



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 15, 2022

Ms. Kaitlin Lopez Cano  
Public Information Coordinator  
Texas Commission on Jail Standards  
P.O. Box 12985  
Austin, Texas 78711

OR2022-35628

Dear Ms. Cano:

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# 984624 (ORR No. 2022-9-4).

The Texas Commission on Jail Standards (the "commission") received a request for records pertaining to commission investigations regarding in-custody deaths at a specified county jail during a stated period of time.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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<sup>1</sup> You state, and provide documentation demonstrating, the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). Additionally, you state, and provide documentation demonstrating, the commission sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. You inform us the requestor modified her request in response to the cost estimate. *See id.* § 552.222(b); *City of Dallas*, 304 S.W.3d at 387.

[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 investigations subject to section 552.022(a)(1) of the Government Code. The commission must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the information submitted as Exhibit G, this section is a discretionary exception to disclosure 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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, no portion of Exhibit G, which is subject to section 552.022(a)(1), may be withheld under section 552.103. However, because sections 552.101, 552.117, 552.1175, and 552.130 of the Government Code make information confidential under the Act, we will address the applicability of these sections to the submitted information.<sup>2</sup>

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 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

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<sup>2</sup> 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 (1987).

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). 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 submitted 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. In addition, we note some of the information we have marked was created by a nurse; this information is made confidential by the MPA only to the extent it was created under the supervision of a physician or contains information taken directly from records created by or under the supervision of a physician. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA; however, the records created by nurses may be withheld on this basis 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.<sup>3</sup>

Section 552.101 of the Government Code also encompasses section 411.192 of the Government Code, which governs the release of all information maintained by the commission concerning the licensure of individuals to carry a concealed handgun, and provides, in relevant part:

(a) The [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual’s name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the [Act].

(b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

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

Gov't Code § 411.192(a), (b). Some of the remaining information, which we have marked, consists of concealed handgun license information of a deceased individual. We note the right of privacy is generally purely personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.) (right of privacy is purely personal and lapses upon death); *see also Justice v. Belo Broad. Corp.*, 472 F. Supp. 145, 146-67 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). However, it is not clear to this office that the sole purpose of section 411.192 is to protect the personal privacy interests of license holders. Furthermore, under the plain language of section 411.192(a), “all other records maintained under this subchapter” are made confidential, regardless of whether the person named in the record is living or dead. *See Gov't Code § 411.192(a)* (emphasis added). Nothing in the statutory text indicates a legislative intent that confidentiality attach only to records of living license holders. Accordingly, we conclude the concealed handgun license information, which we have marked, is confidential under section 411.192 of the Government Code, and the commission must withhold it under section 552.101 of the Government Code.<sup>4</sup>

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the federal government or other states. *See* 28 C.F.R. § 20.21; *see also* Open Records Decision No. 565 (1990). However, the federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* ORD 565. Section 411.083 of the Government Code makes CHRI maintained by the DPS confidential, and only allows for the dissemination of this information as provided in subchapters E-1 and F of chapter 411 of the Government Code. *See* Gov't Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize the dissemination of CHRI to a criminal justice agency, but a criminal justice agency may only release CHRI to another criminal justice agency if it is for a criminal justice purpose. *Id.* § 411.089(b)(1). Certain other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency, but may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411. We further note Federal Bureau of Investigation (“FBI”) numbers constitute CHRI generated by the FBI. However, because the laws that govern the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. Upon review, we find some of the remaining information consists of CHRI that is confidential under section 411.083. Accordingly, the commission must withhold all FBI numbers

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

within the remaining information and the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. However, we find you have failed to demonstrate any of the remaining information at issue consists of confidential CHRI. Therefore, the commission 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 also encompasses information protected by section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We note, however, laws making this type of information confidential are intended to protect an individual’s privacy. *See id.* § 560.003. Thus, because the right of privacy is purely personal and lapses at death, the fingerprints of a deceased individual may not be withheld on the basis of sections 560.001, 560.002, and 560.003. *Moore*, 589 S.W.2d at 491; *see also Belo Broad. Corp.*, 472 F. Supp. at 146-47; *see* Attorney General Opinions JM-229, H-817; ORD 272 at 1. In this instance, the information at issue consists of fingerprints belonging to individuals who are deceased. Therefore, the fingerprints within the remaining information are not confidential under section 560.003 of the Government Code, and the commission may not withhold such 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. 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.). We note the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *Moore*, 589 S.W.2d at 491; *see also Belo Broad. Corp.*, 472 F. Supp. at 146-47; *see* Attorney General Opinions JM-229, H-917; ORD 272. Thus, information pertaining to a deceased individual may not be withheld on common-law privacy grounds.

Upon review, we conclude the commission must withhold the dates of birth of living individuals within the remaining information 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 commission 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 the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have failed to demonstrate any of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the commission may not withhold any portion of the remaining information under section 552.101 of the Government Code on the basis of constitutional privacy.

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 requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). We note section 552.117 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *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). 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 the 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 the 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. Accordingly, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, then the commission must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *Gov't Code* § 552.1175. Section 552.1175 applies, in part, to "current or honorably retired peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1); *see id.* § 552.003(1-b) (defining "honorably retired" for purposes of the Act). Section 552.1175 also encompasses a personal cellular telephone

number, unless the cellular telephone service is paid for by a governmental body. *See* ORD 506 at 5-6. The remaining information contains information that may be subject to section 552.1175. Accordingly, if the cellular telephone numbers we have marked relate to a current or honorably retired peace officer who elects to restrict access to their information in accordance with section 552.1175(b) of the Government Code and a governmental body does not pay for the cellular telephone services, then the commission must withhold such information under section 552.1175 of the Government Code.

Section 552.130 of the Government Code exempts 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. We note section 552.130 protects personal privacy. Because the right of privacy lapses at death, motor vehicle record information that pertains solely to a deceased individual may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229; H-917; ORD 272. Accordingly, the commission must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. However, none of the remaining information consists of motor vehicle record information subject to section 552.130, and no portion of it may be withheld on that basis.

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA; however, the records created by nurses may be withheld on this basis 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. The commission must withhold the concealed handgun license information we have marked under section 552.101 of the Government Code in conjunction with section 411.192 of the Government Code. The commission must withhold all FBI numbers within the remaining information and the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The commission must withhold the dates of birth of living individuals within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, then the commission must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. If the cellular telephone numbers we have marked relate to a current or honorably retired peace officer who elects to restrict access to their information in accordance with section 552.1175(b) of the Government Code and a governmental body does not pay for the cellular telephone services, then the commission must withhold such information under section 552.1175 of the Government Code. The commission must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The commission 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,

Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/pt

Ref: ID# 984624

Enc. Submitted documents

c: Requestor  
(w/o enclosures)