



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 9, 2019

Mr. L. Brian Narvaez
Counsel for the Town of Prosper
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2019-28431

Dear Mr. Narvaez:

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# 790502 (Prosper ID No. 2019-107).

The Town of Prosper (the “town”), which you represent, received a request for records pertaining to a named individual. You state the town will redact dates of birth of members of the public pursuant to the previous determination issued in Open Records Letter No. 2018-06049 (2018).¹ You also state the town will redact information pursuant to section 552.1175(f) of the Government Code, motor vehicle record information pursuant to section 552.130(c) of the Government Code, and access device numbers pursuant to section 552.136(c) of the Government Code.² You further state the town is withholding certain

¹ Open Records Letter No. 2018-06049 authorized the town to withhold dates of birth of members of the public under section 552.101 of the Government Code in conjunction with common-law privacy without the necessity of requesting an attorney general’s decision.

² Section 552.1175(f) of the Government Code authorizes a governmental body to redact information under section 552.1175(b), without the necessity of requesting a decision from this office, including the home addresses and telephone numbers, emergency contact information, social security number, date of birth, and family member information of certain individuals who properly elect to keep this information confidential. *See* Gov’t Code § 552.1175(b), (f). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.1175(h). *See id.* § 552.1175(g), (h). 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 id.* § 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 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

information pursuant to Open Records Decision No. 684 (2009).³ You state the town is releasing some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.1175 of the Government Code. We have considered your claimed exceptions and reviewed the submitted information.

Initially, we note the submitted TCOLE number is not “public information” subject to disclosure under the Act. Section 552.002(a) of the Government Code defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;
or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Gov’t Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand a TCOLE identification number is a unique computer-generated number assigned to licensees for identification in TCOLE’s electronic database and may be used as an access device number on the TCOLE website. Thus, we find the submitted TCOLE number is not “public information” for purposes of the Act, and the town is not required to release this information in response to this request.⁴

Next, we note Exhibit D is subject to section 552.022(a) of the Government Code, which provides, in relevant part:

³Open 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, including e-mail addresses subject to section 552.137 of the Government Code.

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

[T]he 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[.]

Id. § 552.022(a)(1). Exhibit D consists of a completed investigation that is subject to section 552.022(a)(1). The information subject to section 552.022(a)(1) must be released unless it is excepted from disclosure under section 552.108 of the Government Code, or is made confidential under the Act or other law. *See id.* Although you assert the information subject to section 552.022(a)(1) is excepted from disclosure under section 552.111 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the town may not withhold Exhibit D under section 552.111. However, as sections 552.101, 552.117, 552.1175, 552.130, 552.137, and 552.140 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the information subject to section 552.022.⁵ We will also consider your remaining arguments for the information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from public 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 other statutes, such as 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

⁵ The 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

a portion 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 town must withhold the mental health records we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁶

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Upon review, we find the information you marked, and the additional information we have marked and indicated, constitutes information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the town must withhold the information you marked, and the additional information we have marked and indicated, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

⁶ As 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.

Id. § 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).

We note the information the town seeks to withhold under the MPA includes the results of a drug test. 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 test, this individual is not a patient for purposes of section 159.002. Accordingly, the town may not withhold the results of the drug test under section 552.101 of the Government Code on that basis. Further, upon review, we are unable to determine whether the remaining information at issue was created by someone under the supervision of a physician. Thus, we must rule conditionally. To the extent the information we have marked was created by a person acting under the supervision of a physician, then the information we have marked is confidential under the MPA and must be withheld under section 552.101 of the Government Code. If the information we have marked was not created by a person acting under a physician’s supervision, then this information is not confidential under the MPA and may not be withheld from the requestor under section 552.101 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). We also note an individual's name, education, prior employment, and personal information are not ordinarily private information subject to common-law privacy. *See* Open Records Decision Nos. 554 (1990), 448 (1986). 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 generally* Open Records Decision Nos. 600 at 9-10 (1992) (employee's withholding allowance certificate, designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 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 (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Although the references to an employee's previous salaries may be considered highly intimate or embarrassing, we find there is a legitimate public interest in this information as it pertains to the employee's employment qualifications and background. *See* ORD 455 at 9 (applicant salary information is of legitimate public interest because it "bears on the applicants' past employment record and their suitability for the employment position in question").

Upon review, we find some of the remaining information meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, with the exception of the information we have marked for release, the town must withhold the information you marked, as well as the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.⁷ However, we find you failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.117(a)(2) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code. *See* 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. We note section 552.117 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Therefore, to the extent a governmental body did not pay for the cellular telephone service, the town must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. Conversely, if the cellular telephone service is paid for by a governmental body, then the town may not withhold the information at issue under section 552.117(a)(2) of the Government Code.

As stated above, you state you will withhold the information you marked that is subject to section 552.1175 of the Government Code. Additionally, some of the remaining information, which we have marked, may relate to an individual who is a currently licensed peace officer of another law enforcement agency. Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* ORD 506 at 5-7. Thus, to the extent the information relates to licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b), the town must withhold the information you marked, and the additional information we have marked, under section 552.1175 of the Government Code; however, any cellular telephone numbers may only be withheld under section 552.1175 if a governmental body does not pay for the cellular services. Conversely, if the individuals whose information is at issue are not currently licensed peace officers, do not elect to restrict access to the information in accordance with section 552.1175(b), or if the telephone services for the marked cellular telephone numbers are paid for by a governmental body, then the town may not withhold the information at issue under section 552.1175.

Also as noted above, you state the town will redact motor vehicle record information pursuant to section 552.130(c) of the Government Code. We note the remaining information contains additional motor vehicle record information. Section 552.130 of the Government Code 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. *See* Gov't Code § 552.130. Accordingly, the town must withhold the motor vehicle record information you

marked, and the additional information we have marked, under section 552.130 of the Government Code.

You also state the town will redact e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684. We note the remaining information contains additional e-mail addresses subject to section 552.137. 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). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Accordingly, the town must withhold the e-mail addresses you marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Section 552.140 of the Government Code provides a military veteran’s DD-214 form or other military discharge record that is first recorded with, or that otherwise first comes into the possession of, a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). The town came into possession of the submitted military discharge records after September 1, 2003. Accordingly, we conclude the town must withhold the military discharge records we have marked under section 552.140 of the Government Code.

In summary, the submitted TCOLE number is not “public information” for purposes of the Act, and the town is not required to release this information. The town must withhold the mental health records we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The town must withhold the information you marked and we have marked and indicated under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. If the information we have marked was created by a person acting under the supervision of a physician, then the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. With the exception of the information we have marked for release, the town must withhold the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent a governmental body did not pay for the cellular telephone service, the town must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. To the extent the information relates to licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b), the town must withhold the information you marked and we have marked, under section 552.1175 of the Government Code; however, any cellular telephone numbers may only be withheld under section 552.1175 if a governmental body does not pay for the cellular services. The town must withhold the motor vehicle record information you marked and we have marked under section 552.130 of the Government Code. The town must withhold the e-mail addresses you marked and we have marked under section 552.137 of the Government Code, unless

the owners affirmatively consent to their public disclosure. The town must withhold the information we have marked under section 552.140 of the Government Code. The town must release the remaining information.⁸

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,



Erin Groff
Assistant Attorney General
Open Records Division

EMG/gw

Ref: ID# 790502

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁸ To the extent the marked social security number is not being withheld under section 552.1175 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).