



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2018

Ms. Jennifer Smith
Assistant District Attorney
Hidalgo County
100 East Cano Street
Edinburg, Texas 78539

OR2018-02674

Dear Ms. Smith:

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# 694347 (File No. 2017-0122-DA.SO).

The Hidalgo County Sheriff's Office (the "sheriff's office") received a request for the personnel records of a named former employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the claimed exceptions 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. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for some of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the

releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the sheriff’s office may not withhold any portion of the submitted information on that basis.

Section 552.101 of the Government Code also encompasses former section 1701.454 of the Occupations Code. We note the submitted information includes a F-5 form created prior to the effective date of the amendment of section 1701.454 by the Seventy-ninth Legislature. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 4, 2005 Tex. Gen. Laws 4094, 4096. Thus, the F-5 form at issue is governed by the previous version of section 1701.454. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 6, 2005 Tex. Gen. Laws 4094, 4096.¹ Former section 1701.454 provides as follows:

(a) A report or statement submitted to [TCOLE] under this subchapter is confidential and is not subject to disclosure under [the Act] unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

¹Section 6 of the amending legislation states “[t]he changes in law made by this Act in relation to employment termination reports apply only to an employment termination report under Subchapter J, Chapter 1701, Occupations Code, regarding a resignation or termination that occurs on or after the effective date of this Act. An employment termination report regarding a resignation or termination that occurs before the effective date of this Act is governed by the law as it existed immediately before the effective date and that law is continued in effect for that purpose.” Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 6, 2005 Tex. Gen. Laws 4094, 4096.

(b) Except as provided by this subsection, a [TCOLE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCOLE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by [TCOLE] that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code. § 1701.454 (repealed 2005). Upon review, we find the submitted F-5 report, which was created prior to the effective date of the amendment of section 1701.454, is not subject to release under the provisions of former section 1701.454. Therefore, the sheriff's office must withhold the F-5 form under section 552.101 of the Government Code in conjunction with former section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses 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 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). Further, we have 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). Some of the information at issue consists of reports of the results of drug tests. Section 159.001 of the MPA defines “patient” as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001(3). Because the individual at issue did not receive medical care in the administration of the drug tests, this individual is not a patient for purposes of section 159.002, and the drug test results are not subject to the MPA.

Upon review, we find portions of the remaining information, which we marked, constitute records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the sheriff’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. However, we find the sheriff’s office has failed to demonstrate any of the remaining information consists of medical records subject to the MPA. Therefore, the sheriff’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 section 412.0128 of the Labor Code, which provides “[i]nformation in or derived from a workers’ compensation claim file regarding an employee . . . is confidential and is exempt from disclosure under Chapter 552, Government Code, and may not be disclosed by the [State Office of Risk Management (the “SORM”)] except as provided by Subsection (b), other provisions of this subchapter, or other law.” Labor Code § 412.0128. We note the relevant language of section 412.0128 is substantially similar to section 402.083 of the Labor Code, which provides that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Workers’ Compensation of the Texas Department of Insurance (the “division”)] except as provided by this subtitle or other law.” *Id.* § 402.083(a). In Open Records Decision No. 533 (1989), this office construed the predecessor to section 402.083(a) to apply only to information the governmental body obtained from the Industrial Accident Board, subsequently the Texas Workers’ Compensation Commission, and now the division. *See* Open Records Decision No. 533 at 3-6; *see also* Labor Code § 402.086 (transferring confidentiality conferred by section 402.083(a) of the Labor Code to information other parties obtain from division files). Accordingly, for purposes of section 402.083(a), information that was not obtained from the division may not be withheld on that basis. Further, this office has interpreted section 402.083 to protect only that “information in or derived from a claim file that

explicitly or implicitly discloses the identity of employees who file workers' compensation claims." Open Records Decision No. 619 at 10 (1993). However, we also have stated "[w]hether specific information implicitly discloses the identity of a particular employee must be determined on a case-by-case basis." *Id.* We will apply the same analysis in applying section 412.0128 to the information at issue.

Based on this analysis, we find information in the possession of the sheriff's office that was not obtained from the SORM may not be withheld on the basis of section 412.0128 of the Labor Code. Although you assert the submitted information is confidential pursuant to section 412.0128, the sheriff's office provides no representation, and the documents do not reflect, the sheriff's office received these records from the SORM. Therefore, the sheriff's office has failed to demonstrate the applicability of section 412.0128 to any of the remaining information. Thus, the sheriff's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 412.0128 of the Labor Code.

Section 552.101 of the Government Code also encompasses the doctrines of common-law privacy and constitutional privacy. Common-law privacy 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). Further, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See, e.g.*, Open Records Decision Nos. 600 (1992) (personal financial information includes choice of particular insurance carrier), 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), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). This office has also determined a public employee's net pay is protected by common-law privacy even though it involves a financial transaction between the employee and the governmental body. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about a given individual that is not of legitimate concern to public). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to

governmental body not protected by common-law privacy). Furthermore, information pertaining to leave of public employees is generally a matter of legitimate public interest. *See* Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private).

Upon review, we find portions of the remaining information, which we marked, satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the sheriff's office has not demonstrated the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find the sheriff's office has failed to demonstrate any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the sheriff's office may not withhold any of the remaining under section 552.101 of the Government Code on the basis of constitutional privacy.

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 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). Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the birth date of an employee of a governmental body in a record maintained by his or her employer in an employment context. Accordingly, the sheriff's office must withhold the employee's dates of birth we marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with

sections 552.024 or 552.1175 of the Government Code. 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. Accordingly, if the information we marked belongs to an individual who is currently a licensed peace officer, the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code. Conversely, if the individual at issue is not currently a licensed peace officer, the sheriff's office may not withhold the information at issue under section 552.117(a)(2) of the Government Code. However, we find section 552.117(a)(2) is not applicable to the remaining information, and the sheriff's office may not withhold it on that ground.

If the individual at issue is not currently a 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 number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information or not later than the 14th day after the date on which the employee began employment with the sheriff's office. *See* Gov't Code § 552.024(b). Upon review, we conclude that, if the individual at issue is not currently a licensed peace officer, then to the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, then the sheriff's office must withhold the information we marked pertaining to this individual under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the sheriff's office may not withhold this information under section 552.117(a)(1). However, we find section 552.117(a)(1) is not applicable to the remaining information, and the sheriff's office may not withhold it on that ground.

We note the remaining information contains unredacted information subject to section 552.130 of the Government Code, which excepts from public disclosure information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or

country.² *See* Gov't Code § 552.130. Upon review, we find the sheriff's office must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 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. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the sheriff's office must withhold the information we marked under section 552.136 of the Government Code.

In summary, the sheriff's office must withhold the submitted F-5 form under section 552.101 of the Government Code in conjunction with former section 1701.454 of the Occupations Code. The sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the employee's dates of birth we marked under section 552.102(a) of the Government Code. If the individual at issue is currently a licensed peace officer, the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, if the individual at issue is not currently a licensed peace officer, then to the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, then the sheriff's office must withhold the information we marked pertaining to this individual under section 552.117(a)(1) of the Government Code. The sheriff's office must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The sheriff's office must withhold the information we marked under section 552.136 of the Government Code. The sheriff's office must release the remaining information.³

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.

²The 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).

³Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147 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).

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 M. Graham
Attorney
Open Records Division

JMG/eb

Ref: ID# 694347

Enc. Submitted documents

c: Requestor
(w/o enclosures)