



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

October 7, 2016

Ms. Donna L. Clarke  
Assistant Criminal District Attorney  
Civil Division  
Lubbock County  
P.O. Box 10536  
Lubbock, Texas 79408-3536

OR2016-22612

Dear Ms. Clarke:

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# 628140.

Lubbock County (the "county") received a request for eleven categories of information related to a specified event involving a named individual, including all audio and video recordings of communications involving the named individual and a specified pair of handcuffs. You state the county has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the present request seeks to inspect a specified pair of handcuffs. This office has ruled that tangible physical items are not "information" as that term is contemplated under the Act. *See, e.g.*, Open Records Decision No. 581 (1990). Thus, we find any responsive tangible physical evidence that is maintained by the county is not public information as that term is defined in section 552.002 of the Government Code. Accordingly, the Act does not require the county to make the tangible evidence available to the requestor. *See Gov't Code* § 552.021.

Next, we note some of the submitted information is not responsive to the instant request because it consists of audio recordings of communications that do not involve the named individual. This ruling does not address the public availability of the non-responsive information, which we have indicated, and the county need not release it in response to the request.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses information made confidential by statute, such as 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 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 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 (1990). Upon review, we find most of Exhibit A 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, with the exception of the information we have marked, the county must withhold Exhibit A under section 552.101 in conjunction with the MPA. However, we find the remaining information in Exhibit A does not consist of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that

were created or maintained by a physician, or someone under the supervision of a physician. Therefore, the information we have marked in Exhibit A may not be withheld under section 552.101 on that basis.<sup>1</sup>

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F, or subchapter E-1 of the Government Code. *See* Gov’t Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F, of the Government Code. Upon review, we find a portion of the remaining responsive information, which we have marked, consists of CHRI that is confidential under section 411.083. Thus, the county must withhold the information we marked under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by chapter 611 of the Health and Safety Code. Section 611.002 pertains to mental health records and provides, in pertinent part,

(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.

---

<sup>1</sup>We note this ruling does not affect an individual’s right of access to his or her own medical records from the physician who provided treatment under the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 159.004, .005, .006; *cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (MPA does not provide general right of access to medical records from governmental body responding to a request for information under the Public Information Act).

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). 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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* ORD 565. Upon review, we find a portion of the remaining responsive information, which we have marked, consists of mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the county must withhold the marked mental health records under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.<sup>2</sup>

Section 552.101 of the Government Code also encompasses section 418.182 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). Section 418.182(a) of the Government Code provides in relevant part, “information . . . in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.” Gov’t Code § 418.182(a). The fact that information may be related to a security system does not make the information *per se* confidential under section 418.182. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting section 418.182 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state Exhibit B consists of a surveillance video recording at the Lubbock County Detention Center (the “center”). You state the surveillance video system is part of the center’s security system. You assert the recording contains information that identifies vulnerabilities of the system, including blind spots and camera ranges, and its release would compromise county security. Upon review, we find Exhibit B relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. *See Tex. Dep’t of Pub. Safety v. Abbott*, 310 S.W.3d 670 (Tex. App.—Austin 2010, no pet.) (recorded images of Texas Department of Public Safety video taken from Capitol security cameras relate to

---

<sup>2</sup>We note this ruling does not affect an individual’s right of access to his or her own mental health records from the professional who provided treatment under chapter 611 of the Health and Safety Code. *See* Health & Safety Code § 611.004(a)(3); *cf. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (MPA does not provide general right of access to medical records from governmental body responding to a request for information under the Public Information Act).

specifications of security system used to protect public property from act of terrorism or related criminal activity). Accordingly, the county must withhold the video recording submitted as Exhibit B under section 552.101 of the Government Code in conjunction with section 418.182(a) of the Government Code.

The county also claims section 552.101 in conjunction with constitutional privacy, which 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 relating to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *See Fadlo 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 id.* 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). In Open Records Decision No. 430 (1985), this office determined a list of inmate visitors is protected by constitutional privacy because people have a First Amendment right to correspond with inmates, which would be threatened if their names were released. *See also* Open Records Decision Nos. 428 (1985) (logs of certain mail sent or received by inmates protected by constitutional privacy), 185 (1978) (public’s right to obtain inmate’s correspondence list not sufficient to overcome First Amendment right of inmate’s correspondents to maintain communication with inmate free of threat of public exposure). Although the requestor is the authorized representative of the inmate at issue, we note the requestor does not have a right of access to the marked and indicated information under section 552.023 of the Government Code because the constitutional rights of the other parties are also implicated. *See* ORD 430. Accordingly, the county must withhold the information we have marked and indicated under section 552.101 in conjunction with constitutional privacy.<sup>3</sup> Upon review, we find you have failed to demonstrate the remaining responsive information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the county may not withhold any portion of the remaining responsive information under section 552.101 of the Government Code in conjunction with constitutional privacy.

The county asserts the dates of birth in the remaining responsive information are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 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

---

<sup>3</sup>As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). 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. *Indus. Found.*, 540 S.W.2d 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.<sup>4</sup> *Tex. 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. Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the county must withhold the information we marked, and all public citizens' dates of birth in the remaining responsive information, under section 552.101 of the Government Code in conjunction with common-law privacy.

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. Accordingly, the county must withhold the motor vehicle record information it marked under section 552.130 of the Government Code.<sup>5</sup>

In summary, the county must withhold (1) Exhibit A, with the exception of the information we marked, under section 552.101 of the Government Code in conjunction with the MPA, (2) the information we marked under section 552.101 in conjunction with section 411.083 of the Government Code, (3) the mental health records we marked under section 552.101 of

---

<sup>4</sup>Section 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).

<sup>5</sup>We note section 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).

the Government Code in conjunction with section 611.002 of the Health and Safety Code, (4) the video recording submitted as Exhibit B under section 552.101 of the Government Code in conjunction with section 418.182(a) of the Government Code, (5) the jail visitor information we marked and indicated in Exhibit C under section 552.101 of the Government Code in conjunction with constitutional privacy, (6) the information we marked, and all public citizens' dates of birth in the remaining responsive information, under section 552.101 of the Government Code in conjunction with common-law privacy, and (7) the motor vehicle record information it marked under section 552.130 of the Government Code. The remaining responsive information must be released.

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](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,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/akg

Ref: ID# 628140

Enc. Submitted documents

c: Requestor  
(w/o enclosures)