



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

This ruling has been modified by court action
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2014

Mr. Gary Henrichson
Interim Deputy City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2014-09029

Dear Mr. Henrichson:

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# 524306 (McAllen PIR# W014467-031014).

The City of McAllen (the "city") received a request for (1) the city's policy on drug testing, (2) names, dates, and test results of employees who took drug tests from a specified period of time, and (3) records showing how employees are randomly selected for drug tests.¹ You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code.² We have considered the exception you claim and reviewed the submitted representative sample of information.³

¹As you have not submitted a copy of the written request for information, we take our description from your brief.

²As the city has not submitted a copy of the written request for information, we find the city did not comply with the requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301(e). Nonetheless, section 552.101 of the Government Code is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the city's claims under this exception.

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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. Section 552.101 encompasses information that other statutes make confidential, including the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(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(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. The information you seek to withhold consists of drug test results. We note section 159.001 of the MPA defines “patient” as “a person who, to receive medical care, consults with or is seen by a physician.” *Id.* § 159.001(3). Because the individuals at issue did not receive medical care in the administration of the drug tests, these individuals are not patients for purposes of section 159.002. Thus, we find you have not demonstrated any of the information at issue consists of medical records for purposes of the MPA. Therefore, the city may not withhold any of the information at issue under section 552.101 of the Government Code on the basis of the MPA.

Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987)*. We understand you to assert the submitted information is confidential under common-law privacy on the basis of

Open Records Decision No. 594 (1991), in which this office concluded public employees may have a privacy interest in their drug test results. *See* ORD 594 (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)). We note the submitted information pertains to the results of drug tests administered to city employees. As this office has explained on many occasions, information involving public officials and employees and public employment is generally not private because the public has a legitimate interest in such information. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee's dismissal, demotion, or promotion), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). Although the information at issue may be highly intimate or embarrassing, the public has a legitimate interest in the information. Therefore, we conclude the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

We understand the city has redacted information under section 552.117(a)(1) of the Government Code as permitted by section 552.024 of the Government Code.⁴ Additionally, we note some of the remaining information may also be subject to section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.⁵ *See* Gov't Code §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We note the unredacted social security numbers may be subject to section 552.117(a)(1) of the Government Code. Therefore, if the employees whose information is at issue made timely

⁴Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

⁵The 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).

elections under section 552.024, the city must withhold the unredacted social security numbers under section 552.117(a)(1) of the Government Code. If the employees did not make timely elections under section 552.024, the city may not withhold the information at issue under section 552.117(a)(1) of the Government Code.⁶ As no further exceptions to disclosure are raised, the remaining information must be released.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/bhf

Ref: ID# 524306

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶In the event an employee's social security number is not excepted from disclosure under section 552.117(a)(1) of the Government Code, 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. Gov't Code § 552.147(b).

Cause No. D-161-14-001725

CITY OF MCALLEN	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	353rd JUDICIAL DISTRICT
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	
OF TEXAS,	§	
<i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS

Filed in The District Court of Travis County, Texas

JUL 03 2014
At Amalia Rodriguez-Mendoza, Clerk

AGREED ORDER OF DISMISSAL

This cause is an action under the Public Information Act (PIA), Texas Government Code Chapter 552. Plaintiff City of McAllen (McAllen) and Defendant Greg Abbott, Attorney General of Texas (Attorney General) agree that this matter should be dismissed pursuant to PIA section 552.327 on the grounds that the requestor has voluntarily withdrawn his request for information. A court may dismiss a PIA suit under section 552.327 when all parties agree to dismissal and the Attorney General determines and represents to the court that the requestor has voluntarily withdrawn the request or has abandoned the request. See Tex. Gov't Code § 552.327. The Attorney General represent to the Court that the requestor, Mr. David Hendricks, has voluntarily withdrawn his request for information. Accordingly, McAllen is not required to disclose the responsive information in accordance with Letter Ruling OR2014-09029. Further, McAllen may ask for another decision from the Attorney General concerning the precise information that was at issue in Letter Ruling OR2014-09029 pursuant to Tex. Gov't Code § 552.301(g).

The Court is of the opinion that entry of an agreed dismissal order is appropriate.

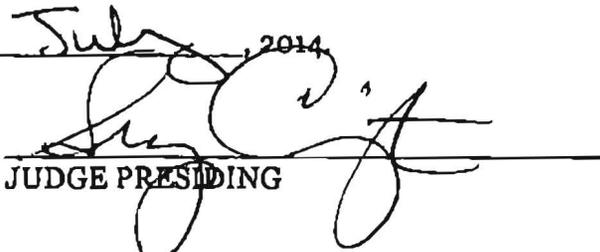
It is THEREFORE, ORDERED, ADJUDGED and DECREED that this cause is DISMISSED in all respects;

All court costs and attorney fees are taxed to the party incurring same;

All other requested relief not expressly granted herein is denied;

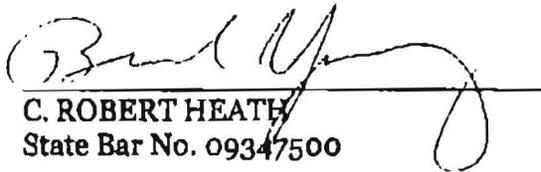
This order disposes of all claims between the parties and is final.

Signed this 2nd day of July, 2014.



JUDGE PRESIDING

AGREED:



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