



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 18, 2016

Ms. Stacie S. White
Counsel for the Town of Flower Mound
Taylor Olson Adkins Sralla Ellam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2016-03902

Dear Ms. White:

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# 601730.

The Town of Flower Mound (the "town"), which you represent, received a request for all documents relating to all disciplinary actions and/or internal investigations relating to the requestor's client, a Flower Mound police officer. You state the town will redact social security numbers not belonging to the requestor pursuant to section 552.147(b) of the Government Code and other information pursuant to Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under

¹Section 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. Gov't Code § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

sections 552.101 and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed 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 encompasses information made confidential by 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, 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 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). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring 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). Upon review, we find the information we have marked is confidential under the MPA. Accordingly, the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

²We note the town failed to comply with its procedural obligations under the Act with respect to a portion of the submitted information. *See* Gov’t Code § 552.301(b). However, because section 552.130 of the Government Code can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will address the applicability of this exception to the information at issue. *Id.* § 552.302.

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. Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.³ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. 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 the information we have marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the town must withhold the dates of birth you have marked and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

As previously noted, 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[.]"⁴ Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). We note the requestor is the authorized representative of the officer at issue and thus, has a right of access to his date of birth pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) ("person or a person's authorized representative has special right of

³Section 552.102(a) 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).

⁴The 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).

access, beyond right of general public, to information held by governmental body that relates to 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 individual requests information concerning herself). Accordingly, the town must withhold the information we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We are unable to determine whether the individual whose information we have marked is currently a licensed peace officer as defined by article 2.12. Accordingly, to the extent the individual is currently a licensed peace officer, the town must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, if the individual is not a currently licensed police officer, then the town may not withhold information we have marked under section 552.117(a)(2) of the Government Code.

If the individual is not a currently licensed peace officer, then his personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the town may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent the individual timely requested confidentiality under section 552.024 of the Government Code, the town must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, if the individual did not timely request confidentiality under section 552.024, then the town may not withhold his information under section 552.117(a)(1).

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. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). In this

instance, it is unclear whether the individual whose information we have marked is a currently licensed peace officer as defined by article 2.12. Thus, if the information we have marked pertains to a currently licensed peace officer and the officer elects to restrict access to his information in accordance with section 552.1175(b), then the town must withhold the information we have marked under section 552.1175 of the Government Code. However, if the individual whose information we have marked is not a currently licensed peace officer or no election is made, then the town may not withhold this 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 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(a). You state the town will withhold the motor vehicle record information it has marked in the submitted documents pursuant to 552.130(c) of the Government Code.⁵ The submitted video recordings contain motor vehicle record information that is subject to section 552.130. You state the town lacks the technical capability to redact the information subject to section 552.130 from some of the video recordings. Based on this representation, we agree the town must withhold those video recordings under section 552.130 of the Government Code. Further, the town must withhold the motor vehicle record information you have marked and indicated, the motor vehicle record information we have marked, and the visible license plate information in the submitted photographs under section 552.130 of the Government Code.

In summary, the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The town must withhold the dates of birth you have marked and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The town must withhold the information we have marked under section 552.102(a) of the Government Code. If the individual whose information we have marked is currently a licensed peace officer, then the town must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individual whose information we have marked is not a currently a licensed peace officer, then to the extent the individual timely requested confidentiality under section 552.024 of the Government Code, the town must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Otherwise, the town may not withhold the information we have marked under section 552.117 of the Government Code. If the information we have marked pertains to a currently licensed peace officer and the officer elects to restrict access to his information in accordance with section 552.1175(b), then the town must withhold the information we have marked under section 552.1175 of the

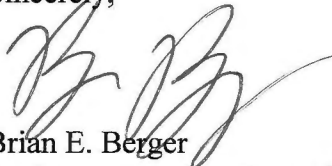
⁵Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

Government Code. Otherwise, the town may not withhold the information we have marked under section 552.1175 of the Government Code. The town must withhold the videos that cannot be redacted, the motor vehicle record information you have marked and indicated, the motor vehicle record information we have marked, and the visible license plate information in the submitted photographs under section 552.130 of the Government Code. The remaining information must be released.⁶

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 601730

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note the requestor has a special right of access to some of the information being released. Thus, if the town receives another request for this information from a different requestor, then the town must again seek a decision from this office.