

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 2, 2003

Mr. Bill Ainsworth
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2003-2978

Dear Mr. Ainsworth:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180372.

The City of Corpus Christi (the "city") received a request for (1) TPAC/Pan American, Entrust, and Edward Jacobson's responses to former city manager David Garcia's January 30 letters and (2) all correspondence or e-mail between the city and Entrust, TPAC/Pan American, Edward Jacobson, or Tomas Duran concerning claims made by a named individual.¹ You state that the city has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code. You believe that the release of other responsive information might affect the proprietary interests of third parties.² We have considered your arguments and have reviewed the information you submitted.³

¹You inform us that the city requested and received a clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under Gov't Code § 552.301(b)).

²You do not indicate that the city notified any of the interested third parties of this request for information. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

³This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). 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. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). You state that the documents submitted as Exhibit A contain medical records and information obtained from medical records. Based on your representation and our review of the information in Exhibit A, we have marked the types of information that are encompassed by the MPA. The city must not release the marked information unless the MPA permits the city to do so.

Section 552.101 of the Government Code also encompasses the common-law right to privacy. Information must be withheld from public disclosure under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary

sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked information in Exhibit A that the city must withhold under section 552.101 in conjunction with common-law privacy.

Common-law privacy also protects certain kinds of personal financial information. In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan), 523 at 3-4 (1989) (certain financial information contained in loan files of veterans participating in Veterans Land Board programs), 373 at 3-4 (1983) (certain financial information contained in housing rehabilitation grant application files). Exhibit A also contains personal financial information that is excepted from disclosure under section 552.101 in conjunction with common-law privacy. We have marked the information that the city must withhold.

The city also must withhold some of the submitted information under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure the home address and telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer complies with sections 552.024 or 552.1175. We have marked the types of information in Exhibits A, B and C that the city must withhold under section 552.117(2).

Exhibit A also contains a social security number that may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the city to obtain or maintain this social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution the city,

however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the social security number that we have marked in Exhibit A, the city should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Next, we address your claim under section 552.137 of the Government Code. This exception to disclosure provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137.⁴ Section 552.137 is applicable to an individual's personal e-mail address. Section 552.137 is not applicable to an institutional e-mail address or website or to an e-mail address that a governmental body provides to one of its officials or employees. We have marked e-mail addresses in Exhibits A, B and C that are confidential under section 552.137. You do not inform us that any of the individuals to whom these e-mail addresses pertain have affirmatively consented to their public disclosure. Therefore, we conclude that the city must withhold the marked e-mail addresses under section 552.137.

You also believe that the documents submitted as Exhibit C may be protected from disclosure under sections 552.101 or 552.110 of the Government Code. You state that these documents were marked as being confidential or proprietary by third parties that corresponded with the city. We note, however, that information is not confidential under chapter 552 of the Government Code simply because the party that submitted the information anticipated or requested that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of chapter 552. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to chapter 552] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Thus, unless the submitted information comes within an exception to disclosure under chapter 552, it must be released, notwithstanding any expectation or agreement to the contrary.

⁴The language of section 552.136, which also is applicable to e-mail addresses, is identical to that of section 552.137.

In this instance, there has been no demonstration that any of the information in Exhibit C is excepted from public disclosure under section 552.101 of the Government Code. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Likewise, there has been no demonstration that any of the information in Exhibit C is proprietary for purposes of section 552.110. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if governmental body takes no position, third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Therefore, the city may not withhold any of the information in Exhibit C under sections 552.101 or 552.110.

In summary, the information that is encompassed by the MPA must not be released unless the MPA permits the city to do so. The city must withhold the information that is protected by common-law privacy under section 552.101 of the Government Code; the information that is excepted from disclosure under section 552.117(2); and the e-mail addresses that are confidential under section 552.137. The social security number in Exhibit A may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(D) of title 42 of the United States Code. The rest of the submitted information is not excepted from disclosure and must be released.

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

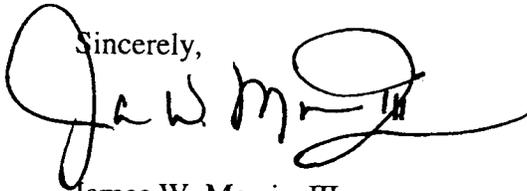
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The 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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a large, stylized initial 'J' and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 180372

Enc: Submitted documents

c: Ms. Janell Ross
Corpus Christi Caller-Times
P.O. Box 9136
Corpus Christi, Texas 78469
(w/o enclosures)

SEP 06 2007

At 9:12A. M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GV302021

CITY OF CORPUS CHRISTI
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 201ST JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff City of Corpus Christi, and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestors, Neal Falgoust and Janell Ross, were sent reasonable notice of this setting and of the parties' agreement that the City must withhold some of the information at issue; that the requestors were also informed of their right to intervene in the suit to contest the withholding of this information; and that the requestors have not informed the parties of their intention to intervene. Neither have the requestors filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Information marked by the Attorney General in Exhibit A to the City's Request for Decision, dated March 6, 2003, is confidential under Tex. Occ. Code § 159.002, or common law privacy, and, therefore, is excepted from disclosure by Tex. Gov't Code Ann. § 552.101.

2. The City shall withhold from the requestor the information described in ¶ 1 of this Judgment.

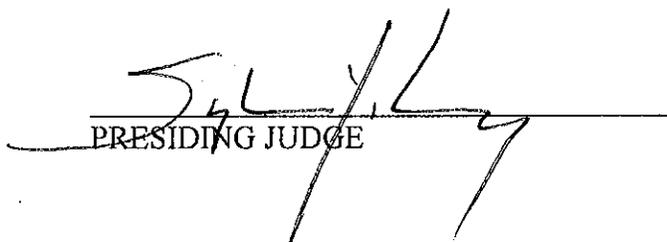
3. The City no longer contests the disclosure of the remaining information at issue. If it has not already so done, the City shall disclose to the requestors all information responsive to each request for information except for that information ruled confidential in the letter rulings of the Attorney General, that underlie this lawsuit, or by this Judgment.

4. All costs of court are taxed against the parties incurring the same;

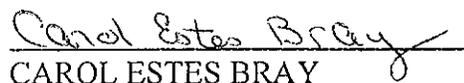
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 10 day of September, 2007.


PRESIDING JUDGE

APPROVED:


CAROL ESTES BRAY

Sr. Assistant City Attorney
City of Corpus Christi
Legal Department
P.O. Box 9277
Corpus Christi, Texas 78469-9277
Telephone: (361) 826-3364
Fax: (361) 826-3239
State Bar No. 06675500
ATTORNEY FOR PLAINTIFF


BRENDA LOUDERMILK

Chief, Open Records Litigation
Administrative Law Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: 475-4292
Fax: 320-0167
State Bar No. 12585600
ATTORNEY FOR DEFENDANT