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ATTORNEY GENERAL OF TEXAS

May 1, 2017

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OR2017-09176

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# 655546.

The Flower Mound Police Department (the "department"), which you represent, received a request for two specified incident reports related to the arrest of a named individual. The department states it is withholding social security numbers pursuant to section 552.147(b) of the Government Code.¹ The department states it is withholding certain information pursuant to Open Records Decision No. 684 (2009).² The department claims the submitted information is excepted from disclosure under sections 552.101, 552.130, and 552.136 of the Government Code.³ We have considered the exceptions the department claims and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-23840

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. *See* Gov't Code § 552.147(b).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

³Although you do not raise sections 552.136 and 552.137 of the Government Code in your brief, we understand you to raise these exceptions based on your markings.

(2015). In that ruling, we determined the department must withhold the information we marked, as well as all private citizens' date of birth, under section 552.101 of the Government Code in conjunction with common-law privacy; the department must withhold the CHRI we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law; except for the State ID numbers, the department must withhold the motor vehicle record information it marked and the information we marked under section 552.130 of the Government Code; and the department must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the department must rely on Open Records Letter No. 2015-23840 as a previous determination and withhold or release the information at issue, which we have marked, in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 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.

The submitted information pertains to reports of alleged sexual assault listing different victims. In Open Records Decision No. 393 (1983), this office concluded generally, only that 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; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No. 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also* *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identities of witnesses to and victims of sexual harassment were highly intimate or embarrassing information and public did not have legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). Thus, this office has held when a requestor knows the identity of the alleged sexual assault victim, an agency must withhold all of the information because withholding only the identifying information would not preserve the victim's common-law right to privacy. In this instance, the department has not demonstrated, nor does it otherwise appear, this is a situation in which the entirety of the information at issue must be withheld on the basis of common-law privacy. In addition, the submitted documentation reveals the victim of alleged sexual assault in one of the reports at issue filed suit against the suspect in district court. The pleadings in the

alleged victim's lawsuit contain the victim's identity and are a matter of public record. Thus, because the requested information contains information that is a matter of public record, we conclude the department may not withhold the identity of the victim at issue under section 552.101 of the Government Code in conjunction with common-law privacy. *See Austin Chronicle Corp. v. City of Austin*, No. 03-08-00596-CV, 2009 WL 483232 (Tex. App.—Austin Feb. 24, 2009, no pet.) (mem. op., not designated for publication); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54.57 (Tex. 1992) (“Trial proceedings are public information. . . . the law cannot recall information once it is in public domain.”). However, we find the remaining alleged victim has not made her identity public. Accordingly, the remaining victim's identity, which we have marked and noted, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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 the Federal Bureau of Investigation number and the additional information we have marked consist of CHRI that is confidential under section 411.083. Thus, the department must generally withhold the marked information under section 552.101 in conjunction with section 411.083 of the Government Code and federal law.

In this instance, however, the requestor is an investigator with the Texas Department of State Health Services (“DSHS”). Section 411.110 of the Government Code provides,

(a) [DSHS] is entitled to obtain from the [Department of Public Safety (the “DPS”)] [CHRI] maintained by the [DPS] that relates to:

...

(3) an applicant for a license, the owner or manager of an applicant for a massage establishment license, or a license holder under Chapter 455, Occupations Code[.]

Id. § 411.110(a)(3). In addition, section 411.087(a) of the Government Code provides, in pertinent part,

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter or Subchapter E-1 to obtain from the [DPS] [CHRI] maintained by the [DPS] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state [CHRI] maintained by that criminal justice agency that relates to that person.

Id. § 411.087(a)(2). CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *See id.* § 411.082(2). In this instance, the submitted information contains CHRI about the individual named in the request, who is a license holder under Chapter 455, Occupations Code. Further, the requestor states he is an investigator with the DSHS and is seeking the information “in connection with [his] agency’s duty to investigate allegations of violations of law or ethical misconduct for health professional licensing programs.” Accordingly, the requestor is authorized to obtain the suspect’s CHRI in the submitted information pursuant to section 411.087(a)(2) of the Government Code. *See id.* §§ 411.087(a)(2), .110. We note although you assert the information at issue is excepted under section 552.101 of the Government Code in conjunction with common-law privacy, a statutory right of access generally prevails over the common law. *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law); Attorney General Opinion GA-0290 at 4 (2005) (noting valid rules of administrative agencies have the same “force and effect of legislation”). Thus, CHRI pertaining to the suspect must be released to the requestor.

Section 552.101 of the Government Code also 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. 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.

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 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 a portion of the remaining 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 department must withhold the marked information under section 552.101 of the Government Code in conjunction with the MPA.

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.

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* Open Records Decision No. 565 (1990). Upon review, we find some of the remaining information, which we have marked, consists of mental health

records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the department 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.

Some of the remaining information is protected under section 552.101 of the Government Code in conjunction with common-law privacy, which is subject to the two-part test discussed above. *Indus. Found.*, 540 S.W.2d at 685. 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). This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.). We note some of the information at issue relates to an individual who has been de-identified and whose privacy interest is thus protected. Information relating to individuals who have been de-identified may not be withheld under section 552.101 in conjunction with common-law privacy. Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation* and the information the department highlighted generally satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, with the exception of the information pertaining to an individual who has been de-identified, the department must withhold the information we marked, the information it highlighted, and all public citizens' dates of birth 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. The department states it will withhold the motor vehicle record information it marked pursuant to section 552.130(c) of the Government Code.⁴ The department must withhold the additional motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

⁴Section 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).

assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the department must withhold the credit card numbers it marked and the partial credit card, bank account, and insurance policy numbers we marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). The department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must rely on Open Records Letter No. 2015-23840 as a previous determination and withhold or release the information we marked in accordance with that ruling. The department must withhold (1) the identity of a victim of sexual assault we marked and noted under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the medical records we marked under section 552.101 of the Government Code in conjunction with the MPA; (3) the mental health records we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code; (4) the information we marked, the information the department highlighted, and all public citizens’ dates of birth, with the exception of information pertaining to an individual who has been de-identified, under section 552.101 of the Government Code in conjunction with common-law privacy; (5) the additional motor vehicle record information we have marked under section 552.130 of the Government Code; (6) the credit card numbers it marked and the partial credit card, bank account, and insurance policy numbers we marked under section 552.136 of the Government Code; and (7) the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department must release the

remaining information to this requestor; however, any information that is subject to copyright may be released only in accordance with copyright law.⁵

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 655546

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the requestor has a right of access to some of the information being released. Thus, if the department receives another request for the same information from a different requestor, the department must again seek a decision from this office.