



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 24, 2009

Mr. Charles D. Olson  
Haley & Olson, P.C.  
510 North Valley Mills Drive, Suite 600  
Waco, Texas 76710

OR2009-10271

Dear Mr. Olson:

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# 351324.

The City of Bellmead (the "city"), which you represent, received three separate requests for the results of an alcohol test administered to a city official after an accident involving a city vehicle. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. After the city received the requests for information on May 27, 2009, you requested a ruling and timely raised section 552.101. However, you did not raise section 552.108 until July 8, 2009. Consequently, we determine that the city failed to raise section 552.108 within the deadline mandated under section 552.301(b). Section 552.108 is discretionary in nature and serves only to protect a governmental body's interest; as such, it may be waived. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general), *see also* Open Records Decision Nos. 663 at 5 (1999) (waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, we conclude the city

has waived its exception under section 552.108 and may not withhold any of the submitted information pursuant to that section of the Government Code. However, because you have timely submitted arguments for your section 552.101 claim, we will consider your arguments under that exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You claim that the submitted information is confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides the following:

(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 may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Upon review, we find that you have failed to demonstrate how any portion of the submitted information constitutes a medical record for purposes of the MPA. Therefore, the submitted information is not confidential under the MPA, and no portion of it may be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. The doctrine of common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 or alcohol 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 (3rd Cir. 1986)). Constitutional privacy protects two kinds of interests. See *Whalen v.*

*Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). 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 *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

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). You state the city official was involved in an accident while operating a city-owned vehicle and that the post-accident alcohol test was administered pursuant to city policy. Upon review, we find the information at issue is of legitimate public interest. Furthermore, we find the city has failed to demonstrate how any portion of the information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with either common law or constitutional privacy. As you raise no other claims for withholding the submitted information, the city must release it in its entirety.<sup>1</sup>

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.

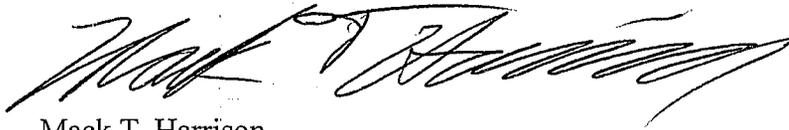
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

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<sup>1</sup>The submitted information contains a social security number. We note 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.

responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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 at (512) 475-2497.

Sincerely,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/eeg

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Ref: ID# 351324

Enc. Submitted documents

c: Requestor (3)  
(w/o enclosures)