



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2020

Ms. Heather Stebbins
County Attorney
Kerr County Attorney's Office
700 Main Street, Suite BA-103
Kerrville, Texas 78028

OR2020-20646

Dear Ms. Stebbins:

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# 840674.

The Kerr County Sheriff's Office (the "sheriff's office") received a request for employment and disciplinary records related to five named officers.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code.² 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. This section encompasses information protected by other statutes, such as the Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. §§ 2601 *et. seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for

¹ As you have not submitted a copy of the request for information, we take our description from your brief.

² We note the sheriff'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, as sections 552.101 and 552.102 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. . . . If the [Americans with Disabilities Act (the “ADA”)], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Some of the submitted information, which we have marked, consists of documents subject to the FMLA. The information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, you do not indicate any of the release provisions of the FMLA apply to this information. Accordingly, the sheriff’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.³

Section 552.101 of the Government Code also encompasses information made confidential by 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”). Upon review, we find portions of the remaining information consist of mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the sheriff’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁴

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which pertains to L-2 Declaration of Medical Condition and L-3

³ As our ruling is dispositive, we need not address your arguments against disclosure of this information.

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

Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement (“TCOLE”). Section 1701.306 provides the following:

(a) [TCOLE] may not issue a license to a person unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a blood test or other medical test.

(b) An agency hiring a person for whom a license is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCOLE]. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). Upon review, we find the sheriff’s office must withhold the L-2 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.⁵

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

⁵ As our ruling is dispositive, we need not address your arguments against disclosure of this information.

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 the information we have marked consists of medical records subject to the MPA. Accordingly, the sheriff’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code.⁶ We note some of the remaining information at issue consists of a report of the result of a drug test. Section 159.001 of the MPA defines “patient” as “a person who, to receive medical care, consults with or is seen by a physician.” Occ. Code § 159.001(3). Because the individual at issue did not receive medical care in the administration of the drug test, he is not a patient for purposes of section 159.002. Furthermore, none of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the sheriff’s office may not withhold any of the remaining information under section 552.101 in conjunction with the MPA.

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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, 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. *See Indus. Found. v. v. Tex. Indus. Accident Bd.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Texas Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Accordingly, the sheriff’s office must withhold the dates of birth of the employees at issue under section 552.102(a) of the Government Code. However, we find you failed to demonstrate the remaining information is subject to section 552.102(a) of the Government Code, and the sheriff’s office may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy, which, as noted above, 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.*, 540 S.W.2d at 685 To demonstrate the applicability of common law privacy, both prongs of this test must be

⁶ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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). The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). This office has also concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, 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 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold the information we have marked and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁷ *See* Gov't Code § 552.117(a)(2). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We note a post office box number is not a "home address" for purposes of section 552.117 and, therefore, may not be withheld on that ground. *See* Open Records Decision No. 622 at 6 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. The information we have marked under section 552.117 consists of the personal information of peace officers employed by the sheriff's office who are currently-licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the cellular telephone numbers at issue if a governmental body did not pay for the cellular telephone service.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is

⁷ 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.

excepted from public release. *See* Gov't Code § 552.130. Accordingly, the sheriff's office must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the sheriff's office must: (1) withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA; (2) withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code; (3) withhold the L-2 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (4) withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code; (5) withhold the dates of birth of the employees at issue under section 552.102(a) of the Government Code; (6) withhold the information we have marked and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; (7) withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the cellular telephone numbers at issue if a governmental body did not pay for the cellular telephone service; (8) withhold the information we have marked under section 552.130 of the Government Code; and (9) 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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/jm

Ref: ID# 840674

Enc. Submitted documents

c: Requestor
(w/o enclosures)