



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 22, 2017

Ms. Lindsey Aston
General Counsel
Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711-2060

OR2017-13910

Dear Ms. Aston:

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# 662731.

The Office of the Secretary of State (the "secretary's office") received a request for information pertaining to a specified complaint. You state the secretary's office will redact certain information pursuant to sections 552.130(c) and 552.147(b) of the Government Code and under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception 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

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130©. 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). Section 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 id.* § 552.147(b). Open Records Decision No. 684 serves as 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 decision.

Code § 552.101. Section 552.101 encompasses 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 submitted information, which we have marked, consists of mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the secretary’s office 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.²

Section 552.101 of the Government Code also encompasses section 181.006 of the Health and Safety Code, which provides the following:

[F]or a covered entity that is a governmental unit, an individual’s protected health information:

(1) includes any information that reflects that an individual received health care from the covered entity; and

(2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2)(A) defines “covered entity” to include any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected

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

health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). The secretary's office asserts it may be a covered entity for purposes of section 181.006 of the Health and Safety Code. However, in order to determine whether the secretary's office is a covered entity, we must address whether the secretary's office engages in the practice of "assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information." *Id.* Section 181.001 states that "[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards ["HIPAA"]." *Id.* § 181.001(a). Accordingly, as chapter 181 does not define "protected health information," we turn to HIPAA's definition of the term. HIPAA defines "protected health information" as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines "individually identifiable health information" as information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. Although the secretary's office asserts it may be a covered entity, the secretary's office has not explained how the information at issue consists of protected health information. Thus, we find the secretary's office has failed to demonstrate the applicability of section 181.006 of the Health and Safety Code. Accordingly, the secretary's office may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 301.466 of the Occupations Code, which provides:

- (a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the [Texas Board of Nursing

“board”] in connection with the complaint and investigation, and the information described by Subsection (d) are:

- (1) confidential and not subject to disclosure under [the Act]; and
- (2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or a board employee or agent involved in license holder discipline.

(b) Notwithstanding Subsection (a), information regarding a complaint and an investigation may be disclosed to:

- (1) a person involved with the board in a disciplinary action against the nurse;
- (2) a nursing licensing or disciplinary board in another jurisdiction;
- (3) a peer assistance program approved by the board under Chapter 467, Health and Safety Code;
- (4) a law enforcement agency; or
- (5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

(c) The filing of formal charges against a nurse by the board, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with [the Act].

Occ. Code § 301.466(a)-(c). You indicate the information at issue was collected or created by the board as part of its investigations into nurses. You do not inform us the information at issue falls into any of the categories of information that are subject to disclosure under section 301.466(c). Based on your representations and our review, we agree the information we have marked is confidential under section 301.466(a). Further, we find the requestor is not entitled to receive this information under section 301.466(b) and the information at issue does not fall under section 301.466(c). Accordingly, we conclude the secretary’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 301.466(a)(1) of the Occupations Code.³

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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).*

The secretary’s office contends a portion of the remaining information 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. Upon review, we find the secretary’s office has not demonstrated any portion of the remaining information consists of medical records for purposes of the MPA, and the secretary’s office may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information made confidential under rule 2.16 of the Texas Rules of Disciplinary Procedure, which provides that certain records of a grievance committee of the State Bar of Texas (the “state bar”) are confidential.⁴ TEX. R. DISCIPLINARY P. 2.16, *reprinted in* Gov’t Code tit. 2, subtit. G, app. A-1. Section 81.033(a) of the Government Code provides that records of the state bar pertaining to grievances that are confidential under the Texas Rules of Disciplinary Procedure are not subject to the Act. *See* Gov’t Code § 81.033(a). We note that rule 2.16 and section 81.033(a) apply to records of the state bar. Gov’t Code § 81.033(a); TEX. R.

⁴We note that the rules of the state bar have the same effect as statutes. *See Board of Law Examiners v. Stevens*, 868 S.W.2d 773 (Tex. 1994).

DISCIPLINARY P. 2.16. The remaining information consists of records of the secretary's office. We find that rule 2.16 and section 81.033(a) are not applicable to the information at issue in the hands of the secretary's office. We therefore determine the information at issue is not confidential pursuant to rule 2.16 and may not be withheld under section 552.101 of the Government Code on that basis.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). The 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.).

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. We note, however, that some of the information at issue belongs to a deceased individual. Because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, the information of deceased individuals may not be withheld on common-law privacy grounds. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); see also Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Additionally, we note the requestor has a right of access to his own private information. See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access to records that contain information relating to the person that are 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 individuals request information concerning themselves). Accordingly, the secretary's office must withhold all dates of birth pertaining to living public citizens, other than the requestor, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing information or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

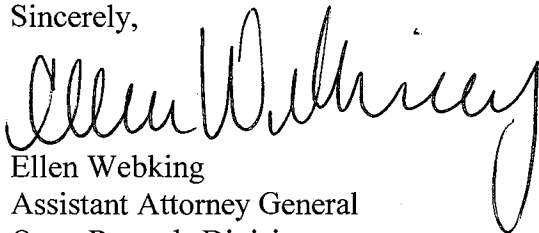
In summary, the secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 301.466(a)(1) of the Occupations Code. The secretary's office must withhold the marked mental health records

under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The secretary's office must withhold all dates of birth pertaining to living public citizens, other than the requestor, under section 552.101 of the Government Code in conjunction with common-law privacy. The secretary's office must release the remaining information.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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 662731

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the requestor has a right of access to some of the information being released. See Gov't Code § 552.023; see also ORD 481 at 4. Thus, if the secretary's office receives another request for the same information from a different requestor, the secretary's office must again seek a decision from this office.