



September 19, 2002

Mr. Jesús Toscano, Jr.  
Administrative Assistant City Attorney  
City of Dallas  
1500 Marilla  
Dallas, Texas 75201

OR2002-5294

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168863.

The Dallas Fire Department (the "department") received a request for copies of a specified employee's internal affairs division file. You state that you will provide the requestor with some responsive information upon receipt of the reproduction costs associated with this particular information. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.<sup>1</sup>

You claim that Exhibit E is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.<sup>2</sup>

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<sup>1</sup> 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.

<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. Section 552.101 encompasses information protected from disclosure by other statutes.

Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Based on our review of your arguments and the information at issue, we agree that Exhibit E is a mental health record subject to chapter 611. We also find that portions of Exhibits B and C that we have marked are also subject to chapter 611. Accordingly, we conclude that the department may only disclose the marked information that is subject to chapter 611 in Exhibits B, C, and E as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.

You also claim that Exhibit D is excepted from disclosure pursuant to section 552.101 in conjunction with section 2654 of title 29 of the United States Code, also known as the Family and Medical Leave Act (the “FMLA”). Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You state that Exhibit D consists of FMLA paperwork that is contained in the file of the employee who is the subject of this request and which was collected and maintained by the City of Dallas pursuant to the FMLA. Based on your representations and our review of Exhibit D, we understand you to assert that the information in that exhibit is maintained as information related to medical certifications, recertifications or medical histories that were created for purposes of FMLA. We find that none of the release provisions of the FMLA apply to this information. Accordingly, we conclude that the department must withhold Exhibit D from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 2654 of title 29 of the United States Code.

You also claim that the yellow and green highlighted information in Exhibit B is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure pursuant to the common-law right to privacy. Information is protected by the common-law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included, for example, information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

In addition, this office has long held that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure pursuant to the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 at 5 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues). Based on our review of your arguments and the information at issue in Exhibit B, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that the blue highlighted information in Exhibit B is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who

request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the department must withhold from disclosure the information that we have marked in Exhibits B and C pursuant to section 552.117(1) of the Government Code, if the employee who is the subject of this request requested confidentiality for this information in accordance with section 552.024 prior to the department's receipt of the present request. Otherwise, the department must release this particular information to the requestor.

Finally, we note that Exhibits B and C contain information that is subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the department must withhold from disclosure the information that we have marked in Exhibits B and C pursuant to section 552.136 of the Government Code, if the employee who is the subject of this request is in fact a member of the credit union.

In summary, the department may only disclose the marked information that is subject to chapter 611 in Exhibits B, C, and E as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. The department must withhold Exhibit D from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 2654 of title 29 of the United States Code. The department must withhold from

disclosure the information that we have marked in Exhibit B pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The department must withhold from disclosure the information that we have marked in Exhibits B and C pursuant to section 552.117(1) of the Government Code, if the employee who is the subject of this request requested confidentiality for this information in accordance with section 552.024 prior to the department's receipt of the present request. The department must withhold from disclosure the information that we have marked in Exhibits B and C pursuant to section 552.136 of the Government Code, if the employee who is the subject of this request is in fact a member of the credit union. The department must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

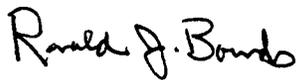
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 168863

Enc. Marked documents

cc: Mr. Daniel P. Rosales  
5881 Preston View Boulevard #179  
Dallas, Texas 75240  
(w/o enclosures)