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ATTORNEY GENERAL OF TEXAS

May 24, 2022

Mr. Tucker Furlow
General Counsel
Texas Civil Commitment Office
4616 West Howard Lane, Building 2, Suite 350
Austin, Texas 78728

OR2022-14955

Dear Mr. Furlow:

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# 949738 (Ref. No. 2022-0006).

The Texas Civil Commitment Office (the "commitment office") received a request for information pertaining to a named individual. The commitment office states it released some of the requested information. The commitment office also states it will redact certain information pursuant to sections 552.136(b) and 552.147(b) of the Government Code.¹ The commitment office claims some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

¹ Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See Gov't Code* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). 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 id.* § 552.147(b)

² 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.

Initially, we note the submitted information includes court-filed documents. Section 552.022(a)(17) of the Government Code provides for required public disclosure of “information that is also contained in a public court record[,]” unless the information is expressly made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). Although the commitment office raises section 552.101 of the Government Code in conjunction with common-law privacy for the information subject to section 552.022(a)(17), we note common-law privacy is not applicable to information contained in public records. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). Thus, no portion of the court-filed documents subject to section 552.022(a)(17), which we have marked, may be withheld under section 552.101 in conjunction with common-law privacy. However, as section 552.101 of the Government Code in conjunction with statutory law applies to confidential information, we will consider the submitted arguments under section 552.101 for the information subject to section 552.022.

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. The commitment office asserts the information at issue is confidential under former section 1703.306 of the Occupations Code, which provided for the confidentiality of certain polygraph information. However, the 87th Legislature repealed former chapter 1703 of the Occupations Code effective September 1, 2021. Act of May 31, 2021, 87th Leg., R.S., HB 1560, § 2.01(1). Accordingly, the commitment office may not withhold the information it marked under section 552.101 of the Government Code in conjunction with former section 1703.306 of the Occupations 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. 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 found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). 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 an individual’s address is generally not private information under common-law

privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person's address is not an invasion of privacy). Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, except for the information we have marked for release, the commitment office must withhold the public citizen's date of birth, information it marked, and additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.³ However, we find the commitment office has not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the commitment 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 552.101 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.

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 remaining information 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.

³ As our ruling is dispositive, we need not address the commitment office's remaining arguments against disclosure of this information.

Accordingly, except for the information we have marked for release, the commitment office must withhold the information it marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with the MPA.⁴ However, we find the commitment office has not demonstrated any portion of the remaining information consists of medical records for purposes of the MPA, and the commitment office may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 508.313 of the Government Code, which is applicable to records of the Texas Department of Criminal Justice (“TDCJ”). Section 508.313 provides, in pertinent part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of TDCJ] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) [TDCJ], on request or in the normal course of official business, shall provide information that is confidential and privileged under Subsection (a) to:

...

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

(d) In this section, “eligible entity” means:

...

(1) a government agency, including the office of a prosecuting attorney[.]

⁴ As our ruling is dispositive, we need not address the commitment office’s remaining argument against disclosure of this information.

Gov't Code § 508.313(a), (c)(4), (d)(1). Thus, TDCJ may provide information that is encompassed by section 508.313 to an eligible entity, and such information remains confidential in the possession of the entity to which it was provided. *See id.* § 508.313(c)-(d); *see also* Open Records Decision No. 655 at 8 (1997) (information excepted from public disclosure under Act may be transferred between governmental agencies without destroying its confidential character if agency to which information is transferred has authority to obtain it). The commitment office states, and the documents reflect, the information at issue consists of parole records obtained from the TDCJ's parole division and that relate to a releasee. Based on this representation and our review, we conclude the commitment office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.

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"). 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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). Upon review, we find some of the information at issue consists of mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, with the exception of the information we have marked for release, the commitment office must withhold the remaining information it marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. However, we find the commitment office has not demonstrated any portion of the remaining information at issue consists of a mental health record for purposes of chapter 611 of the Health and Safety Code. Accordingly, the commitment office may not withhold the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 841.0833 of the Health and Safety Code, which reads as follows:

(a) The [commitment office] shall develop procedures for the security and monitoring of committed persons in each programming tier.

(b) Information regarding the security and monitoring procedures developed under Subsection (a) is confidential and not subject to disclosure under [the Act].

Health & Safety Code § 841.0833. The commitment office states the information it marked consists of information regarding procedures for the security and monitoring of a committed person. Upon review, we agree the information at issue consists of information related to the security and monitoring of a committed person, which is made confidential under section 841.0833(b). Accordingly, the commitment office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 841.0833(b) of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadlo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a “first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found that “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” ORD 185. Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 428 and 430. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The rights of those individuals to anonymity was found to outweigh the public’s interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors).

Accordingly, the commitment office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. However, we find the commitment office has not demonstrated the remaining information it marked falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the commitment office may not withhold any of the remaining information at issue under section 552.101 on the basis of constitutional privacy.

Section 552.108 of the Government Code provides, in pertinent part:

(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:

(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.

Id. § 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). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement

agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. The commitment office asserts the information at issue was prepared by an attorney representing the state or reflects the mental impressions or legal reasoning of an attorney representing the state. In this instance, however, we have not received any representation to indicate the Montgomery County District Attorney's Office wishes to have the information at issue withheld. Therefore, the commitment office has failed to demonstrate the applicability of section 552.108(a)(4) or section 552.108(b)(3) of the Government Code to the information it marked, and it may not be withheld on that basis.

Section 552.134(a) of the Government Code relates to inmates of TDCJ and provides the following:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by [TDCJ] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). We note section 552.134 applies only to "information obtained or maintained by" TDCJ. *See id.* Section 552.134(d) states the release of information subject to section 552.134(a) to an eligible entity, as defined by section 508.313(d) of the Government Code, for a purpose related to law enforcement, prosecution, corrections, clemency, or treatment is not considered a release of information to the public and does not waive the protection of section 552.134 or other law. Additionally, we have previously held TDCJ has the discretion to transfer to another governmental body information subject to the statutory predecessor to section 552.134, and the transferred information remains confidential in the hands of the receiving governmental body. *See* Open Records Decision No. 667 (2000) (TDCJ has discretion to release inmate's social security number made confidential by statutory predecessor to section 552.134 to voter registrar for purpose of maintaining accurate voter registration lists and transferred social security number remains confidential in possession of the voter registrar). The commitment office contends the information at issue falls within the scope of section 552.134. The commitment office states this information was obtained from TDCJ and concerns a former inmate now under the supervision and treatment of the commitment office. Upon review, we find the information at issue pertains to a former inmate who was confined in a facility operated by the TDCJ and is subject to section 552.134. Accordingly, the commitment office must withhold the information it marked under section 552.134(a) of the Government Code.⁵

In summary, except for the information we have marked for release, the commitment office must withhold the public citizen's date of birth, information it marked, and additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Except for the information we have marked for release, the

⁵ As our ruling is dispositive, we need not address the commitment office's remaining arguments against disclosure of this information.

commitment office must withhold the information it marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The commitment office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. With the exception of the information we have marked for release, the commitment office must withhold the remaining information it marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The commitment office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 841.0833(b) of the Health and Safety Code. The commitment office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. The commitment office must withhold the information it marked under section 552.134(a) of the Government Code. The commitment 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,

Katie Stallcup
Assistant Attorney General
Open Records Division

AKS/be

Ref: ID# 949738

Enc. Submitted documents

c: Requestor
(w/o enclosures)