



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2009

Ms. Leigh Tomlin
Public Information Officer
Texas Forensic Science Commission
816 Seventeen Street, Box 2296
Huntsville, Texas 77341-2296

OR2009-18426

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# 366158.

The Texas Forensic Science Commission (the "commission") received a request for: 1) information pertaining to complaints filed with the commission during a specified time period, 2) correspondence between the commission, the Fire Marshall's Office, and the Texas Department of Public Safety for a certain time period, 3) correspondence between the commission and three named individuals, 4) personal financial statements of commissioners, 5) the commission's budget and expenditures, 6) the commission's written policies and procedures, and 7) information regarding a particular "potential conflict of interest." You state you will make some of the requested information available to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code.¹ You state you have notified third parties whose privacy interests may be implicated by the request. *See Gov't Code*

¹Although you cite to section 552.305 of the Government Code with respect to your argument that some of the submitted information may implicate individuals' privacy rights, that provision is not an exception to disclosure. We note the proper exception to claim for an individual's common-law right to privacy is section 552.101 of the Government Code. Further, although you initially raised section 552.111 of the Government Code, you have provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume you no longer assert this section. *See Gov't Code §§ 552.301, .302.*

§ 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See id.*

Initially, we must address the commission's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Within fifteen business days of receiving the request, the governmental body must submit to this office (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)(1)(A)-(D). You received the request for information on October 12, 2009. Accordingly, the commission's fifteen business-day deadline was November 2, 2009. However, you did not submit a portion of the requested information until November 3, 2009. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, with respect to the information submitted on November 3, 2009, we find the commission failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, 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). Because section 552.101 can provide a compelling reason to overcome the presumption of openness, we will consider whether the information submitted to this office on November 3, 2009 is excepted under the Act. We will also consider your arguments under sections 552.101 and 552.137 for the timely submitted information.

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. This section encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. 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). This office has concluded that 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 also have concluded that 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). Medical records may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). Upon review, we conclude the information we have marked constitutes medical records that may only be released in accordance with the MPA.

Section 552.101 also encompasses section 411.153 of the Government Code, which provides as follows:

(a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.

(b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.

(c) An offense under this section is a state jail felony.

(d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6)-(7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) (providing that "forensic analysis" has meaning assigned by Crim. Proc. Code art. 38.35). A "DNA database" means "one or more databases that contain

forensic DNA records maintained by the director [of the Texas Department of Public Safety (the "DPS").] Gov't Code § 411.141(5); *see id.* § 411.001(3).

The director of the DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), .142(h) (requiring director to establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C § 28.82(a). The DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b).

In this instance, some of the remaining documents are DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. The documents in question pertain to the testing of physical evidence conducted for the purpose of determining the connection of the evidence to a criminal action. The documents appear to be the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. We therefore conclude the commission must withhold the DNA records we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.

Section 552.101 also encompasses confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Gov't Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Upon review, we find a portion of the remaining information, which we have marked, constitutes CHRI for purposes of section 411.083. Accordingly, this information must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S.589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). 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).

You argue some of the remaining information should be excepted from disclosure based upon the privacy rights of the family of deceased individuals. In this instance, you state that you have notified the deceased individuals’ family members of the request. However, as of the date of this decision, we have received no correspondence from the notified parties. Thus, we have no basis for determining that the family members at issue have a privacy interest in any of the remaining information. Thus, the remaining information may not be withheld on the basis of constitutional privacy.

Section 552.101 also encompasses the doctrine of 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). To demonstrate the applicability of the common-law privacy exception under section 552.101, a person must establish both prongs of the test articulated in *Industrial Foundation*. 540 S.W.2d at 681-82. The types of information considered intimate and 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. Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, generally not protected from disclosure under common-law privacy. See Open Records Decision Nos. 405

at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). This office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600, 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We note that common-law privacy is a personal right that lapses at death and does not encompass information that relates only to a deceased individual. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1.

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the commission must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information is of legitimate public interest. Thus, the commission may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

We note some of the remaining information is subject to section 552.130 of the Government Code.² Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130(a)(1)-(2). We note section 552.130 does not encompass motor vehicle record information of other states. Accordingly, to the extent the information we have marked consists of motor vehicle record information issued by an agency of the State of Texas, the commission must withhold it under section 552.130 of the Government Code.³ The commission may not withhold any information that does not pertain to motor vehicle record information issued by an agency of the State of Texas under section 552.130.

Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the

² 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).

³ 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 a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). Section 552.137 does not apply to a general business address nor to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. We also note that an e-mail address "provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public" is specifically excluded from the confidentiality provisions of section 552.137(a) by section 552.137(c)(4). *Id.* § 552.137(c)(4). You have marked an e-mail address contained on a letterhead, general business e-mail addresses, and a government employee's e-mail address. Thus, the commission may not withhold these e-mail addresses under section 552.137. You do not inform us that the owners of the remaining e-mail addresses at issue have affirmatively consented to their public disclosure. Therefore, we find the commission must withhold the e-mail addresses we have marked under section 552.137.⁴

We note that portions of the submitted information appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the marked medical records may only be released in accordance with the MPA. The commission must withhold the DNA records we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code. The commission must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we have marked consists of motor vehicle record information issued by an agency of the State of Texas, the commission must withhold it under section 552.130 of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

⁴We 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 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.

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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 366158

Enc. Submitted documents

cc: Requestor
(w/o enclosures)