception of the information marked under section 552.022(a)(17) of the Government Code, the date of birth of a public citizen in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) the information we have marked under section 552.130 of the Government Code. The commission must release the remaining responsive information.

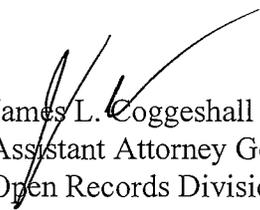
⁴Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Gov't Code* § 552.102(a).

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See Open Records Decision* Nos. 481 at 2 (1987), 480 at 5 (1987).

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 608164

Enc. Submitted documents

c: Requestor
(w/o enclosures)