



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2022

Ms. Erica E. Valladares
Counsel for the City of Eagle Pass
Langley & Banack, Incorporated
745 East Mulberry, Suite 700
San Antonio, Texas 78212

OR2022-23935

Dear Ms. Valladares:

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# 965502 (ORR# 2022-139).

The City of Eagle Pass (the "city"), which you represent, received a request for a specified city policy and information pertaining to a named individual. You claim the requested information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.130, and 552.147 of the Government Code.¹ Additionally, the city provides documentation showing it has notified an individual of the right to submit comments to this office why some of the submitted information should not be released.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered your arguments and reviewed the submitted information.

Initially, you argue the submitted information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

¹ Although the city raises section 552.022 of the Government Code, section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

² As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

(a) . . . information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in his or her official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001(a). You claim the submitted information is not public information subject to the Act. However, upon review, we find the submitted information consists of information that was created and is maintained by the city for the transaction of official business. Accordingly, the submitted information is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act.

Next, we note you have not submitted the requested city policy. Thus, to the extent such information existed and was maintained by the city on the date the city received the request for information, we presume the city has released it. If not, the city must do so at this time.

See id. §§ 552.301, .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

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 other statutes, such as section 40.321 of title 49 of the Code of Federal Regulations, which provides:

Except as otherwise provided in this subpart, as a service agent or employer participating in the [United States Department of Transportation] drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee’s specific written consent.

(a) A “third party” is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.

(b) “Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases,” in which an employee agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

49 C.F.R. § 40.321. You state the submitted information relates to drug and alcohol test results of a city employee. You indicate this information is maintained by the city pursuant to section 40.321 of title 49 of the Code of Federal Regulations. The city does not indicate written consent has been given with respect to disclosure of the requested drug and alcohol tests. *See id.* § 40.321(b). Based upon these representations and our review, we conclude the city must withhold the information we marked under section 552.101 in conjunction with section 322 of title 49 of the United States Code and section 40.321 of title 49 of the Code of Federal Regulations.³ However, you failed to demonstrate the applicability of section 40.321 to the remaining information, and the city may not withhold it under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in relevant part the following:

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

(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 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 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982).* Upon review, we find the remaining information consists of alcohol test results and city human resources documentation. 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 in the report did not receive medical care in the administration of the alcohol tests, this individual is not a patient for purposes of section 159.002. Therefore, this information does not consist of confidential medical records for purposes of the MPA. Consequently, the city may not withhold this information under section 552.101 of the Government Code on this basis.

Section 552.102(a) 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. Section 552.101 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals held the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102 and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas

Comptroller of Public Accounts. *Id.* at 347-48. Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the city may not withhold any of the remaining information on that basis.

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. *See* Gov't Code § 552.130. Accordingly, the city must withhold the information you marked under section 552.130 of the Government Code.⁴

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. *Id.* § 552.147. Upon review, we agree the city may withhold the social security numbers you marked under section 552.147 of the Government Code.

In summary, the city must withhold the information we marked under section 552.101 in conjunction with section 322 of title 49 of the United States Code and section 40.321 of title 49 of the Code of Federal Regulations. The city must withhold the information you marked under section 552.130 of the Government Code. The city may withhold the social security numbers you marked under section 552.147 of the Government Code. The city 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,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/jxd

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

Ref: ID# 965502

Enc. Submitted documents

c: Requestor
(w/o enclosures)