



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 8, 2020

Ms. Anastasia Broadfoot  
Attorney, Office of the General Counsel  
Texas Alcoholic Beverage Commission  
P.O. Box 13127  
Austin, Texas 78711-3127

OR2020-00697

Dear Ms. Broadfoot:

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# 805241 (ORR R001822-101419).

The Texas Alcoholic Beverage Commission (the "commission") received a request for ten categories of information pertaining to a specified business. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 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 public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Section 5.48 of the Alcoholic Beverage Code provides as follows:

- (a) "Private records," as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.
- (b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an

investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

Alco. Bev. Code § 5.48. The term “privileged” in this statute has been construed to mean “confidential” for purposes of the Act. Attorney General Opinion JM-1235 at 2 (1990); Open Records Decision Nos. 186 (1978), 62 (1974). Thus, section 5.48 makes confidential any records required or obtained by the commission, with the exception of “the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license” and “a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.” Alco. Bev. Code § 5.48.

You assert some of the submitted information is confidential pursuant to section 5.48. You explain the information in Exhibit C consists of application records for commission licenses or permits and communications within the commission related to the application records. You state none of the information at issue has been introduced as evidence in a hearing before the commission or before a court in Texas or the United States. Based upon these representations and our review, we agree most of the information at issue constitutes private records under section 5.48. Accordingly, with the exception of the name, proposed location, and type of license or permit sought in the application, which the commission states it has released, as well as the information we have marked for release, the commission must withhold Exhibit C under section 552.101 in conjunction with section 5.48. However, we find you have failed to demonstrate the applicability of section 5.48 to the information we have marked for release; thus, the commission may not withhold the remaining information in Exhibit C under section 552.101 on that basis.

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. We note the commission’s Enforcement Division is a law enforcement agency. *See* Alco. Bev. Code §§ 5.14 (commission may commission inspectors with police powers to enforce Alcoholic Beverage Code), .36 (commission shall investigate violations of Alcoholic Beverage Code and other laws relating to alcoholic beverages), .361 (commission shall develop risk-based approach to enforcement). You state the information in Exhibit B pertains to a closed criminal investigation of the commission’s enforcement division that did not result in conviction or deferred adjudication. Based upon this representation and our review, we agree section 552.108(a)(2) is applicable to the information at issue.

However, we note, and you acknowledge, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*

*Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of the basic information, which you state the commission has released, the commission may withhold Exhibit B under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes, such as 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 also found that when a file is created as the result of a hospital stay, all the documents in the file relating 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). 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). Under this definition, a deceased person cannot be a patient under section 159.002 of the MPA. *See* ORDs 487, 370, 343. Thus, the MPA is applicable only to records related to a person who was alive at the time of diagnosis, evaluation, or treatment to which the records pertain.

Upon review, we find some 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. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government

Code in conjunction with the MPA.<sup>1</sup> However, we find none of the remaining information constitutes medical records subject to section 159.002. Therefore, the commission may not withhold any portion 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 773.091 of the Health and Safety Code, which provides, in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services [(“EMS”)] personnel or by a physician providing medical supervision that are created by the [EMS] personnel or physician or maintained by an [EMS] provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving [EMS].

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091. The term “patient” is not defined for the purposes of section 773.091 of the Health and Safety Code. When a word used in a statute is not defined and that word is “connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art.” Gov’t Code § 312.002; *see also Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998). Taber’s Cyclopedic Medical Dictionary defines “patient” as “one who is sick with, or being treated for, an illness or injury; [or] . . . an individual receiving medical care.” Taber’s Cyclopedic Medical Dictionary 1446 (17th ed. 1989). We also note other statutes dealing with medically related professions generally define patient as an individual who consults a health care professional. *See* Health & Safety Code § 611.001 (mental health records), Occ. Code §§ 159.001 (physician records), 201.401 (chiropractic records), 202.401 (podiatric records), 258.101 (dental records). Thus, because the generally accepted medical definition of patient indicates that the term refers to a living individual, we find the term does not encompass information that concerns the deceased individual. Upon review, we find some of the remaining information consists of records of the identity, evaluation, or treatment of a patient made and maintained by EMS personnel. Thus, section 773.091 is applicable to this information. Accordingly, with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.<sup>2</sup>

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<sup>1</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

<sup>2</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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 or 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 common-law right to privacy, however, is a personal right that “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 Broadcasting 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 § 652I (1977))); 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 at 1 (1981) (privacy rights lapse upon death). Thus, the commission may not withhold the information pertaining to the deceased individual under section 552.101 on the basis of common-law privacy. Upon review, we find you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing information of a living individual and not of legitimate public concern. Therefore, the commission may not withhold any of the remaining information in Exhibit D under section 552.101 on that basis.

In summary, with the exception of the name, proposed location, and type of permit sought in the relevant applications, which you state the commission has released, as well as the information we have marked for release, the commission must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. With the exception of the basic information, which you state the commission has released, the commission may withhold Exhibit B under section 552.108(a)(2) of the Government Code. The commission 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 subject to section 773.091(g) of the Health and Safety Code, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The commission 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 <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 "Erin Groff". The signature is written in a cursive, flowing style.

Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/be

Ref: ID# 805241

Enc. Submitted documents

c: Requestor  
(w/o enclosures)