



February 26, 2015

Mr. Charles H. Weir
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2015-03796

Dear Mr. Weir:

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# 554795 (COSA File No. W044993).

The City of San Antonio (the "city") received a request for information pertaining to a specified incident. 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 information.

Initially, we note the submitted information contains a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides the Office of the Attorney General shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Crim. Proc. Code art. 49.18(b). The format of a custodial death report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The Office of the Attorney General has determined the four-page report and summary must be released to the public, but any other documents submitted with the revised report are confidential under article 49.18(b). Although you seek to withhold the custodial death report under section 552.108 of the Government Code, the exceptions to disclosure found in the Act generally do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city must release

the submitted custodial death report pursuant to article 49.18(b) of the Code of Criminal Procedure.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You generally assert section 552.108(a)(2) applies to the submitted information. However, you do not explain the information you marked pertains to a criminal case that concluded in a final result other than conviction or deferred adjudication. Therefore, we find you have failed to demonstrate the applicability of section 552.108(a)(2) to the information at issue. Accordingly, the city may not withhold any of the information at issue under section 552.108(a)(2).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ *Id.* § 552.101. Section 552.101 encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See Occ. Code* §§ 151.001-168.202. 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.

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. This office has

¹The 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).*

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). Upon review, we find some of the submitted information, which we have marked, constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient's medical records. Accordingly, the city must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses the common-law right to privacy, which protects information if it (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. *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 met. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

In Open Records Decision No. 393 (1983), this office concluded generally only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. Open Records Decision No. 393 at 2 (1983); *see Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Upon review, we find the identifying information of the victim of sexual assault, a representative sample of which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the city must withhold the victim's identifying information, in accordance with our representative sample of markings, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1175 of the Government Code 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. Gov't Code § 552.1175(b). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure [and] officers and employees of a community supervision and corrections department established under Chapter 76 who perform a duty described by Section 76.004(b)[.]" *Id.* § 552.1175(a)(1),(6). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988). We note the protection afforded by section 552.1175 generally does not lapse at death, as it is intended to protect the privacy of both the individual and the individual's family members. However, because the protections of dates of birth and social security numbers under section 552.1175 are intended solely to protect the privacy of the individual,

those protections lapse at death. *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).

Some of the remaining information pertains to individuals whose information may be subject to section 552.1175. Thus, to the extent the information we have indicated pertains to individuals whose information is subject to section 552.1175(a), the city must withhold this information under section 552.1175 of the Government Code if the individuals elected to restrict access to their information in accordance with section 552.1175(b); however, the city may only withhold the cellular telephone numbers under section 552.1175 if a governmental body does not pay for the cellular telephone service. If the individuals whose information is at issue are not subject to section 552.1175(a), or they did not elect to restrict access to their information in accordance with section 552.1175(b), then the city may not withhold the indicated information under section 552.1175.

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 a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Upon review, we find the city must withhold the motor vehicle record information, a representative sample of which we have marked, under section 552.130 of the Government Code.

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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We note the purpose of section 552.136 is to protect the privacy interests of individuals. As noted above, because the right of privacy lapses at death, information that pertains solely to deceased individuals may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. We have marked information generally subject to section 552.136. However, we note the information we marked consists of an insurance policy number which belongs to the deceased individual. To the extent the information we have marked pertains to an insurance policy in which a living individual has an interest, the city must withhold it under section 552.136 of the Government Code. However, if the information we have marked pertains solely to the deceased individual, the city may not withhold it under section 552.136 of the Government Code.

In summary, the city must release the custodial death report pursuant to article 49.18(b) of the Code of Criminal Procedure. The city must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the victim's identifying information, in accordance with our representative sample of markings, under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we have indicated pertains to

individuals whose information is subject to section 552.1175(a), the city must withhold this information under section 552.1175 of the Government Code if the individuals elected to restrict access to their information in accordance with section 552.1175(b); however, the city may only withhold the cellular telephone numbers under section 552.1175 if a governmental body does not pay for the cellular telephone service. The city must withhold the submitted motor vehicle record information, a representative sample of which we have marked, under section 552.130 of the Government Code. To the extent the information we have marked pertains to an insurance policy in which a living individual has an interest, the city must withhold it under section 552.136 of the Government Code. The city must release the remaining information.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.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 554795

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the remaining information includes social security numbers. Section 552.147(b) of the Government Code authorizes a government 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).