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# Common Confidentiality Provisions

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# The Basics of “Confidential” Information

- Generally protects individuals or outside organizations, not a governmental body
- Information must be withheld
- Provides a compelling reason to withhold information
  - Overcomes a section 552.301 violation
- Both with the PIA and outside of the PIA

# Dates of Birth

- Gov't Code § 552.102
- Common-law Privacy
- Can show up anywhere:
  - Forms
  - Reports
  - E-mails
  - Requests
  - Personnel files

# Common-Law Privacy

- Two Prong Test:
  - Highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person; and
  - Not of legitimate concern to the public
- *Industrial Foundation v. Texas Industrial Accident Board*
  - 540 S.W.3d 668

# Medical Information: Medical Practice Act

- Occ. Code § 159.002
- Medical records and information obtained from those records are confidential.

# Mental Health Professional Records

- Health & Safety Code § 611.002
  - Communications between a patient and a mental health professional and records of the identity, diagnosis, or treatment of a mental health patient created or maintained by a mental health professional.
- L-3 Forms
  - Occupations Code § 1701.306
  - ❖ Remember: May be withheld without a ruling, ORD 684

# EMS Records

- Health & Safety Code § 773.091(b)
  - Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential.
- Health & Safety Code § 773.091(g)
  - Information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services is not excepted.

# Medical Privacy: Common-law Privacy

- Specific illnesses and Injuries
- Mental health references
- Suicide attempt and suicidal ideations
- Can be found in:
  - Police reports
  - E-mails
  - Personnel records
  - Call logs



# Medical Information: Federal Statutes

- Family and Medical Leave Act (FMLA)
  - Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files.
- Americans with Disabilities Act (ADA)
  - If the ADA is applicable records must be maintained in conformance with ADA confidentiality requirements.

# Financial Information: Common-law Privacy

- Personal financial information not relating to a financial transaction with a governmental body.
- Can be found in:
  - Employment applications
  - Call logs
  - Personnel records

# Financial Information: Federal Law

- Federal Tax Return Information
  - 26 U.S.C. § 6103(a)
- Includes:
  - Tax Returns
    - ❖ W-4 forms
    - ❖ W-2 forms

# Child Victims (Slide 1 of 2)

- Fam. Code § 261.201, makes confidential:
  - a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
  - the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.
- The child must be under 18 years of age.
- Potential right of access to parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age.
  - Additional information may still be redacted.
  - No access to the parent accused of abuse.

# Child Victims (Slide 2 of 2)

- Common-law privacy
- Gov't Code § 552.1315
  - Relates to any criminal offense if the victim was younger than 18 when any element of the offense was committed.
  - Applies to identifying information of victim of:
    - Sexual abuse of child
    - Indecency with child
    - Sexual performance of child
    - Any offense if victim is under 18 years of age when any element is committed

# Child Offenders

- Fam. Code § 58.008 makes confidential:
  - records involving delinquent conduct and conduct indicating a need for supervision.
  - The child must have been at least ten years old and less than seventeen years of age when the conduct occurred.
- Applies to all records regardless of creation date.
- There is a right of access for a juvenile justice agency, a criminal justice agency, the child, the child's parent or guardian, and CEO of school in certain circumstances.
  - Additional information may still be redacted.

# Adult Victims

- Common-law privacy
  - Sexual assault victims
  - What the requestor knows matters
  - Mental health issues
- Mental health issues: common-law privacy
- Gov't Code § 552.1315
  - Applies to identifying information of victim of:
    - Human trafficking
    - Sexual assault
    - Prostitution
    - Aggravated sexual assault

# Adult Victims: Sexual Harassment

- *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied)
  - Look for adequate summary
- Common-law physical safety



# Military Records

- Gov't Code § 552.140
- ❖ DD-214 From
  - Hired on or after September 1, 2003

# Animal Records

- Adoption Records
  - Gov't Code § 552.1177
- Pet Registry
  - Health & Safety Code § 826.0311
- Vet Records
  - Occ. Code § 801.535
- Rabies Records
  - Health & Safety Code § 826.0211

# School Records

- Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g
  - FERPA

# School Personnel Records

- Transcripts
  - Gov't Code § 552.102(b)
- Evaluations
  - Educ. Code § 21.355
- ❖ Social Security numbers
  - Gov't Code §§ 552.117, 552.147
- Informer
  - Gov't Code § 552.135
- Badge
  - Gov't Code § 552.139

# Law Enforcement Personnel Records

- Local Gov't Code § 143.089

- ❖ L-2 & L-3 forms

- Occ. Code § 1701.306

- F-5 form

- Occ. Code § 1701.454

- Identification badges

- Gov't Code § 552.139

- ❖ 552.117

# Law Enforcement: Body Worn Camera

- Subchapter N of chapter 1701 of the Occupations Code
- Requestor must provide:
  - The date and approximate time of the recording;
  - The specific location where the recording occurred; and
  - The name of one or more subject of the recording.
- Be aware of additional exceptions.
- Twenty and twenty-five business days when requesting a ruling.

# Criminal History

- DPS criminal history checks
  - Gov't Code § 411.083
- Common-law privacy
  - *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989)

# Homeland Security Act

- Gov't Code § 418.176: Prevention of act of terrorism or related criminal activity
- Gov't Code § 418.181: Critical Infrastructure



# Rights of Access (Slide 1 of 4)

- Requestor's own information
  - Gov't Code 552.023

# Rights of Access (Slide 2 of 4)

- Others with potential access
  - Military recruiter
  - State investigative agencies (TEA, DPS, licensing boards)
  - Child Placing Agencies

# Rights of Access (Slide 3 of 4)

- DWI
  - Videos of arrest: Crim. Proc. Code art. 2.1396
  - Blood test: Transp. Code § 724.018

# Rights of Access (Slide 4 of 4)

- Identity theft
  - Crim. Proc. Code art. 2.29

# Deceased Individuals (Slide 1 of 2)

- Constitutional privacy
  - *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004)
  - Based upon the interests of surviving family members.
- Gov't Code § 552.1085
  - Protects sensitive crime scene images.
  - Closed case

# Deceased Individuals (Slide 2 of 2)

- Common-law privacy
  - 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. Civ. App.—Texarkana 1979, writ ref’d n.r.e.).

# Confidentiality Provisions Withheld Without a Ruling

- ❖ Gov't Code § 552.117 pursuant to Gov't Code § 552.024
- ❖ Gov't Code § 552.130
- ❖ Gov't Code § 552.136

# When there are multiple exceptions?

- Is one more encompassing?
- Mark the documents



# Questions?

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