



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 5, 2005

Ms. Merri Schneider-Vogel
Bracewell & Patterson
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2005-02913

Dear Ms. Schneider-Vogel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 221426.

The La Porte Independent School District (the "school district"), which you represent, received a request for any and all records relating to a named individual. You state that some of the requested information will be released to the requestor but claim that the submitted 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 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. Some of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 382.405 of title 49 of the Code of Federal Regulations. The purpose of part 382 is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles. 49 C.F.R. § 382.101. These 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. *See* 49 C.F.R. § 382.401. 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.

(b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:

(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[.]

...

(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.

...

Id. 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.

...

(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). Section 382.405 also specifies the circumstances under which an employer may release test results. *See id.* § 382.405(b)-(g).

Based on the information you have provided and our review of the submitted documents, we conclude that the school district provides drug and alcohol testing that meets the federal requirements of 49 C.F.R. part 382. As such, we agree that some of the submitted information is confidential under 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 submitted information. Accordingly, we conclude that the school district must withhold the information we have marked pursuant to section 552.101 of the Government Code and section 382.405 of title 49 of the Code of Federal Regulations.¹

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). We have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

In summary, the school district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 382.405 of title 49 of the Code of Federal Regulations and common law privacy.

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

¹You also raise sections 521.053(d) and 643.643(c) of the Transportation Code for this information. We note that these provisions apply only to information maintained by the Texas Department of Transportation and not to other governmental bodies, such as the school district.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 221426

Enc. Submitted documents

c: Ms. Cheryl Mayorga
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La Porte, Texas 77571
(w/o enclosures)