ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 2, 2004

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

OR2004-1575

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# 197093.

The Texas Department of Public Safety (the "department") received a request for information regarding "Compliance Reviews, Safety Reviews and L and W-3's" issued to a specified company. You indicate that most of the responsive information has been made available to the requestor. You claim, however, that portions of the remaining requested information are 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 disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You contend that the information at issue is confidential under federal law.

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:

[1] We 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).

> (b) Testing program for operators of commercial motor vehicles. - (1)(A) In the interest of commercial motor vehicle safety, the Secretary of 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 31306(c) pertains to testing and laboratory requirements and provides that

> [i]n carrying out subsection (b) of this section, the Secretary of Transportation shall develop requirements that shall -
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> . . . .
>
> (7) provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section[.]

Id. § 31306(c)(7). Federal regulations clarify the extent to which test results pertaining to operators of motor vehicles are confidential. 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.
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> (b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:
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> > (1) Five years. The following records shall be maintained for a minimum of five years:
> >
> > > (i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater, [and]

> (ii) Records of driver verified positive controlled substances test results[.]
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> . . . .
>
> (3) One year. Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.
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> . . . .

49 C.F.R. § 382.401(a)-(b). Section 382.405 of title 49 of the Code of Federal Regulations, titled "Access to facilities and records," provides in 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(a), (d), (h). Section 382.405 also specifies the circumstances under which an employer may release test results. *See id.* § 382.405(b)-(g).

You indicate that the testing information in the submitted documents was obtained by the department pursuant to its regulatory authority 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 the test results at issue. Based on your representations and our review of the information at issue, we find that the information that you have highlighted in the submitted documents is confidential pursuant to section 382.405 of title 49 of the Code of Federal Regulations and section 31306 of title 49 of the United States Code. We therefore conclude that the department must withhold the highlighted information under section 552.101 of the Government Code as information made confidential by law. The remainder of the submitted 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 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,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 197093

Enc: Submitted documents

c: Mr. Gary Bell
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(w/o enclosures)