



December 5, 2000

Ms. Janice Mullenix  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2000-4602

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141804.

The Texas Department of Transportation ("TxDOT") received a request for the personnel records of three named individuals, including the requestor himself. You state that you will release information that has previously been released to the public, such as job vacancy notices. However, you claim that the remainder of requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

You contend that the requestor's medical file is excepted from disclosure under section 552.101 in conjunction with the Family and Medical Leave Act (the "FMLA"). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes outside the Public Information Act. First, we note that the TxDOT claims that Exhibit D must be withheld under section 552.101 in conjunction with the Family Medical Leave Act (the "FMLA"). Section 552.101 encompasses confidentiality provisions such as the FMLA. We also note that section 825.600 of chapter V of volume 29 of the Code of Federal Regulations provides that

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of the requested 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.

(g) [r]ecords and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for the purposes of the FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[.]

29 CFR § 825.600(g). TxDOT also claims that Exhibit D is confidential under the American with Disabilities Act of 1990 (the "ADA"). Because the FMLA defers to the confidentiality provisions of the ADA when the ADA is applicable, we will address whether the submitted documents are confidential under the ADA.

The ADA provides for the confidentiality of certain medical records of employees and applicants. Specifically the ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

You state that the submitted documents in Exhibit D are contained in a separate medical file. You state that there appears to be no provision permitting the release of confidential information with the consent of the employee or after the employee's death. After reviewing your arguments and the submitted documents, we find that Exhibit D is confidential under section 552.101 in conjunction with the ADA. The exceptions to section 12112(d) are not applicable in this instance. Therefore, the department must withhold Exhibit D in its entirety.

You next contend that all of the requested personnel files are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information

relating to litigation of a civil or criminal nature 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.

Gov't Code § 552.103(a). The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). TxDOT must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the "APA"), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

You state that the requested files relate to a contested case hearing before the Texas Workers' Compensation Commission. Such contested cases are generally governed by the APA. Labor Code § 410.153. You further state that the contested case involves the requestor and TxDOT, and relates to the requestor's personnel record, his claim that he was constructively fired, and his difficulties with other employees. The requested records consist of personnel files of the requestor, his supervisor, and a fellow employee. In light of your arguments and our review of the records, we conclude that the requested records relate to pending litigation. We note, however, that no section 552.103(a) interest exists with respect to the requested information if both parties to the litigation have already seen the information. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We further note that the requested personnel files contain information specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Section 552.103 is not other law that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). First, the requested personnel files contain completed evaluations of each of

the three employees. These completed evaluations are public information under section 552.022, and thus can not be excepted from disclosure under section 552.103. We have marked the completed evaluations that must be released.

We caution, however, that the evaluations contain the social security numbers of the employees being evaluated, which may be excluded from public disclosure. Section 552.117 excepts from disclosure, among other things, information relating to the social security number of a current or former government employee. Section 552.117 requires you to withhold this information if a current or former employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

The social security numbers may also be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if they were obtained or are maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the evaluations at issue were obtained or are maintained by TxDOT pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes TxDOT to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, TxDOT should ensure that the numbers were not obtained or are not maintained by TxDOT pursuant to any provision of law enacted on or after October 1, 1990. Regardless, the requestor's own social security number information may not be withheld from him under either section 552.101 or section 552.117. *See* Gov't Code § 552.023.

In summary, in accordance with section 552.022 of the Government Code, you must release the completed employee evaluations. However, you must withhold the social security numbers of each of the employees, other than the requestor, contained within their evaluations if the employees requested that their social security number information be kept confidential before the instant request for information was made or if TxDOT obtained or maintained the social security numbers pursuant to a provision of law enacted on or after

October 1, 1990. You must also withhold the medical file of the requestor under section 552.101. Furthermore, you may withhold the remainder of the information under section 552.103 of the Government Code.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.*, § 552.321(a).

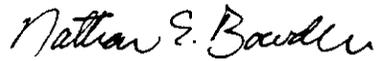
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/er

Ref: ID# 141804

Encl: Marked documents

cc: Mr. Earneston Haywood  
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(w/o enclosures)