



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2014

Ms. Christina Alvarado
Assistant District Attorney
Dallas County District Attorney's Office
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399

OR2014-06079

Dear Ms. Alvarado:

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# 519448.

The Dallas County District Attorney's Office (the "district attorney's office") received a request for the district attorney's file concerning a named individual. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the district attorney's office's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. 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. *See* Gov't Code § 552.301(b). In this instance, you state the district attorney's office received the request for information on January 17, 2014. You state the district attorney's office was closed on January 20, 2014. Accordingly, the ten-business-day deadline was February 3, 2014. However, the district attorney's office submitted the information required

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.

under section 552.301(b) in an envelope meter-marked February 4, 2014. *See id.* § 552.308(a) (deadline under the Act is met if document bears post office mark indicating time within the deadline period). Consequently, we find the district attorney's office failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. The district attorney's office claims section 552.108 of the Government Code for the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, none of the submitted information may be withheld under section 552.108 of the Government Code. However, we note portions of the submitted information are subject to sections 552.101 and 552.136 of the Government Code.² Because these sections provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information.

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. Section 552.101 of the Government Code encompasses information protected by other statutes, such as section 611.002 of the Health and Safety Code, which provides:

(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.

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

Health & Safety Code § 611.002(a)-(b). 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). Upon review, we find the information we have marked consists of mental health records for purposes of chapter 611 of the Health and Safety Code. Accordingly, the district attorney’s office must withhold this information under section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code.

Section 552.101 also encompasses the Medical Practices Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant 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.

Occ. Code § 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. 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. Upon review, we find the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the district attorney’s office must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses information section 48.101 of the Human Resources Code, which provides in relevant part:

(a) The following information is confidential and not subject to disclosure under [the Act]:

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by [the Texas Department of Family and Protective Services (the "DFPS")] or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). Upon review, we find the information we have marked consists of information used or developed by DFPS in an investigation conducted under chapter 48 of the Human Resources Code. *See id.* § 48.252(a)(1) (authorizing DFPS to conduct investigations in mental health facilities operated by the Texas Department of State Health Services (the "department")); 40 T.A.C. § 711.1 (relating to chapter 48 of the Human Resources Code investigations in department and Texas Department of Aging and Disability Services facilities). Such information must not be released to the public, except for a purpose consistent with chapter 48 and as provided by a DFPS or investigating state agency rule or federal law. *See id.* § 48.101(b). *But see id.* § 48.101(c)-(f) (permitting release of confidential information in certain circumstances). You do not indicate, nor does it appear, an exception to confidentiality applies in this instance. Accordingly, we conclude the district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources 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 found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code states “notwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. We note the purpose of section 552.136 is to protect the privacy interests of individuals. Because “the right of privacy is purely personal,” that right “terminates upon the death of the person whose privacy is invaded.” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *see* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Thus, information pertaining solely to a deceased individual may not be withheld under section 552.136 of the Government Code. We note the submitted information contains the bank account and routing numbers of an insurance company. Accordingly, we find the district attorney’s office must withhold the bank account and routing numbers of the insurance company we have marked under section 552.136. We note some of the remaining information contains account and routing numbers which belong to the deceased individual. We further note the requestor represents an individual who may have an interest in the bank account and routing numbers. Thus, if the requestor’s client has an interest in the accounts at issue, the requestor has a right of access to the information at issue, and this information may not be withheld from this requestor under section 552.136. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). However, to the extent the remaining information we have marked pertains to an account in which a living individual other than the requestor’s client has an interest, the district attorney’s office must withhold it under section 552.136 of the Government Code.³ If the remaining information we have marked pertains solely to the deceased individual or solely the requestor’s client, the district attorney’s office may not withhold it under section 552.136 of the Government Code.

In summary, the district attorney’s office must withhold the information we have marked under section 552.101 in conjunction with section 611.002(a) of the Health and Safety Code, the MPA, section 48.101 of the Human Resources Code, and common-law privacy. The

³Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov’t Code § 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).

district attorney's office must withhold the bank account and routing numbers of the insurance company we have marked under section 552.136. To the extent the remaining information we have marked pertains to an account in which a living individual other than the requestor's client has an interest, the district attorney's office must withhold it under section 552.136 of the Government Code. The district attorney's office must release the remaining information.⁴

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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/tch

Ref: ID# 519448

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the requestor's client has a right of access to his own personal e-mail address. See Gov't Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure).