



OFFICE of *the* ATTORNEY GENERAL  
GREG ABBOTT

December 16, 2002

Mr. Gary Grief  
Acting Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR2002-7180

Dear Mr. Grief:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173757.

The Texas Lottery Commission (the "commission") received a request for all documents associated with the posting of an opening for Commander of Security, including all employment applications and all communications between the applicants and the commission. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

We begin by addressing the requestor's argument that the commission did not comply with section 552.301 of the Government Code. Section 552.301(d) provides:

(d) A governmental body that requests an attorney general decision [to withhold information from public disclosure] must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's

written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

The requestor acknowledges that the department sent him a copy of its October 9, 2002 correspondence with this office. The requestor argues, however, and provides documentation showing, that the commission did not timely provide this correspondence to the requestor. You state that the commission received the present request on September 26, 2002. The commission faxed this office a request for a decision on October 9, 2002. The requestor states, however, that the commission did not send him a copy of its request for a decision from this office until October 11, 2002, which is the eleventh business day after the commission's receipt of the present request. The requestor provided this office with a copy of an envelope sent to the requestor from the commission that is postmarked October 11, 2002.

Section 552.308 of the Act provides in relevant part:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to *a person* within a specified period, the requirement is met in a timely fashion if the document is sent to the person by *first class United States mail* properly addressed with postage prepaid and:

(1) it bears a post office cancellation mark indicating a time within that period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within that period.

(b) When this subchapter requires an agency of this state to submit or otherwise give to *the attorney general* within a specified period a request, notice, or other writing, the requirement is met in a timely fashion if:

(1) the request, notice, or other writing is sent to the attorney general by *interagency mail*; and

(2) the agency provides evidence sufficient to establish that the request, notice, or other writing was deposited in the interagency mail within that period.

Gov't Code § 552.308 (emphasis added). Section 552.308(b) discusses what is required to show the timeliness of correspondence or other information sent to *this office* via interagency mail. Section 552.308(a) discusses what is required to show the timeliness of correspondence or other information sent to any person, including the requestor. Thus, in

order to show timely compliance with section 552.301(d), the commission must either (1) show that the copy of the commission's request for a decision that was sent to the requestor was sent by first class United States mail properly addressed with postage prepaid and had a cancellation mark indicating that it was sent on or prior to the tenth business day, or (2) furnish satisfactory proof that it was deposited in the mail on or prior to the tenth business day. Gov't Code § 552.308(a). Upon request from this office that the commission provide proof of the date on which it provided the requestor with a copy of its October 9th request for a decision from this office, the commission states that "the requestor was copied on this request" and that the commission provided the requestor with a copy of its request for a decision in compliance with "its long standing practice." You state that the commission used its mail center "to place the copies in first class US mail postage prepaid." The commission did not provide evidence that the copy of the commission's request for a decision that was sent to the requestor was sent by first class United States mail properly addressed with postage prepaid and had a cancellation mark indicating that it was sent on or prior to the tenth business day. See Gov't Code § 552.308(a)(1). Further, we find that the commission has not provided satisfactory proof of the date on which it provided the requestor with a copy of its request for a decision from this office. See Gov't Code § 552.308(a)(2). Therefore, we conclude that the commission has failed to timely comply with the requirements of section 552.301(d).

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). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.103 and 552.122 are discretionary exceptions under the Public Information Act and do not demonstrate compelling reasons to withhold information from the public. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App. Dallas 1999, no pet.) (governmental body may waive section 552.103); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, the submitted information may not be withheld under section 552.103 or 552.122 of the Government Code. On the other hand, as sections 552.101, 552.117, 552.119, 552.130, and 552.137 provide compelling reasons to withhold information from the public, we will address the applicability of these exceptions to the submitted information.<sup>1</sup>

---

<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like sections 552.101, 552.117, 552.119, 552.130 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. The Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. §§ 12101 *et seq.*, 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”) has 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). We have marked the information in the submitted documents that must be withheld under section 552.101 and the ADA.

Section 552.117(2) of the Government Code excepts from public disclosure information that reveals a peace officer’s home address, home telephone number, social security number, and whether the officer has family members. “Peace officer” is defined by article 2.12 of the Code of Criminal Procedure. You state that the requestor does not seek the section 552.117 information of the commission’s peace officers. However, the submitted information contains information of other peace officers. We have marked a representative sample of the submitted employment applications and related documents to indicate the types of information that must be withheld pursuant to section 552.117(2) for those individuals who are peace officers.<sup>2</sup> We note that the peace officers’ names, ages, work phone numbers, and birth dates are not subject to section 552.117 and must be released. We also note that section 552.117(2) does not except the home address, home telephone number, social security number, and family member information of those applicants who are not peace officers or who are not Texas peace officers.

We note that the social security numbers of those who are not peace officers or who are not Texas peace officers may nevertheless be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is 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

---

<sup>2</sup>We note that a governmental body may withhold information that is excepted from disclosure under section 552.117(2) without the necessity of requesting an attorney general decision. *See* Open Records Decision No. 670 at 6 (2001).

the social security numbers contained in the information at issue were obtained or maintained by the commission 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 the commission 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 the commission, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, the commission should ensure that this number was not obtained or is not maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

...

(3) a personal identification document issued by an agency of this state or a local authorized to issue an identification document.

Thus, we have marked a representative sample of the information in the submitted documents that the commission must withhold under section 552.130. We note that section 552.130 does not except a driver's license number issued by a state other than Texas.

Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The commission must, therefore, withhold e-mail addresses of members of the public under section 552.137. We have marked a representative sample of the types of e-mail addresses

that must be withheld under section 552.137. We note that section 552.137 does not apply to a business' general e-mail address or to a government employee's work e-mail address.

Section 552.119 excepts from public disclosure a photograph of a peace officer<sup>3</sup> that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The submitted information includes a photograph depicting a peace officer and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officer has executed any written consent to disclosure. Thus, the commission must withhold the photograph depicting a peace officer, which we have marked, under section 552.119.

To summarize: (1) we have marked the information in the submitted documents that must be withheld under section 552.101 in conjunction with the ADA; (2) we have marked a representative sample of the submitted employment applications and related documents to indicate the types of information that must be withheld pursuant to section 552.117(2) for those individuals who are Texas peace officers; (3) the social security numbers of those who are not peace officers or who are not Texas peace officers may nevertheless be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I); (4) we have marked a representative sample of the information in the submitted documents that must be withheld under section 552.130; (5) we have marked a representative sample of the types of e-mail addresses that must be withheld under section 552.137; and (6) the commission must withhold the photograph depicting a peace officer, which we have marked, under section 552.119. The remaining information must be released to the requestor.

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

---

<sup>3</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

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,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 173757

Enc: Submitted documents

c: Mr. David Fisher  
706 West 11<sup>th</sup>  
Elgin, Texas 78621  
(w/o enclosures)