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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

September 19, 1991

Mr. Joel V. Roberts
City Attorney
City of Odessa
P. O. Box 4398
Odessa, Texas 79760-4398

Open Records Decision No. 594

Re: Whether information regarding drug testing of city employees is subject to disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-2110)

Dear Mr. Roberts:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. The following information has been requested:

- (1) the total number of drug tests administered to City of Odessa employees from August 1, 1989, through March 1, 1990;
- (2) the total number of those drug tests that showed positive results, and the total number that showed positive results for illegal drug use;
- (3) the total number and the names of all City of Odessa employees terminated from city employment between the dates indicated; and
- (4) budget expenditures to cover the costs of drug tests between the dates indicated.

You advise that you have provided the information regarding the budget expenditures to the requestor. You assert that the balance of the requested

information is excepted from public disclosure under sections 3(a)(1) and 3(a)(2) of the Open Records Act.¹

Section 3(a)(1) excepts from public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) the court found that personnel file information is confidential under section 3(a)(2) only if the information meets the test articulated in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), for common-law privacy protection under section 3(a)(1). Accordingly, your claims under sections 3(a)(1) and 3(a)(2) may be considered together. We will consider, in turn, whether the requested information is "deemed confidential" by city ordinance, state statute, common-law privacy, or constitutional privacy.

City Ordinance

The City of Odessa administered the drug tests that gave rise to the requested information pursuant to Ordinances Nos. 89-49, 89-50, and 89-51 which provide, among other things, that in certain situations city employees will be required to submit to blood and urine tests for the presence of drugs and alcohol.² These ordinances were implemented according to an administrative procedure promulgated by the city and designated Administrative Procedure No. 89-8.³

Ordinance No. 89-49 purports to provide for the confidentiality of test information as follows:

¹You have also asserted that the requested information is excepted under section 3(a)(11) of the Open Records Act. However, you have not suggested why the requested information would be within the exception provided by section 3(a)(11), nor is it apparent. None of the requested information consists of the advice, opinion, or recommendation that is excepted from required public disclosure by section 3(a)(11). Accordingly it is not necessary to further consider the applicability of that exception.

²The ordinances also provide for the drug testing of applicants for city employment. However, records regarding applicants are not at issue here, and are not addressed.

³Our inquiry is limited to the availability of public information under the Open Records Act. We express no opinion as to the validity of any part of the City of Odessa's drug testing program, except as it may relate to the availability of public information.

Strict confidentiality of the drug and alcohol testing process shall be maintained to protect the privacy of employees and job applicants tested. Information on test results and all forms completed by the employee or applicant shall be released within the City organization only on a need to know basis unless required by law or in defense of the City. An employee or job applicant may obtain his or her own test results upon written request to the Risk and Insurance Management Division. Test results and forms shall not be released to any other person not associated with the City of Odessa without the written consent of the employee or the job applicant unless such release is required by law or in defense of the City.

The Open Records Act provides that all information maintained by governmental bodies is public except as provided in that act. Thus, the provisions in the city's Ordinance No. 89-49 cannot operate on their own to make city drug testing information confidential. See *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex.), cert. denied, 459 U.S. 1087 (1982).

State Statute

You assert that the requested information is made confidential by section 5.08(b) of the Medical Practice Act, V.T.C.S. art. 4495b. Section 5.08(b) provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

You advise that "[t]he urine or blood test is performed by medical facilities and questions concerning the diagnosis and evaluation are subject to review by the Medical Review Officer." As no request has been made for actual drug test results or any documentation of such testing that may have been prepared by or under the direction of a physician, we need not consider whether any documents regarding the testing of an individual employee would be within the provisions of section 5.08(b) of the Medical Practice Act. The information requested is not the kind of information described by section 5.08(b) of the Medical Practice Act.

Constitutional and Common-law Privacy

Section 3(a)(1) incorporates constitutional and common-law protections regarding individual privacy into the Open Records Act. *Industrial Foundation, supra*. With respect to the disclosure of public records, the constitutional privacy interest protects the right of individuals to be free from the government disclosing private facts about its citizens, as well as individual autonomy interests in making certain kinds of important decisions concerning such matters as marriage, procreation, contraception, family relationships, child rearing, and education. *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981). In general, the constitution is violated only by invasions of privacy involving the most intimate aspects of human affairs. *Ramie*, 765 F.2d at 492; *see also* Open Records Decision No. 455 (1987).

The section 3(a)(1) exception also incorporates the privacy rights of individuals under the common law. In *Industrial Foundation, supra*, the court found that the kind of information that is protected by tort law regarding the invasion of privacy through "the publicizing of one's private affairs with which the public has no legitimate concern" is the "type of information which the Legislature intended to exempt from mandatory disclosure under Section 3(a)(1)." 540 S.W.2d at 682-83. The court held that information is excepted from public disclosure if (1) it contains highly intimate or embarrassing facts about a person's private affairs, the release of which would be highly objectionable to a person of ordinary sensibilities, and (2) it is of no legitimate concern to the public. *Id.* at 683-85.⁴

Here, the requestor seeks the number, but not the names, of the employees who had positive drug tests during the period in question. He also seeks both the number and names of employees terminated for any reason during the period. The information you submitted indicates that a certain number of employees tested positive during that time. It also indicates that a substantially larger number were terminated in that interval, and names them.

Nothing in the requested information identifies a particular individual as having tested positive or having been terminated for that reason. The information leaves wholly to conjecture whether any or all of the named individuals who were

⁴We note that this office recently concluded that the so-called "false-light" branch of the invasion of privacy tort does not form a basis for exception from public disclosure under section 3(a)(1). Open Records Decision No. 579 (1990).

terminated were terminated for testing positive. Assuming *arguendo* that direct identification of an individual as having tested positive for use of illegal drugs might raise constitutional or common-law invasion of privacy issues, we do not believe that release of the information requested here would raise such concerns. The public has a strong interest in information concerning public employment, and such information is ordinarily open to the public. Open Records Decision Nos. 579 (1990); 470 (1987); 441 (1986); 350 (1982). Accordingly, we do not find that the information requested here is excepted under either the constitutional or common-law privacy branches of section 3(a)(1).

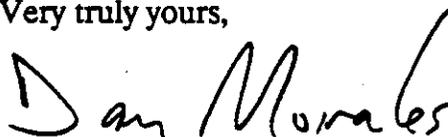
We note finally that the information you have submitted to this office as responsive to the request includes information beyond the scope of the request. The information which you submitted provides more details than were requested as to the particular times employees tested positive and/or were terminated, and thus raises issues as to the confidentiality of individually identifiable test data that the request itself does not require us to reach in this case and that we do not consider. Accordingly, we find that you must release the *requested* information, which consists of:

- (1) the total number of drug tests administered to City of Odessa employees from August 1, 1989, through March 1, 1990;
- (2) the total number of those drug tests that showed positive results, and the total number that showed positive results for illegal drug use;
- (3) the total number and the names of all City of Odessa employees terminated from city employment between the dates indicated; and
- (4) budget expenditures to cover the costs of drug tests between the dates indicated.

SUMMARY

Certain information regarding a city's drug testing program for employees is not excepted from required public disclosure under section 3(a)(1) of the Open Records Act.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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