



**Office of the Attorney General
State of Texas**

July 27, 1992

DAN MORALES
ATTORNEY GENERAL

Mr. Earl Bracken, Jr.
Waco City Attorney
P. O. Box 2570
Waco, Texas 76702-2570

Open Records Decision No. 607

Re: Whether the subject of an HIV antibody test has a right to a copy of a laboratory report issued under a fictitious name (RQ-389)

Dear Mr. Bracken:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Specifically you ask whether the City of Waco must release a copy of a laboratory report of the results of an HIV antibody test to the subject of the report. The test was given as part of a confidential HIV testing program operated by the City of Waco and funded by a grant from the Texas Department of Health. The statute authorizing the Health Department grant requires the testing program to be anonymous. Health & Safety Code § 85.088(2) (formerly V.T.C.S. art. 4419b-4, § 4.03). The specific procedures that the city has adopted to ensure confidentiality, however, are not mandated by section 85.088(2) or by the terms of the grant.

You explain that each person who is tested under the program receives a form containing the following paragraph:

I understand that I am taking this test anonymously. The test results will be given only to me in person upon presentation of my anonymous four (4) digit number. I further understand that once I have received the test results I may not take the copy of the test results and they will be destroyed. If I do not return for my test results within 30 days after the blood was drawn, the test results will be destroyed.

The person to be tested gives his consent to the conditions of testing that are set out on the form and chooses a four-digit number for identification. Although the form

does not mention the use of a name, you state that each person tested gives a fictitious name, which he must use, in addition to the four-digit number, to identify himself when he requests the test result. The laboratory report containing the test results shows the number and name selected. The practice of the program is to destroy the laboratory report after a counselor has informed an individual of his test result. In the case at issue, however, the person tested made an open records request for a copy of the laboratory report before the counselor destroyed the report. In light of that request, the counselor retained a copy of the report. You ask whether the Open Records Act requires that you comply with the request.

Before we address your specific question under the Open Records Act, we first review the provisions governing a local government's retention of records. A "local government record" for purposes of the statutes governing retention and destruction of local government records includes any document received by a local government pursuant to law or in the transaction of public business. Local Gov't Code § 201.003(8). *See generally* Gov't Code ch. 441, subch. J (preservation and management of local government records). Section 202.001 of the Local Government Code sets out the conditions under which a local government may destroy records:

(a) A local government record may be destroyed if:

(1) the record is listed on a records control schedule accepted for filing by the director and librarian [of the Texas State Library and Archives Commission] as provided by Section 203.041 and either its retention period has expired or it has been microfilmed or stored electronically . . . ;

(2) the record appears on a list of obsolete records approved by the director and librarian . . . ; or

(3) a destruction request is filed with and approved by the director and librarian as provided by Section 203.045 for a record not listed on an approved control schedule.

(b) The following records may be destroyed without meeting the conditions of Subsection (a):

(1) records the destruction or obliteration of which is directed by an expunction order issued by a district court pursuant to state law; and

(2) records defined as exempt from scheduling or filing requirements by rules adopted by the commission or listed as exempt in a records retention schedule issued by the commission.

Local Gov't Code § 202.001. An employee of the State Library and Archives Commission has informed us that the commission has not yet issued a records retention schedule for health records of local governments. Therefore, in order to destroy such records, a local government should file a destruction request with the director and librarian of the State Library and Archives Commission.¹ Even if the destruction of a local government record is authorized by statute, however, a record that is the subject of an open records request may not be destroyed until the request is resolved. Local Gov't Code § 202.002(b); *see also* Open Records Decision Nos. 530 (1989); 505 (1988).

Any information that is collected or maintained by a governmental body is subject to the Open Records Act. V.T.C.S. art. 6252-17a, § (3)(a). Because the laboratory reports in question are collected and maintained by the City of Waco, they are subject to the act. *See* Open Records Decision No. 324 (1982) (regarding lead screening blood tests administered by city personnel under the written orders of a physician). Public information may be withheld from disclosure to the public only if it is within one of the exceptions set out in section 3(a) of the act. Otherwise, a governmental body must, upon request, make such information available to the public for inspection or duplication or both. V.T.C.S. art. 6252-17a, § 4.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You urge that the laboratory report in question is made confidential by section 5.08 of the Medical Practice Act, V.T.C.S. art. 4495b. Section 5.08(b) of the Medical Practice Act 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.

V.T.C.S. art. 4495b, § 5.08(b). You state that the HIV-testing program in question is conducted under the standing orders of a physician. Therefore, the records are

¹The Local Government Code does not authorize a local government to destroy records on the basis of the consent of a person who is a subject of the records.

within the scope of section 5.08(b) and are not available to the public. See Open Records Decision No. 324, *supra*. A patient may, however, consent to the release of his own medical records. See V.T.C.S. art. 4495b, § 5.08(h)(5), (j), and (k). Subsection (j) sets out the required contents of the consent, and subsection (k) provides in part as follows:

A physician shall furnish copies of medical records requested, or a summary or narrative of the records, pursuant to a written consent for release of the information as provided by Subsection (j) of this section, except if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, and the physician may delete confidential information about another person who has not consented to the release.

V.T.C.S. art. 4495b, § 5.08(k). Thus, under subsection (k) medical records may be withheld from the subject of the records if the physician under whose direction the records are maintained concludes that release of the records "would be harmful to the physical, mental, or emotional health of the patient." Presumably, however, a physician would not be able to determine that release in this instance would be harmful since the patient has already been informed of the contents of the laboratory report.

It has been suggested that subsection (k) also gives a physician the right to provide the patient a narrative or a summary of the records rather than copies of the records themselves and that the verbal release of the contents of the laboratory report would therefore satisfy the requirements of subsection (k). We observe that subsection (k) authorizes only the release of copies of "medical records" or summaries or narratives of such records. It does not authorize verbal disclosures of medical information. Also, we do not believe a summary of the medical record requested here could be any more succinct than the record itself.

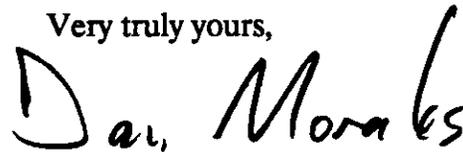
We note that section 81.103 of the Health and Safety Code also makes an HIV test result confidential. That provision does not, however, prohibit release of a test result to the person tested. Health & Safety Code § 81.103(b)(6). Therefore, section 81.103 of the Health and Safety Code is not inconsistent with the provisions of the Medical Practice Act that authorize a patient to obtain copies of his own medical records.

You state that you are concerned about the release of laboratory reports that bear fictitious names. We see no basis, however, for withholding records under the Medical Practice Act from a person who can be identified as the subject of the records.² Misuse of such reports might, of course, violate other law, including section 81.103 of the Health and Safety Code. Also, as a precaution, the city could use a different system of identification, or, at the very least, add a notation to a report that the name used is fictitious.

S U M M A R Y

A laboratory report of the results of a test for HIV antibodies administered under the authority of a physician is made confidential by section 5.08(b) of the Medical Practice Act, article 4495b, V.T.C.S. A patient may obtain copies of his or her records in accordance with the provisions of subsections (j) and (k) of section 5.08.

Very truly yours,



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²You suggest that common-law tort of false-light privacy is a basis for withholding the report in question. We note that this office has rejected false-light privacy as a basis for withholding records under the Open Records Act. Open Records Decision No. 579 (1990).