



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2012

Ms. Delietrice Henry
Open Records Assistant
Plano Police Department
P.O. Box 860358
Plano, Texas 75086-0358

OR2012-20705

Dear Ms. Henry:

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# 475184 (ORR# HARD100912).

The Plano Police Department (the "department") received a request for the requestor's polygraph test. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Behavioral Measures & Forensic Services SW, Inc. ("BMI"). Accordingly, you state you notified BMI of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You have submitted a copy of comments from BMI. We have reviewed the submitted information and the submitted arguments.

Initially, BMI argues some of the requested information is not subject to the Act because the department does not have a "legal right or access to those professional work product documents," and thus argues "all the files and the content of those files" should be withheld from disclosure. Section 552.002 of the Act defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code

§ 552.002(a). Whether information prepared by a private party on behalf of a governmental body is in the physical custody of a governmental body is not determinative of whether the information is subject to the Act. *See, e.g.*, Open Records Decision Nos. 558 (1990), 499 (1988), 462 (1987).

Pursuant to its Request for Proposal Number 2008-175-C, Pre-Employment Polygraph Services and Pre-Employment Psychological Evaluations (the "RFP"), the City of Plano (the "city") entered a contract with BMI for pre-employment polygraph services. The department has submitted a copy of the contract at issue for our review. The contract provides the specifications in the RFP are "incorporated herein by reference." The specifications require BMI to "provide a comprehensive report to a member of the [department] of each examination conducted by the [department] within two (2) working days of the test administration date." Further, the specifications state, "for a period of (2) years from the date of a pre-employment polygraph and psychological examinations, [BMI] shall make available at the request of the [department] copies of all respective reports and opinions, question sheets, polygraph charts, records of numerical scoring, audio and video recordings, or any other information or records of any polygraph and psychological examination conducted on behalf of the [department] that are in file, to either the [d]epartment or agent of the [d]epartment or the [city]." Thus, upon review of the arguments, contract, and submitted information, we find the department has a right of access to the requested information for a period of two years after the date of the polygraph examination.

In this instance, the requested information pertains to polygraph examinations that were administered on March 1, 2011, and March 7, 2011. We note the polygraph examinations at issue were administered less than two years prior to the department's receipt of the instant request for information. Thus, the department has a right of access to the information at issue. Accordingly, the requested information constitutes information "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by [or] for" the department for purposes of section 552.002 of the Government Code. *See* Gov't Code § 552.002(a)(1)-(2). Therefore, the requested information is subject to the Act, and it must be released unless an exception to disclosure is applicable.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 1703.306 of the Occupations Code, which provides, in relevant part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. The submitted information consists of the requestor's polygraph information. Thus, the department has the discretion to release the requestor's polygraph information to her pursuant to section 1703.306(a)(1) of the Occupations Code. *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). Otherwise, the department must withhold the requested information under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 475184

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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