



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 23, 2022

Mr. Kevin Capps
Assistant District Attorney
Brazos County District Attorney's Office
300 East 26th Street, Suite 310
Bryan, Texas 77803

OR2022-05510

Dear Mr. Capps:

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# 932147.

The Brazos County District Attorney's Office (the "district attorney's office") received a request for eleven categories of information pertaining to a specified arrest of a named individual, including the personnel files of law enforcement officers involved in the arrest and communications with healthcare providers regarding the incident. You state the district attorney's office has released some information to the requestor. 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 representative sample of information.¹

Section 552.108 of the Government Code provides, in relevant part, as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

¹ 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.

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must explain how and why section 552.108 is applicable to the information at issue. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information submitted as Exhibit F consists of information that was prepared by or on behalf of prosecutors within the district attorney's office in the course of preparing for criminal litigation. You also state this information reflects the mental impressions or legal reasoning of attorneys representing the state. Based upon these representations and our review, we agree some of the information at issue reflects the mental processes or legal reasoning of attorneys representing the state. Accordingly, the district attorney's office may withhold the information we have marked under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. However, we note the remaining information at issue was sent to or received from opposing counsel in the case. Upon review, we find you have failed to demonstrate how this information reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we find you have failed to demonstrate how the remaining information at issue is protected by sections 552.108(a)(4) and 552.108(b)(3), and the district attorney's office may not withhold any portion of it under section 552.108 of the Government Code.

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 made confidential by other statutes, such as section 611.002 of the Health and Safety Code, which provides, in 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).² 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. *Id.* § 611.001(2). Upon review, we find some of the remaining information consists of mental health records for purposes of section 611.002. Accordingly, the district attorney’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.³ However, we find the remaining information at issue does not consist of mental health records for purposes of chapter 611, and no portion of it may be withheld under section 552.101 of the Government Code on that basis.

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.⁴ 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.

² Although you do not raise section 611.002 of the Health and Safety Code in your brief, we understand you to raise section 552.101 of the Government Code in conjunction with this section based on the substance of your arguments.

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

⁴ Although you do not raise the MPA in your brief, we understand you to raise section 552.101 of the Government Code in conjunction with this section based on the substance of your arguments.

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). 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 remaining 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 district attorney’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.⁵ In addition, we note some of the remaining information, which we have marked, was created by a nurse. The district attorney’s office must withhold these documents under section 552.101 of the Government Code in conjunction with the MPA only if they were created under the supervision of a physician, or if they contain information taken directly from records created by or under the supervision of a physician. If the documents created by a nurse were not created under the supervision of a physician, or if they do not contain information taken directly from records created by or under the supervision of a physician, they are not subject to the MPA and the district attorney’s office may not withhold them under section 552.101 on that basis. However, we find none of the remaining information constitutes medical records subject to section 159.002. Therefore, the district attorney’s office 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 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.⁶ *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). Further, 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.).

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

⁶ Although you do not raise section 552.101 of the Government Code in conjunction with common-law in your brief, we understand you to make this argument based on the substance of your arguments.

Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the dates of birth within the remaining information and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate the remaining information at issue 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 of the Government Code in conjunction with common-law privacy.

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.⁷ See Gov't Code § 552.130. Accordingly, the district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the district attorney's office may withhold the information we have marked under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney'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. The district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA; however, the marked records created by nurses may only be withheld to the extent they were created under the supervision of a physician or contain information taken directly from records created by or under the supervision of a physician. The district attorney's office must withhold the dates of birth within the remaining information and the information we have 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 have marked under section 552.130 of the Government Code. The district attorney's office 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->

⁷ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁸ We note the remaining information includes a social security number. 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 under the Act. Gov't Code § 552.147(b).

[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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/mo

Ref: ID# 932147

Enc. Submitted documents

c: Requestor
(w/o enclosures)