



May 24, 1999

Ms. Alejandra I. Villarreal  
Wickliff & Hall  
105 South St. Mary's Street, Suite 700  
San Antonio, Texas 78205

OR99-1461

Dear Ms. Villarreal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125365.

The San Antonio Water System (the "system") received a request for information pertaining to employees terminated because of their drug test results. The requestor specifies that he is not seeking the identities of such individuals. You seek to withhold the responsive information under section 552.101 of the Government Code in conjunction with the Texas Medical Practice Act, V.T.C.S. article 4495b and constitutional and common-law privacy. We note at the outset that you have not submitted information responsive to the request for our review because, as you say, you have not yet found the records. You have instead submitted other, non-responsive drug-test information held by the system.

Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas Medical Practice Act, V.T.C.S. article 4495b (the "MPA") 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).

Section 552.101 also incorporates constitutional and common-law privacy protections. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

The constitutional right to privacy consists of two related interests: 1) the individual interest in independence in making certain kinds of important decisions, and 2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional “zones of privacy” described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These “zones” include matters related to marriage, procreation, contraception, family relationships, and child rearing and education.

The second interest, in non-disclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual’s privacy interests against the public’s need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).<sup>1</sup>

In our opinion the drug testing information you submitted is protected by the MPA because it appears to have been prepared by, or under the supervision of, a physician. Again, however, the information you submitted is not that requested by the requestor. We are unable to determine, without examining the responsive information, whether it is subject to the MPA or the privacy principles discussed above. *See e.g.* Open Records Decision No. 594 (1991) (indicating that employee drug test information may be protected by constitutional or common-law privacy).

We note that the responsive information here is “presumed to be public” because you have not submitted it, or a representative sample thereof, to this office within 15 business days of receiving the request. Gov’t Code §§ 552.301(3), 552.302. Should you locate the responsive information, you may not withhold it from the requestor without obtaining from this office a determination that the specific information is confidential. *See* Open Records Decision No. 319 (1987).

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

---

<sup>1</sup>You also raise, but we do not separately address, section 552.102(a). That provision is designed to protect public employees’ personal privacy, but its scope is very narrow. The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person’s *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.-Austin 1983, writ ref’d n.r.e.).

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.

Sincerely,

A handwritten signature in black ink, appearing to read "William Walker", with a horizontal line extending to the right.

William Walker  
Assistant Attorney General  
Open Records Division

WMW/eaf

Ref.: ID# 125365

encl: Submitted documents

cc: Mr. Edward L. Pina  
8118 Datapoint Drive  
San Antonio, Texas 78229-3268  
(w/o enclosures)