



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2014

Mr. Donald R. Stout
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OR2014-18813

Dear Mr. Stout:

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# 540353.

The City of Midlothian (the "city"), which you represent, received requests from different requestors for information pertaining to the investigation of the death of a named individual. The city claims the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments submitted by one of the requestors (the "first requestor") and another interested third party (the "interested third party"). *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

You inform us the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-05286 (2014). In Open Records Letter No. 2014-05286, we determined the city may withhold the requested information under section 552.108(a)(1) of the Government Code, except for basic information, which must be released, because the information pertained to a pending investigation. The city represents the law, facts, and circumstances on which the prior ruling was based had not changed on the date it received the request for information. However, the first requestor has submitted a copy of correspondence from the Ellis County & District Attorney's Office (the "district attorney's office") to the first

requestor in which the district attorney's office states the underlying criminal investigation or prosecution is closed. Thus, we find the circumstances have changed and the city may not rely on Open Records Letter No. 2014-05286 as a previous determination and withhold any of the requested information on that ground. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address your arguments against disclosure of the information at issue.

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. The city raises section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 for the information at issue. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In Open Records Decision No. 681, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *Id.*; *see* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. Therefore, we held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may not withhold any portion of the information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information made confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101-12213. Title I of the ADA provides information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14 (c); *see also* Open Records Decision No. 641 (1996). As such, the ADA applies only to the medical information of applicants or employees. The submitted information consists of law enforcement records and, thus, is not information relating to the medical condition or medical history of an applicant or employee of the city for purposes of the ADA. Therefore, we find you have not established any of the submitted information is confidential pursuant to the ADA and the city may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code 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 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 at 1 (1990). This office has also 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). Section 159.001 of the

MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a patient under section 159.002 of the MPA. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Thus, the MPA is applicable only to records related to a person who was alive at the time of diagnosis, evaluation, or treatment to which the records pertain. Upon review, we find a portion of the submitted information constitutes medical records. Accordingly, the city must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with the MPA. However, we find you have 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 city may not withhold it from release on that ground.

Section 552.101 of the Government Code also encompasses information section 611.002 of the Health and Safety Code, which provides in part as follows:

- (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). 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. *Id.* § 611.001(2). Upon review, we find the city has failed to demonstrate any of the remaining information consists of mental health records for purposes of section 611.002. Accordingly, the remaining information is not confidential under section 611.002, and the city may not withhold it from release on that ground.

Section 552.101 of the Government Code 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. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information, see Open Records Decision No. 455 (1987); personal financial information not relating to the financial transaction between an individual and a

governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and the identity of a juvenile offender. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007(c). However, 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); 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”).

Upon review, we find some of the submitted information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, the first requestor has a right of access to her own private information pursuant to section 552.023 of the Government Code. *See* Gov’t Code § 552.023(a) (“[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is 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). Accordingly, with the exception of the information pertaining to the first requestor, which the city must release to her pursuant to section 552.023 of the Government Code, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. We conclude the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses constitutional 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 Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. 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). As noted above, the right to privacy is a personal right that lapses at death. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. However, the United States Supreme Court has determined surviving family members can have a privacy interest in information relating to

their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004).

In correspondence to this office, the interested third party, who is a family member of the deceased individual, asserts a privacy interest in some of the submitted photographs based on the privacy of the deceased individual's family. Upon review, we find the privacy interests of the deceased individual's family in the photographs we have marked outweigh the public's interest in the disclosure of this information. We note the first requestor is also a family member of the deceased individual. As such, that requestor has a right of access under section 552.023 of the Government Code to any information relating to her family member that the city might be required to withhold from the public on privacy grounds under *Favish*. *See* Gov't Code § 552.023. However, the other requestor (the "second requestor") is not a family member of the deceased individual. Therefore, the city must withhold the photographs we have marked under section 552.101 in conjunction with constitutional privacy and the holding in *Favish* from the second requestor, but may not withhold this information from the first requestor on that ground.

Section 552.102(a) of the Government Code 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 none of the remaining information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the remaining information may be withheld on that basis.

Section 552.1175 of the Government Code may be applicable to some of the submitted information.¹ Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. The city must withhold the information we have marked under section 552.1175 if the individual at issue is a licensed peace officer and elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code. However, the city may not withhold this information under section 552.1175 if the individual either is not a currently licensed peace officer or does not elect to restrict access to this information in accordance with section 552.1175(b).

Section 552.130 of the Government Code 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 first requestor has a right of access to her own motor vehicle record information pursuant to section 552.023 of the

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

Government Code. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, with the exception of the motor vehicle record information pertaining to the first requestor, which the city must release to her pursuant to section 552.023 of the Government Code, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides in part the following:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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(a)-(b). However, section 552.136 is designed to protect the privacy of individuals, and the right to privacy expires at death. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. The remaining information contains account numbers, but we are unable to determine if this information pertains to a deceased individual. Accordingly, we must rule conditionally. The city must withhold the account numbers we have marked under section 552.136 of the Government Code if they pertain to a living individual. However, the city may not withhold the account numbers marked under section 552.136 if they pertain to a deceased individual.

Section 552.137 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 Gov’t Code* § 552.137(a)-(c). Section 552.137 does not apply 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. However, because the right to privacy lapses at death, the e-mail address of a deceased individual may not be withheld under section 552.137 of the Government Code. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). The city does not inform us a member of the

public has affirmatively consented to the release of any e-mail address contained in the submitted materials. We note the first requestor has a right of access to her e-mail address pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). Accordingly, with the exception of the e-mail address pertaining to the first requestor, which the city must release to her pursuant to section 552.137(b) of the Government Code, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

We note some of the materials at issue may 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 copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, 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.

To conclude, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. With the exception of the information to which the first requestor has a right of access under section 552.023 or 552.137(b) of the Government Code, which the city must release to her, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.130 and 552.137 of the Government Code. The city must withhold the photographs we have marked under section 552.101 in conjunction with constitutional privacy and the holding in *Favish* from the second requestor. The city must withhold the information we have marked under section 552.1175 of the Government Code if the individual at issue is a licensed peace officer and elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code. The city must withhold the account numbers we have marked under section 552.136 of the Government Code if they pertain to a living individual. The city must release the remaining information, but may only release any copyrighted information in accordance with copyright law.²

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.

²We note the submitted information contains a social security number of a living person. 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).

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,



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Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 540353

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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