



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2004

Mr. Ignacio Perez
Assistant City Attorney
City of McAllen
P. O. Box 220
McAllen, Texas 78505-0220

OR2004-8454

Dear Mr. Perez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210497.

The City of McAllen (the "city") received a request for the following information: (1) a list of all city employees charged with driving while intoxicated ("DWI") within the past twelve years, the disciplinary action taken against these employees, and the rationale behind the disciplinary action; and (2) a list of all city employees who have failed random drug and alcohol tests, the disciplinary action taken against these employees, and the rationale behind the disciplinary action. You claim that the Public Information Act (the "Act") does not require a response to a portion of the first request. You also claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code §552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we note that some of the submitted information, which we have marked, is not responsive to any portion of the request for information. Therefore, we do not address the extent to which these records are public information subject to disclosure.

Next, we note that the Act does not require a governmental body to answer factual questions, perform legal research, or create new information when responding to a request. *See* Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). You assert that requiring the city to search DWI arrest records in response to the first request

would be “cumbersome” and “require several weeks of research,” because arrest records are not maintained separately for city employees. We agree that the city is not required to comply with the first part of the request in so far as the request requires the city to compare a list of all city employees for the past twelve years against DWI arrest records in order to compile an exhaustive list of employees who fit the requested criteria.

We also note that you have not submitted the disciplinary records of city employees who have been arrested for DWI or who have failed random drug and alcohol tests, nor have you submitted a representative sample of these records for our review. *See* Gov’t Code §§552.301(e). Furthermore, you have not indicated whether such disciplinary records exist or if you wish to withhold any such information from disclosure. Therefore, to the extent that this information exists, we assume you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov’t Code §§552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if a governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we turn to the submitted individual drug and alcohol test results. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses information protected by other statutes, including the Medical Practice Act (the “MPA”), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(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.

Occ. Code § 159.002(b), (c). 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. *Id.* §§ 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the submitted information that constitutes medical records that may only be released in accordance with the MPA.

Section 552.101 also encompasses the doctrines of common law and constitutional privacy. For information to be protected from public disclosure under common law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public 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. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Id.* at 683.

Constitutional privacy under section 552.101 protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of constitutional privacy requires a balancing of the individual's privacy interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." Open Records Decision No. 455 at 8 (1987) (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

This office has recognized that public employees may have a privacy interest in the results of drug tests required by their employers. *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 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3rd Cir. 1986)). Upon review of the submitted information, we conclude that it contains information that is protected by common law or constitutional privacy. Accordingly, we have marked the report that must be withheld under section 552.101 of the Government Code in conjunction with common law or constitutional privacy.

In summary, the city is not required to comply with the request in so far as it would necessitate the compilation of an exhaustive list of city employees from the past twelve years who have been charged with DWI. To the extent that there are disciplinary records responsive to the request, they must be released if the city has not already done so. The

reports we have marked may only be released in accordance with the MPA. We have also marked the report that is excepted from disclosure under section 552.101 in conjunction with common law or constitutional privacy. As our ruling under section 552.101 is dispositive, we need not address your remaining arguments against disclosure.

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 'Caroline E. Cho', written in a cursive style.

Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/krl

Ref: ID# 210497

Enc. Submitted documents

c: Ms. Karol Montes
1110 North 5th Street
McAllen, Texas 78501
(w/o enclosures)