



September 10, 2002

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
4000 South IH-35, MS-4D
Austin, Texas 78704-7491

OR2002-5054

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168349.

The Texas Workers' Compensation Commission (the "commission") received a request for four categories of records pertaining to two named individuals. Specifically, the request seeks (a) medical records of a named individual, (b) copies of materials submitted by this individual concerning a named chiropractor, (c) all documents regarding the chiropractor's designation as a chiropractor by the commission, (d) all documents concerning the chiropractor's loss of license to practice workers compensation in October, 2001. You state that the commission has no documents responsive to the item (a) of the request. We note that the Public Information Act does not require a governmental body to make available information which did not exist at the time of the request nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 (1992), 362 (1983); see Gov't Code §§ 552.002, .021, .227, .351. You claim that the remaining requested 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. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the commission's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

You indicate that the commission received this request for information on June 19, 2002. The requestor asserts, and has submitted documentation showing, that this request was hand-delivered to the commission on June 18, rather than June 19, 2002. We received your hand-delivered request for a decision on July 8, 2002. Thus, in either circumstance, the commission failed to request a decision within the ten business day period mandated by section 552.301(b) of the Government Code. *See* Gov't Code § 552.308(b) (state agency can meet the ten-day requirement if: 1) if the request is sent to the attorney general by first class mail, and the request bears post office cancellation mark indicating time within ten-day period or the governmental body furnishes satisfactory proof that the request was deposited in the mail within that period; or 2) if the request is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within that period).¹

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You do not demonstrate a compelling reason to withhold information under section 552.108. *See* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information from disclosure provides compelling reason under section 552.108).

¹ In addition, we note the requestor's assertion that the commission failed to provide notice of the commission's request for a decision within the ten business day time period as mandated under section 552.301(d). Because we address the commission's failure to comply with section 552.301(b), and because we address the commission's claim under section 552.101, we do not further address the requestor's procedural claim under section 552.301(d) of the Government Code.

Section 552.101, however, does provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 630 (1994) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). We will therefore address your arguments under section 552.101.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 402.092 of the Labor Code provides that information maintained in the investigative files of the commission is confidential and may not be disclosed except in four limited circumstances, none of which apply here. Labor Code § 402.092(a). “Investigative file” is defined as “any information compiled or maintained by the commission with respect to a commission investigation authorized by law.” *Id.* § 402.092(d). Section 414.005 of the Labor Code provides that the commission’s Compliance and Practices Division shall maintain an investigation unit for the purpose of conducting investigations relating to alleged violations of the Texas Workers’ Compensation Act (the “Act”) and commission administrative rules. *See* Labor Code § 414.005; *see also id.* §§ 414.001, .002.

You inform us that the submitted information concerns suspected violations of the Act. You state that the commission maintains investigation files pursuant to section 414.002 of the Labor Code, which authorizes the commission to maintain a division of compliance and practices and requires that division to conduct investigations relating to alleged violations of the Act and commission administrative rules. *See* Labor Code §§ 414.001, .002. You indicate that the submitted information is contained in such an investigation file, and is confidential under section 402.092.

Based on your representations and our review of the submitted information, we determine that submitted information consists of investigative material that is subject to section 402.092. Therefore, we conclude that the commission must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor 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 Department of Public 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 168349

Enc: Submitted documents

c: Ms. Laura Lee Stapleton
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(w/o enclosures)