



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 14, 1995

Ms. Cathy Cunningham
Senior Assistant City Attorney
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR95-118

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30924.

The City of Irving (the "city") received a request for information relating to a former city firefighter. Specifically, the requestor seeks the following information:

Any memorandum or written report outlining the reasons for firefighter Tommy Burgess' release from the fire department in August. Any memorandum or written report that describes Burgess' alleged forging of documents to excuse himself for sick leave. Any memorandum or written report authored by Fire Chief Dick Knopf concerning Burgess' alleged activities. Any memorandum or written report authored by a City Council member regarding Burgess' official actions as a fireman and his alleged forging of documents. Any memorandum or written report authored by Loy Mayfield concerning Burgess.

You state that the requested reports have been released. You contend, however, that the remaining information responsive to the request is excepted from required public disclosure under sections 552.101 and 552.102(a) of the Government Code.

Section 552.102 excepts:

(a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

(b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (ruling that test to be applied in decision under statutory predecessor to § 552.102 was same as that delineated in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for statutory predecessor to § 552.101). Information is protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it if

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

Industrial Found., 540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to § 552.101).

In the *Industrial Foundation* case, the Texas Supreme Court considered intimate and embarrassing information such as that 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. *Industrial Found.*, 540 S.W.2d at 683. *Industrial Foundation* specifically rejected the claim that *all* medical information may be withheld by common-law privacy; individual determinations are required. Open Records Decision No. 370 (1983); *see also* Open Records Decision No. 478 (1987) (not all medically related information is protected by common-law privacy).

We have examined the information submitted for our review. None of the information relating to the employee's reasons for taking sick leave is highly intimate or embarrassing. Furthermore, although being investigated for forgery could be considered intimate or embarrassing, the legitimate public interest in a public employee's performance on the job and suspected criminal activity far outweighs any possible privacy concerns in this information. *See* Open Records Decision Nos. 484 (1987)

(public interest in knowing how police department has resolved complaints against police officer ordinarily outweighs officer's privacy interest, even if some complaints are found to be "unfounded" or "not sustained"); 470 (1987) (public employee's job performance does not generally constitute his *private* affairs); 438 (1986) (public clearly has legitimate interest in knowing details of apparently well-founded accusation against city supervisor). You may not, therefore, withhold any of the information under section 552.102(a) of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The city contends that some of the submitted information may be made confidential by the Medical Practice Act, V.T.C.S. art. 4495b. Section 5.08 of the Medical Practice Act provides in part that:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

There are several documents that appear to have been created by a physician that would be confidential under section 5.08(b). However, there is apparently some question as to whether the documents were truly created and signed by a physician or created and signed by the former firefighter. Disputed questions of fact are not resolvable in the open records process, and therefore, the attorney general must rely on the representations of the governmental body or third parties. Open Records Decision Nos. 554, 552 (1990). Accordingly, the city must determine whether the disputed records were created by a physician. Should the city determine that this is indeed the case, the "return to work" notes and the letter dated April 26, 1984, may only be released as provided by the Medical Practice Act. *See* V.T.C.S. art. 4495(b), § 5.08(c), (j)(3). If, on the other hand, the city determines the disputed records were created and signed by the former firefighter, the records must be released in their entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/LBC/rho

Ref: ID# 30924

Enclosures: Submitted documents

cc: Ms. Liz Cardenas
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(w/o enclosures)