



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 24, 2019

Mr. Robert M. Summers  
Director of Government Filings  
Office of the Secretary of State  
P.O. Box 13375  
Austin, Texas 78711-3375

OR2019-20271

Dear Mr. Summers:

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# 777556.

The Office of the Secretary of State (the "secretary of state's office") received a request for reports pertaining to two named individuals. You state the secretary of state's office will release some information. The secretary of state's office states it will withhold motor vehicle record information pursuant to section 552.130(c) of the Government Code, social security numbers pursuant to section 552.147(b) of the Government Code, e-mail addresses pursuant to Open Records Decision No. 684 (2009), and dates of birth pursuant to Open Records Letter No. 2016-07153 (2016).<sup>1</sup> You claim the submitted information is excepted

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<sup>1</sup>Section 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(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). 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 under the Act. *See id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office. Open Records Letter No. 2016-07153 authorizes the secretary of state's office to withhold public citizens' dates of birth from notary applications and contained in the Notary Public Unit Database of the secretary of state's office under section 552.101 of the Government Code in conjunction with common-law privacy without requesting a ruling from this office.

from disclosure under sections 552.101, 552.115, and 552.122 of the Government Code. We have considered the exceptions 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 Code § 552.101. Section 552.101 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 submitted 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 secretary of state’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA.<sup>2</sup>

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your arguments against its disclosure.

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. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). 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.). However, because “the right of privacy is purely personal[,]” that right “terminates upon the death of the person whose privacy is invaded[.]” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broad. Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 6521)); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”).

Although you state the secretary of state's office will redact dates of birth pursuant to the previous determination issued to the secretary of state's office in Open Records Letter No. 2016-07153, we note you have redacted the date of birth of an individual who is deceased from the submitted information. The secretary of state's office may not withhold the dates of birth of deceased individuals pursuant to the previous determination issued to the secretary of state's office in Open Records Letter No. 2016-07153. Further, we find the secretary of state's office has not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the secretary of state's office may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

The secretary of state's office raises section 552.115 of the Government Code for the information it has marked. Section 552.115 excepts from disclosure “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]” Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. See Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the secretary of state's office, the information you have marked may not be withheld on this basis.

Section 552.122(b) of the Government Code exempts from disclosure “[a] test item developed by a licensing agency or a governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated.” ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* at 7. Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987).

The secretary of state’s office seeks to withhold the submitted questions and answers under section 552.122 of the Government Code. The secretary of state’s office indicates the questions test the knowledge and abilities of applicants in a particular area. The secretary of state’s office also states it uses the submitted questions on a continuing basis. Based on these representations and our review, we find the submitted questions are “test items” under section 552.122(b) of the Government Code. Furthermore, we find release of the answers to the questions would reveal the questions themselves. Therefore, the secretary of state’s office may withhold the questions and answers you marked under section 552.122(b) of the Government Code.

Although you state the secretary of state’s office will redact social security numbers pursuant to section 552.147(b) of the Government Code, we note the submitted information contains social security numbers of deceased individuals. Section 552.147(a) of the Government Code exempts the social security number of a living individual from public disclosure. Gov’t Code § 552.147(a). Section 552.147 does not apply to a deceased individual. The social security numbers in the submitted information do not pertain to living individuals and the secretary of state’s office may not withhold that information under section 552.147 of the Government Code.

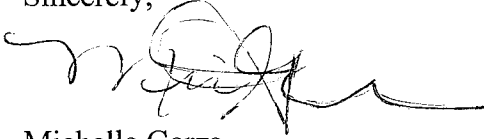
In summary, the secretary of state’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The secretary of state’s office may withhold the questions and answers you marked under section 552.122(b) of the Government Code. The remaining 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Garza", with a long horizontal flourish extending to the right.

Michelle Garza  
Attorney  
Open Records Division

MG/eb

Ref: ID# 777556

Enc. Submitted documents

c: Requestor  
(w/o enclosures)