



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 30, 1996

Ms. Bettye S. Springer
Haynes and Boone, L.L.P.
1300 Burnett Plaza
Fort Worth, Texas 76102-6866

OR96-0832

Dear Ms. Springer:

On behalf of the City of Keller (the "city"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31112.

The city received a request for "information available concerning an open records request by a city employee - Brent Robbins. I am interested in what information Mr. Robbins requested, and copies of any information he received through the Texas Open Records Act." You assert that the requested information is excepted from required public disclosure based on sections 552.101 and 52.103 of the Government Code.

Section 552.103(a) applies to information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). However, if the opposing parties in the anticipated litigation have seen or had access to any of the

information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982).

You assert that section 552.103 applies because you maintain that the requested information relates to reasonably anticipated litigation. You inform us that pursuant to a request dated December 14, 1993, the city released to the potential opposing party the information you now seek to withhold from public disclosure. See Open Records Letter No. 94-584 (1994). We need not determine whether the city has established that the requested information relates to reasonably anticipated litigation. Since the potential opposing party has had access to the requested information, the city may not withhold it from disclosure pursuant to section 552.103 of the Government Code. See Open Records Decision Nos. 349 (1982), 320 (1982).

Section 552.101 excepts from required public disclosure information that is confidential by law, either Constitutional, statutory, or by judicial decision. You assert that disclosure of the requested information would violate Mr. Robbins' privacy rights and the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*¹

The information at issue consists of the request letter from Mr. Stephen Gardner as attorney for Mr. Robbins, two copies of a letter to Mr. Robbins from Ms. Pauline Drewry, the city's personnel director, a letter to Ms. Drewry from an optometrist, a letter to the city's police department from a physician, the record of a physician's physical examination of Mr. Robbins, and a copy of an article taken from the *Journal of Police Science and Administration* titled "Police Vision Standards."

The requested information concerns an individual who applied for a position as a city police officer. Under the ADA, during the job application phase, that is, when an individual is applying for a job before a job offer is made and accepted, an employer generally is prohibited from requiring an applicant to undergo a medical examination or to answer medical inquiries. See 42 U.S.C. § 12112(d)(2)(A); see also 20 C.F.R. pt. 1630 (1995). During the conditional job offer phase, that is, after an employer makes an offer of employment to a job applicant and before the applicant begins his or her employment duties, an employer may collect medical condition and history information on an applicant, if all entering employees in the same job category are subjected to such an examination or inquiry. See 42 U.S.C. § 12112(d)(3). An employer must collect and maintain information obtained regarding the medical condition or history of the applicant on separate forms and in separate medical files and treat such information as a confidential medical record. 42 U.S.C. § 12112(d); see 29 C.F.R. pt. 1630.14(b)(1).

¹The ADA became effective 24 months after the date of its enactment, July 26, 1990. Act July 26, 1990, P.L. 101-336, Title I, § 108, 104 Stat. 337.

We believe the ADA requirement that a covered entity keep separate and confidential information regarding the medical condition or history of an applicant applies in this situation. Since the letter to Ms. Drewry from an optometrist, the letter to the city's police department from a physician, and the record of a physician's physical examination of Mr. Robbins are made confidential under section 12112(d) of the ADA, they may be released only as provided under that provision. *See Open Records Decision No. 641 (1996).*

We do not believe the ADA applies to Mr. Gardner's request letter, the letter to Mr. Robbins from Ms. Drewry or the journal article, as we do not believe such information constitutes information obtained regarding the medical condition or history of the applicant. Nor do we believe this information is protected from public disclosure under the common-law right to privacy, as we will explain.

Section 552.101 exempts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

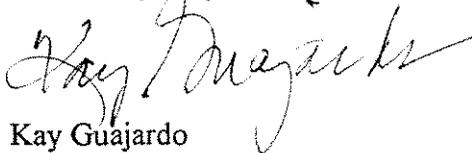
While common-law privacy may protect an individual's medical history, it does not protect all medically related information. *See Open Records Decision No. 478 (1987).* Individual determinations are required. *See Open Records Decision No. 370 (1983).* This office has determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, *Open Records Decision No. 455 (1987)*; the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, *Open Records Decision No. 422 (1984)*; the names of parents of victims of sudden infant death syndrome, *Attorney General Opinion JM-81*; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress, *Open Records Decision No. 343 (1982).*

We do not believe Mr. Gardner's letter, the letter from Ms. Drewry, or the journal article reveals highly intimate or embarrassing information about Mr. Robbins. We conclude that the city may not withhold from the public this information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref: ID# 31112

Enclosures: Submitted documents

cc: Mr. Roy Kron
Editor
The Keller Citizen
P.O. Box 615
Keller, Texas 76244
(w/o enclosures)