



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 8, 2020

Ms. Amy Bass-Domel
Open Records
Williamson County
508 South Rock Street
Georgetown, Texas 78626

OR2020-25409

Dear Ms. Bass-Domel:

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# 848431.

The Williamson County Sheriff's Office (the "sheriff's office") received a request for certain information pertaining to a named individual. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) [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[.]

Gov't Code § 552.022(a)(1). The submitted information consists of completed evaluations and investigations subject to section 552.022(a)(1). The submitted information 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.* § 552.022(a)(1). Although

you assert the information at issue is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the submitted information may not be withheld under section 552.103. However, as sections 552.101, 552.117, and 552.152 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to 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 the release of medical records. Section 159.002 of the MPA provides, in relevant part, as follows:

- (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). Upon review, we find the information you marked contains 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 in the submitted information did not receive medical care in the administration of the drug test, this individual is not a patient for purposes of section 159.002. Thus, we find you have failed to demonstrate the information you marked consists of medical records for purposes of the MPA, and the sheriff’s office may not withhold the marked information under section 552.101 of the Government Code 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). This office has held common-law privacy protects the identity of a juvenile offender. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.008(b).

Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. In this instance, however, some of the information at issue contains the identifying information of individuals who may have been juvenile offenders. However, because the information at issue does not reflect the ages of these individuals, we must rule conditionally. Thus, to the extent the information we marked pertains to offenders ten years of age or older and under seventeen years of age at the time of the alleged conduct, the sheriff's office must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. Conversely, to the extent the information at issue does not reflect offenders who were ten years of age or older and under seventeen years of age at the time of the alleged conduct, the sheriff's office may not withhold the marked information on that basis. Regardless, the sheriff's office must withhold the remainder of the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code exempts from public disclosure the home addresses, home telephone numbers, 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 section 552.024 or section 552.1175 of the Government Code. 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. Section 552.117 also 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). Upon review, we find some of the remaining information is subject to section 552.117(a)(2) of the Government Code. You state the sheriff's office lacks the technological capability to redact the confidential information from the video recording at issue. However, it is unclear whether the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the information we marked and indicated pertains to individuals who are currently licensed peace officers as defined by article 2.12, the sheriff's office must withhold such information under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold

the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body.¹

If the individuals at issue are not currently licensed peace officers, then the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). As noted above, section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. As noted above, you state the sheriff's office lacks the technological capability to redact the confidential information from the video recording at issue. Accordingly, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality or a governmental body pays for the cellular telephone service, the sheriff's office may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee to a substantial threat of physical harm.

Gov't Code § 552.152. You state the information you marked and indicated identifies an undercover officer. You represent the release of the undercover officer's identity would subject the officer to a substantial threat of physical harm. As noted above, you state the sheriff's office lacks the technological capability to redact the confidential information in some of the remaining video recordings at issue. Upon review, we find section 552.152 is applicable to the information you marked and indicated. Accordingly, the sheriff's office

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

must withhold the information you marked and indicated under section 552.152 of the Government Code.

In summary, to the extent the information we marked pertains to offenders ten years of age or older and under seventeen years of age at the time of the alleged conduct, the sheriff's office must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must withhold the remainder of the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked and indicated pertains to individuals who are currently licensed peace officers as defined by article 2.12, the sheriff's office must withhold such information under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. To the extent the individuals at issue are not currently licensed peace officers and the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. The sheriff's office must withhold the information you marked and indicated under section 552.152 of the Government Code. The sheriff's office 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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/be

Ref: ID# 848431

Enc. Submitted documents

c: Requestor
(w/o enclosures)