



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 14, 1998

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR98-0961

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 115291.

The City of Houston (the "city") received a request for information relating to the city's fire department employees and their drug test results. You assert that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information submitted.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. First, you assert that the representative sample of documents submitted as Exhibit 3¹ is confidential under the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, section 5.08(b), which provides:

(b) 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.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are 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.

¹In reaching our conclusion here, we assume that 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 that those records contain substantially different types of information than that submitted to this office.

Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b, §§ 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). You argue that the “drug test results at issue were prepared by or under the supervision of a physician,” and “[t]he names of the persons tested came from drug test results.” We agree that most of the documents in Exhibit 3 are records created or maintained by a physician or someone under a physician’s supervision and are thus confidential under section 5.08 of the MPA. See Open Records Decision No. 546 (1990). Thus, the city may release this information only in accordance with the MPA. Open Records Decision Nos. 598 (1991), 546 (1990); see V.T.C.S. art. 4495b, §§ 5.08 (c), (j), (k). However, Exhibit 3 also contains records that do not fall within the purview of the MPA; we have marked these documents accordingly.

Although some of the documents in Exhibit 3 are not made confidential under the MPA, they are nevertheless excepted from public disclosure by common-law privacy. Section 552.101 of the Government Code also applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person’s private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *id.* One type of information protected by common-law privacy is information revealing results of drug or alcohol testing. This office has long recognized a privacy interest in drug test results of public employees. See Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 (1987) at 5 (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff’d*, 795 F.2d. 1136 (3rd Cir. 1986)). We have marked the information in Exhibit 3 that must be withheld under common-law privacy.

The documents in Exhibit 3 that must be released because they are neither confidential under the MPA nor protected by common-law privacy contain information that may be excepted from public disclosure by section 552.117 of the Government Code. Section 552.117 excepts from required public disclosure the home addresses, home telephone numbers, social security numbers, or personal family members information of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information if a current or former employee or official requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made.

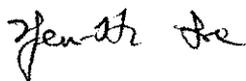
Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

Next, you assert that the information submitted as Exhibit 4 is excepted from disclosure under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a firefighter's civil service file that the fire department is required to maintain, and an internal file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a fire department takes disciplinary action against a firefighter, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the firefighter's civil service file maintained under section 143.089(a). Such records are subject to release under chapter 552 of the Government Code. See Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6. However, information maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).²

You state that the submitted personnel file is maintained in the fire department's internal file pursuant to section 143.089(g), and that none of the records are contained in the firefighter's civil service file. We therefore conclude that this information is confidential pursuant to section 143.089(g) of the Local Government Code and may be withheld under section 552.101.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

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²We note that section 143.089(g) requires a fire department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

Ref: ID# 115291

Enclosures: Marked documents

cc: Mr. David Lee Coe
P.O. Box 460
Franklin, Texas 77856
(w/o enclosures)