



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2015

Mr. John Batoon
Assistant City Attorney
City of El Paso
P. O. Box 1890
El Paso, Texas 79950-1890

OR2015-19889

Dear Mr. Batoon:

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# 580302 (Ref. No. 15-1065-055).

The City of El Paso (the "city") received a request for all records pertaining to fourteen cases where indigency waivers were granted, during a specified period of time. You state you will release some information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note you have not submitted information pertaining to all fourteen of the specified cases. Thus, to the extent such information existed and was maintained by the city on the date the city received the request for information, we presume the city has released it. If not, the city must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

¹Although you raise section 552.101 of the Government Code in conjunction with a statutory grant of confidentiality, a judicial grant of confidentiality, and constitutional privacy, you have not submitted arguments explaining how these apply to the submitted information. Therefore, we assume you have withdrawn these claims. *See* Gov't Code §§ 552.301, .302.

Section 552.142 of the Government Code is applicable to records subject to certain deferred adjudications. Section 552.142 provides as follows:

(a) Information is excepted from [required public disclosure] if an order of nondisclosure of criminal history record information with respect to the information has been issued under Subchapter E-1, Chapter 411 [of the Government Code].

(b) A person who is the subject of information that is excepted from [required public disclosure] under this section may deny the occurrence of the criminal proceeding to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding.

Act of May 27, 2015, 84th Leg., R.S., ch. 1279, §§ 26-27, 2015 Tex. Sess. Law Serv. 4327, 4338 (Vernon) (to be codified as an amendment to Gov't Code § 552.142). Section 411.0725 of the Government Code authorizes a person placed on deferred adjudication community supervision for certain offenses to petition the court "for an order of nondisclosure," which prohibits criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication community supervision. *See* Act of May 27, 2015, 84th Leg., R.S., ch. 1279, § 4, 2015, Tex. Sess. Law Serv. 4327, 4328-4329 (Vernon) (to be codified at Gov't Code § 411.0725). A criminal justice agency may only disclose criminal history record information that is the subject of the order to other criminal justice agencies, for criminal justice or regulatory purposes; non-criminal justice agencies listed in section 411.0765(b); or the person who is the subject of the order. *See* Act of May 27, 2015, 84th Leg., R.S., ch. 1279, § 11, 2015, Tex. Sess. Law Serv. 4327, 4332-4334 (Vernon) (to be codified at Gov't Code § 411.0765). You have provided documentation reflecting an order of nondisclosure was issued pursuant to subchapter E-1, chapter 411 of the Government Code prohibiting the release of some of the submitted information. Thus, we find this information, which we have marked, is subject to the court order and must be withheld under section 552.142 of the Government Code.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," and encompasses information made confidential by other statutes. Gov't Code § 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. Section 159.002 of the MPA provides, in relevant part:

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(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. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).* We have also found that 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 (1990).* 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 were created or are maintained by a physician. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses 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. *See id.* at 681–82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987).* Upon review, we find some of the submitted information, which we have marked, meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the city must withhold the information we have marked under section 552.142 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must release the remaining information.

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,



Joseph Keeney
Assistant Attorney General
Open Records Division

JDK/dls

Ref: ID# 580302

Enc. Submitted documents

c: Requestor
(w/o enclosures)