



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2003

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2003-5825

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186203.

The Texas Department of Public Safety (the "Department") received a request for records of an enforcement action initiated against a particular trucking company. You indicate that you have released some of the requested information, but argue that the remainder of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. Section 31306 of title 49 of the United States Code relates to alcohol and controlled substances testing for operators of commercial motor vehicles.¹ Section 31306(b) provides in part:

(b) Testing program for operators of commercial motor vehicles. - (1)(A)
In the interest of commercial motor vehicle safety, the Secretary of

¹We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. See Open Records Decision No. 476 (1987) (addressing statutory predecessor).

Transportation shall prescribe regulations that establish a program requiring motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial motor vehicles for the use of a controlled substance in violation of law or a United States Government regulation and to conduct reasonable suspicion, random, and post-accident testing of such operators for the use of alcohol in violation of law or a United States Government regulation. . . .

49 U.S.C. § 31306(b)(1)(A). Section 382.401 of title 49 of the Code of Federal Regulations, titled "Retention of records," requires employers to retain certain records pertaining to alcohol and controlled substances testing. Section 382.401 provides in part:

(a) General requirement. Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

49 C.F.R. § 382.401. Section 382.401 specifically requires that employers maintain "[r]ecords related to the administration of the alcohol and controlled substances testing programs." *Id.* § 382.401(b)(vi).

Under section 382.405, titled "Access to facilities and records," the following provisions control release of information obtained or gathered while complying with the requirements of section 382.401. Section 382.405 states in pertinent part:

(a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.

...

(d) Each employer shall make available copies of all results for employer alcohol and/or controlled substances testing conducted under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

...

(h) An employer shall release information regarding a driver's records as directed by the specific written consent of the driver authorizing release of the information to an identified person. Release of such information by the

person receiving the information is permitted only in accordance with the terms of the employee's specific written consent as outlined in § 40.321(b) of this title.

Id. § 382.405.

You state that the Department received the submitted compliance review report as a “regulatory authority,” presumably in accordance with section 382.405 of title 49 of the Code of Federal Regulations. You do not inform us that any written consent has been given with respect to the disclosure of drivers’ records that are reflected in the submitted report. Based on your representations, the applicable federal law, and our review of the information at issue, we find that a portion of the information that you have highlighted in the submitted report is confidential in the hands of the Department under section 31306 of title 49 of the United States Code and under section 382.405 of title 49 of the Code of Federal Regulations. You must withhold the names of the individual drivers as they are “driver information” contained in records required to be maintained under section 382.401. *See id.* However, we find that the dates contained in the submitted information are not “driver information,” and do not constitute information that would aid in the identification of drivers. We therefore conclude that the highlighted names are excepted from disclosure under section 552.101 of the Government Code as information made confidential by law. All other information must be released.

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 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,



Heather R. Rutland
Assistant Attorney General
Open Records Division

HRR/seg

Ref: ID# 186203

Enc: Submitted documents

c: Mr. Rick Mesecher
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(w/o enclosures)