



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 2, 2006

Mr. John S. Schneider, Jr.  
First Assistant City Attorney  
City of Pasadena  
P.O. Box 672  
Pasadena, Texas 77501

OR2006-04473

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 247781.

The City of Pasadena (the "city") received a request for information pertaining to a particular employee, including a chain of custody form for a drug test and the transcript of a hearing related to the employee's termination. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

We first address your representation that "Exhibit 'B' contains the information responsive to the 'Chain of Custody' issue." A governmental body is required to make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). Upon review, we find that the city has made

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<sup>1</sup>Although you raise sections 552.103 and 552.108 of the Government Code, you have not provided arguments explaining why the requested information is excepted from disclosure under these sections. We therefore determine that the city has waived its claim under sections 552.103 and 552.108. *See* Gov't Code § 552.301(e); *see also* *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (552.103 is discretionary exception that protects a governmental body's interests and may be waived); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103); 177 (1977) (statutory predecessor to section 552.108 subject to waiver).

a good-faith effort to relate the request to the submitted information that the city maintains. Accordingly, we will address your arguments against disclosure of this information.

The submitted information includes medical records, access to which is governed the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

- (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.

Occ. Code § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." 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. 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). We have marked medical records in the submitted documents that may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is encompassed by the common law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Section 552.102(a) 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 v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Information is protected from disclosure under the common law right to privacy if (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* at 685. 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.

This office also has recognized that public employees may have a privacy interest in their drug test results. *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 (3<sup>rd</sup> Cir. 1986)). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See Open Records Decision Nos. 562* at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to 552.101 and 552.102). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See Open Records Decision Nos. 470* at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review of the remaining submitted information in Exhibit B, we find that the blood, urine, and breath tests were administered after the employee at issue was under investigation for allegedly driving while intoxicated while completing his usual duties as a city employee. Therefore, the test results are directly related to the employee's employment. Having considered your arguments and reviewed the information that you claim is private, we conclude that there is a legitimate public interest in the information and the city may not

withhold this information on privacy grounds under section 552.101 or section 552.102 of the Government Code.

We now address the information in Exhibit C. You claim that the requested transcript in Exhibit C is confidential under section 552.101 in conjunction with the Article II, § 13 of the City Charter, which provides:

The suspended officer or employee may request either a public or private hearing.

In Open Records Decision No. 594 (1991), this office considered a claim that information relating to drug testing of employees of the City of Odessa was confidential under section 552.101 in conjunction with a city ordinance. In concluding that it was not, we explained:

The Open Records Act provides that all information maintained by governmental bodies is public except as provided in that act. Thus, the provisions in the city's Ordinance No. 89-49 cannot operate on their own to make city drug testing information confidential.

ORD 594 at 3 (applying statutory predecessor to Gov't Code § 552.101). We likewise conclude, in this instance, that Article II, § 13 of the City Charter, does not make the requested information confidential by law under section 552.101. *See City of Brookside v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (stating that ordinance that conflicts or is inconsistent with state legislation is impermissible).

The submitted documents in Exhibit C contain information that may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code 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 timely elect to keep this information confidential pursuant to section 552.024. You do not inform us whether the city personnel at issue timely elected to keep information confidential. We therefore determine that if the individual at issue timely elected to keep such information confidential pursuant to section 552.024, the city must withhold the information we have marked in Exhibit C pursuant to section 552.117(a)(1). If, however, the city personnel at issue did not timely elect to keep the information confidential, the city may not withhold this information under section 552.117(a)(1).

The remaining information contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted

from” required public disclosure under the Act.<sup>2</sup> Therefore, the city must withhold the social security numbers contained in the submitted information under section 552.147.<sup>3</sup>

In summary, we have marked medical records in the submitted documents that may be released only as provided under the MPA. If the individual at issue timely elected to keep his information confidential pursuant to section 552.024, the city must withhold the information we have marked in the submitted documents pursuant to section 552.117(a)(1). If, however, the city personnel at issue did not timely elect to keep the information confidential, the city may not withhold this information under section 552.117(a)(1). To the extent the requestor is not the individual’s representative, the information we have marked under section 552.147 must be withheld. The city 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

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<sup>2</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

<sup>3</sup>If the requestor is the authorized representative of one of the individuals at issue, pursuant to section 552.023, the requestor has a special right of access to information that is otherwise confidential under section 552.147 of the Government Code, and that information must be released to her. *See* Gov’t Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). To the extent the requestor is not the individual’s representative, the information must be withheld under the Act.

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



James Forrest  
Assistant Attorney General  
Open Records Division

JF/sdk

Ref: ID# 247781

Enc. Submitted documents

c: Mr. Terry Pendas  
P.O. Box 807  
Baycliff, Texas 77518  
(w/o enclosures)