



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2005

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, PC
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2005-05329

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226262.

The Southside Independent School District (the "district"), which you represent, received a request for records relating to disciplinary action taken against district bus drivers and bus assistants during the last five years. You state that you have provided a portion of the requested information to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code* § 552.301(b). You inform us that the district received the initial request for information on March 21, 2005. The submitted information reflects that the district asked the requestor to clarify his request on March 28, 2005. *See Gov't Code* § 552.222; *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Thus, the ten business day time period to request a decision from us under section 552.301(b) was tolled on the date that the district sought clarification of the request from the requestor. *See*

Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). You have provided documentation showing that the district received the requestor's clarification on March 29, 2005. Accordingly, we conclude that the ten business day time period for requesting a decision from our office resumed on March 30, 2005. The district did not request a decision from this office until April 12, 2005. The district indicates, and provides documentation showing, that the requestor agreed to "work off the date of [his] clarification for purposes of a deadline." However, the deadlines contained in section 552.301 are fixed by statute and cannot be altered by agreement. *See* Open Records Decision No. 541 at 3 (1990) (obligations of a governmental body under predecessor to Act cannot be compromised simply by decision to enter into contract). Consequently, we conclude that the district failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because sections 552.101 and 552.102 can provide compelling reasons to withhold information, we will address your arguments for withholding this 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. *See* Gov't Code § 552.101. This section encompasses information that is protected from disclosure by other statutes. You claim that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations. Section 31306 relates to alcohol and controlled substances testing for operators of commercial motor vehicles, and provides in pertinent part:

(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 -

...

(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. *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.

(c) Types of records. The following specific types of records shall be maintained. 'Documents generated' are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

(1) Records related to the collection process:

...

(vi) Documents generated in connection with decisions on post-accident tests[.]

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).

You state that the submitted driver information is maintained by the district in accordance with section 382.401 of title 49 of the Code of Federal Regulations and is subject to section 382.405. You do not inform us that any written consent has been given with respect to the disclosure of the submitted information. Thus, based on our review of the applicable federal law and your arguments, we find that the submitted information is confidential 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. Accordingly, we conclude that the district must withhold the submitted information pursuant to section 552.101 of the Government Code.¹

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, 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.

¹ As our ruling is dispositive, we need not address your remaining arguments.

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,



Lauren E. Klein
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 226262

Enc. Submitted documents

c: Mr. Brian Collister
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