



October 16, 2002

Ms. Nancy O. Williams
Assistant City Attorney
City of Irving
825 W. Irving Blvd.
Irving, Texas 75060

OR2002-5869

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170784.

The City of Irving (the "city") two requests from the same requestor for all files pertaining to two named individuals, including files contained in the "Track E.R. Database File" and the "Risk Management File," as well as all information about city contracts or agreements with outside firms or agencies related to the two named individuals. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.

We begin by addressing a procedural matter. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney

¹We note that you also originally raised section 552.108 of the Government Code as an exception to disclosure. However, as you make no arguments in support of this exception, we do not address the applicability of section 552.108 to the submitted information.

general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

In this case, the information you have provided to this office indicates that the city received the requests for information on July 25, 2002. The city therefore had until August 8, 2002 to request a ruling from this office. Although your letters to this office are dated August 8, 2002, the envelopes in which the city submitted its requests for a ruling indicate a postmark date of August 10, 2002. Consequently, we conclude that the city failed to comply with the procedural requirements of section 552.301(a) in timely submitting a request for a decision from this office.

Section 552.302 provides that a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). You claim that the requested information is excepted under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code. Sections 552.103 and 552.107 are discretionary exceptions intended to protect only the interests of the governmental body. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (city's failure to meet 10-day deadline waived protections of sections 552.103 and 552.111). Therefore, sections 552.103 and 552.107 do not provide compelling reasons to overcome the presumption of openness, and we do not consider your claims under these exceptions. Sections 552.101 and 552.102 do present compelling reasons to overcome the presumption of openness, and therefore, we will consider your arguments under these exceptions.

We first note that some of the records at issue are medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is 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.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The medical records at issue, which we have marked, may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

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 such as the Family and Medical Leave Act, 29 U.S.C. § 2654 (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). Upon review of the information you seek to withhold under the FMLA, we agree that this information is made confidential by the federal law. Accordingly, under section 552.101, the city must withhold the information you have marked as confidential under the FMLA. We have marked additional information within the submitted records that must also be withheld under the FMLA.

You also claim that a portion of the submitted information is confidential under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (the "ADA"). The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

Upon review of the information you seek to withhold under the ADA, we note that most of this information is confidential in this case under the MPA, as noted above. However, for the document that we find is not a medical record for purposes of the MPA, we similarly find that this document is not a confidential medical record under the ADA, and therefore, it may not be withheld under that statute.

We will next address your argument under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In

Industrial Foundation, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. Upon review of the remaining information, we find that a portion of this information, which we have marked, is protected by common-law privacy, and therefore, it must be withheld under either section 552.101.

We finally note that a portion of the submitted information may be excepted under section 552.117. Section 552.117 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information that may be excepted from disclosure under section 552.117.

To summarize, a portion of the submitted information, which we have marked, consists of medical records which are confidential and must be released only in accordance with the MPA. The city must withhold the information it has marked under the FMLA. We have also marked additional information that is confidential under the FMLA and which therefore must be withheld under section 552.101. A portion of the submitted information, which we have marked, is protected by common-law privacy and is therefore excepted from disclosure under section 552.101. A portion of the submitted information, which we have marked, may be excepted from disclosure under section 552.117. The remainder of the submitted information must be released 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 170784

Enc. Submitted documents

c: Mr. John Briscoe
Managing Director
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(w/o enclosures)