



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 26, 2020

Ms. Laura Anne Coats
Assistant District Attorney
Dallas County Criminal
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399

OR2020-09583A

Dear Ms. Coats:

This office issued Open Records Letter No. 2020-09583 (2020) on March 27, 2020. Since that date, we have received new information that affects the facts on which this ruling was based. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on March 27, 2020. Your request was assigned ID# 850102.

The Dallas County District Attorney's Office (the "district attorney's office") received a request for thirty-five categories of information pertaining to two specified cases involving a named individual.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.130, 552.136, and 552.137 of the Government Code.² We have considered the claimed exceptions and reviewed the submitted representative sample

¹ The district attorney's office states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² We note the district attorney's office did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

of information.³ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state, the information you indicated is not responsive to the instant request. Additionally, we note the information we marked is not responsive to the instant request because it does not pertain to the specified cases or named individual. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release such information in response to this request.

Next, we note some of the submitted information consists of grand jury subpoenas and information obtained pursuant to grand jury subpoenas. The judiciary is expressly excluded from the requirements of the Act. *Id.* § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury's constructive possession when the same information also is held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent the district attorney's office holds the information at issue solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the district attorney's office is not required to release that information in response to the instant request. To the extent the district attorney's office holds the information at issue in its own capacity and not solely as an agent of the grand jury, we will address your arguments against its disclosure.

We next note some of the responsive information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2019-28596A (2019) and 2020-00448 (2020). As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed, the district attorney's office may continue to rely on those rulings as previous determinations and withhold or release the submitted information in accordance with Open Records Letter Nos. 2019-28596A and 2020-00448. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from

³ We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

disclosure). To the extent the submitted information was not previously ruled on, we will address your submitted arguments.

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 district attorney’s office must withhold the marked information under section 552.101 of the Government Code in conjunction with the MPA. However, we find you have not established any of the remaining information consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. Thus, the remaining information is not confidential under the MPA, and the district attorney’s office may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses information protected by other statutes, including section 160.007 of the Occupations Code, which provides in part:

- (a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged;

...

- (g) A person seeking access to privileged information must plead and prove waiver of privilege. A member, employee, or agent of a medical peer review committee who provides access to an otherwise privileged communication or record in cooperation with a law enforcement authority in a criminal investigation is not considered to have waived any privilege established under this subtitle.

Occ. Code § 160.007(a), (g). “Medical peer review” is defined by the Medical Practice Act, found at subtitle B of title 3 of the Occupations Code, as “the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners.” *Id.* § 151.002(a)(7). “Medical peer review” involves, among other things, the process known as “credentialing,” which is the granting or retention of a doctor’s hospital privileges. *See St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians[.]” Occ. Code § 151.002(a)(8).

You state the information at issue consists of credentialing files regarding surgical privileges of a named individual. You state the submitted documents were obtained by different hospitals’ credentialing committees, which you state are committees of the medical staff of those hospitals that are authorized to evaluate the competence of physicians. You assert, and we agree, these committees meet the definition of medical peer review committees under section 151.002(8) of the Occupations Code. We note release of the information at issue to the district attorney’s office in this instance does not waive the confidentiality of that information or the privilege established under this subtitle. *See id.* § 160.007(g). Based on your representations and our review, we agree the information you indicated is confidential records of medical peer review committee under section 160.007 of the Occupations Code and must be withheld under section 552.101 of the Government Code.

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.). We note that 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 Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *see* 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). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold all living public citizens' dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney's office may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of constitutional 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 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find you 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 district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country. *See id.* § 552.130(a)(1)-(2). Upon review, we find the district attorney's office must withhold the motor vehicle record information we indicated under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, “Notwithstanding 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the district attorney’s office must withhold insurance policy numbers and partial credit card numbers in the remaining responsive information under section 552.136 of the Government Code.

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). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a district attorney’s office’s employee or official used to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). To the extent the e-mail addresses in the remaining responsive information belong to members of the public, the district attorney’s office must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See Gov’t Code* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c) or belong to a district attorney’s office employee or official, the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, to the extent the district attorney’s office holds the information at issue solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the district attorney’s office is not required to release that information in response to the instant request. The district attorney’s office may continue to rely on Open Records Letter Nos. 2019-28596A and 2020-00448 as previous determinations and withhold or release the submitted information in accordance with those rulings. The district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The district attorney’s office must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code. The district attorney’s office must withhold all living public citizens’ dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney’s office must withhold the motor vehicle record information we indicated under section 552.130 of the Government Code. The district attorney’s office must withhold insurance policy numbers and partial credit card numbers in the remaining responsive information under section 552.136 of the Government Code. To the extent the e-mail addresses in the remaining responsive information belong to members of the public, the district attorney’s office must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail

addresses belong affirmatively consent to their release. The remaining responsive information must be released.⁴

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,

Pearlie Gault
Attorney
Open Records Division

PG/jxd

Ref: ID# 850102

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴ The information being released contains social security numbers. 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. See Gov't Code § 552.147(b).