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ATTORNEY GENERAL OF TEXAS

November 27, 2017

Mr. Eric K. Miller
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2017-26830

Dear Mr. Miller:

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# 689489 (TDCJ# AL0091).

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to investigations of a named former employee. The department claims the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note the submitted information consists of a completed investigation that is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Section 552.103 of the Government Code is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the submitted information under section 552.103. However, sections 552.101, 552.102, 552.117, and 552.134 of the Government Code make information confidential under the Act.¹ Accordingly, we will consider the applicability of these sections to the information at issue.

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[.]” Gov't Code § 552.102(a). The Texas Supreme Court has 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). The department must withhold the date of birth of the former employee at issue under section 552.102(a) of the Government Code.²

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. This section encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

²As our ruling is dispositive, we do not address the other argument of the department to withhold this information.

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). Upon review, we find some of the submitted information, which we have marked, constitutes medical records. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.³

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides in part as follows:

(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”). 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. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁴

Section 552.134(a) of the Government Code relates to inmates of the department and provides the following:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

³As our ruling is dispositive, we do not address the other arguments of the department to withhold this information.

⁴As our ruling is dispositive, we do not address the other argument of the department to withhold this information.

Gov't Code § 552.134(a). Although the department contends the remaining information falls within the scope of section 552.134, we note it pertains to the conduct of a department employee and is administrative information. Such information does not constitute "information about an inmate" for purposes of section 552.134 and may not be withheld on that basis. However, we find some of the remaining information, which we have marked, pertains to inmates confined in a facility operated by the department. Therefore, the department must withhold the information we have marked under section 552.134 of the Government Code.⁵

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 concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense is confidential under common-law privacy. 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) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). We note the victims at issue in the submitted investigation have been de-identified pursuant to section 552.134 of the Government Code. Therefore, the privacy interests of these individuals are protected. Further, we find the department has failed to demonstrate any of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

Section 552.117(a)(3) of the Government Code excepts from public disclosure the home address and telephone number, social security number, emergency contact information, and family member information of current or former employees of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. Gov't Code § 552.117(a)(3). Accordingly, the department must withhold the information we have marked under section 552.117(a)(3) of the Government Code.

In summary, the department must withhold the following: (1) the date of birth of the former employee at issue under section 552.102(a) of the Government Code; (2) the information we

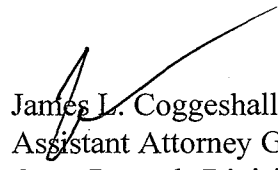
⁵As our ruling is dispositive, we do not address the other argument of the department to withhold this information.

have marked under section 552.101 of the Government Code in conjunction with the MPA and section 611.002 of the Health and Safety Code; and (3) the information we have marked under sections 552.117(a)(3) and 552.134 of the Government Code. The department must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 689489

Enc. Submitted documents

c: Requestor
(w/o enclosures)