



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 22, 2003

Mr. Don R. Bradley  
Assistant General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2003-0448

Dear Mr. Bradley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175316.

The Texas Department of Health (the "department") received a request for any information regarding the requestor and her position at the department. In particular, the requestor seeks any investigative information that includes her name or position title in any form. We note that a portion of the submitted information was created after this request for information was received. Because this information is not subject to the instant request, we do not address it in this ruling. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted records include information that is subject to section 552.022 of the Government Code. This section provides in relevant part:

(a) 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate.

Gov't Code § 552.022(a)(3), (5). The submitted information includes vouchers and contracts relating to the receipt or expenditure of public funds. These documents also include working papers used to estimate the need for or expenditure of public funds. Because this information is subject to section 552.022, it may only be withheld if it is confidential under other law.

You claim that all of these documents are excepted under sections 552.103 and 552.108 and that a portion of the records are excepted under section 552.116. However, these sections constitute discretionary exceptions, which are intended to protect the interests of a governmental body, as distinct from exceptions that are intended to protect information deemed confidential by law or the interests of third parties. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 586 (1991) (governmental body may waive law enforcement exception), 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body), 522 at 4 (1989) (discretionary exceptions in general). Therefore these exceptions do not constitute "other law" that makes information confidential for purposes of section 552.022.

We note, however, that the documents subject to section 552.022 include the social security number of a department employee. Section 552.117 of the Government Code excepts from disclosure the social security numbers of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Therefore, if, prior to the department's receipt of this request, the individual at issue requested that his social security number be kept confidential, the department must withhold it pursuant to section 552.117(1).

Regardless of whether the employee made a timely election under section 552.024, his social security number may be confidential under federal law.<sup>1</sup> The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622* (1994). We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public

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<sup>1</sup>Section 552.101 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.

Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

In addition, the documents that are subject to section 552.022 include email addresses of members of the public. Section 552.137 of the Government Code provides that “[a]n 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 [the Public Information Act].” Section 552.137 does not apply to a business’s general e-mail address or a government employee’s work e-mail address. We have marked the types of e-mail addresses that must be withheld pursuant to section 552.137 unless their owners have consented to their release. As you claim no other exception for the documents that are subject to section 552.022 and they are not otherwise confidential by law, they must be released. We have marked the documents that must be released pursuant to section 552.022.<sup>2</sup>

We now address your arguments under section 552.108 of the Government Code for the remaining submitted information. Section 552.108 of the Government Code provides that “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [disclosure] if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). An agency whose function is essentially regulatory in nature is not a “law enforcement agency” for purposes of section 552.108. *See* Open Records Decision No. 199 (1978) (predecessor statute). However, a non-law-enforcement agency may withhold information under section 552.108 if the information relates to possible criminal conduct and has been or will be forwarded to an appropriate law enforcement agency for investigation. *See* Attorney General Opinion MW-575 (1982), Open Records Decision No. 493 (1988); *see also* Open Records Decision No. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of information which relates to incident). A governmental body that raises an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov’t Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

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<sup>2</sup>We note that the documents that are subject to release under section 552.022 also include information relating to the requestor that might ordinarily be withheld under sections 552.117, 552.130, and 552.136. *See* Gov’t Code §§ 552.117 (making certain personal information of government employees confidential), 552.130(a)(1) (making confidential motor vehicle title or registration and driver’s license issued by agency of this state), 552.136 (making confidential certain access device numbers). However, as these exceptions are based on privacy, the requestor has a special right of access as the subject of such information. *See* Gov’t Code § 552.023(b) (governmental body may not deny access to person to whom information relates on grounds that information is considered confidential under privacy principles).

You state that the submitted information pertains to an on-going investigation by the department's Office of Criminal Investigations into alleged violations of the Texas Penal Code. You also indicate that the department intends to refer its investigation to the district attorney for possible prosecution. Based on these representations, we conclude that the remaining submitted information may be withheld pursuant to section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

In summary, we have marked documents that are subject to section 552.022 of the Government Code. The department must release these documents after redacting social security numbers and e-mail addresses as indicated above. The submitted information that is not subject to section 552.022 may be withheld pursuant to section 552.108. As our ruling on these issues is dispositive, we need not address your claims concerning section 552.101 and the informer's privilege.

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).

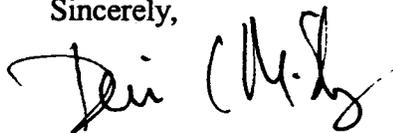
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,

A handwritten signature in black ink, appearing to read "Den (M. Elroy)".

Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 175316

Enc. Submitted documents

c: Ms. Rachel Rosales  
7103 Grover Avenue  
Austin, Texas 78757  
(w/o enclosures)