



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2005

Mr. James Downes
Assistant County Attorney
Harris County Attorney's Office
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2005-10058

Dear Mr. Downes:

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# 235791.

The Harris County Hospital District (the "district") received a request for information relating to an investigation of one of the district's employees. You inform us that some of the requested information either has been or will be released. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.¹

We initially note that you have submitted no arguments in support of your assertion of section 552.103 of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000)

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver). The district's claim under section 552.103 does not provide a compelling reason for non-disclosure under section 552.302 of the Government Code. *See* Open Records Decision No. 630 at 3 (1994). The district has waived section 552.103 and may not withhold any of the submitted information under that exception.

Next, we address your claim under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 161.032 of the Health and Safety Code, which provides in relevant part:

(c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

....

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . [or] hospital district [.]

Health & Safety Code § 161.032(c), (f). You state that some of the information that the district seeks to withhold consists of "records, information and reports received, created or maintained by the Corporate Compliance Officer of the [district] as the result of an investigation into allegations of improper or illegal activities and enforcement of appropriate disciplinary actions against an employee[.]" You also state that this information "came to the Compliance Officer in the exercise of his proper function as a compliance officer[.]" Based on your representations and our review of the information that you seek to withhold, we conclude that the information in question consists of records, information, or reports of, or reports provided by, a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. *Cf. Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). We therefore conclude that all of the information encompassed by your claim under section 161.032 of the Health and Safety Code is excepted from disclosure under section 552.101 of the Government Code.

We next note that some of the remaining information is contained in an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section

550.065(c)(4) provides for the release of an accident report to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *See id.* § 550.065(c)(4). Under this provision, the Texas Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the three items of information specified by the statute. *Id.* In this instance, the requestor has not provided two of the three required items of information. Therefore, the district must withhold the information contained in the accident report form under section 550.065 of the Transportation Code. We have marked that information accordingly.

Section 552.101 also encompasses 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 relevant 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,

(ii) Records of driver verified positive controlled substances test results,

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests,

(iv) Driver evaluation and referrals,

(v) Calibration documentation,

(vi) Records related to the administration of the alcohol and controlled substances testing programs, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).

(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:

...

(ii) Documents relating to the random selection process;

...

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests; [and]

...

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

49 C.F.R. § 382.401(a)-(c). 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).

We have marked information that appears to be maintained by the district under section 382.401 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 marked information. Therefore, to the extent that it is maintained by the district pursuant to section 382.401, the marked information must be withheld from the requestor under section 552.101 of the Government Code 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. To the extent that the marked information is not so maintained, it may not be withheld under section 552.101 in conjunction with the federal law.

Next, we address your claim under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. A governmental body may not withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely election under section 552.024 to keep the information confidential. You have not demonstrated, and it is not otherwise clear to this office, that section 552.117 is applicable to any of the remaining information at issue. We therefore conclude that the district may not withhold any of the remaining information under section 552.117.

You also raise section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). To the extent that the information that we have marked under this exception relates to a Texas operator's or driver's license or motor vehicle registration, the district must withhold the marked information under section 552.130.

Lastly, we address your claim under section 552.136 of the Government Code. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We agree that section 552.136 is applicable to most of the information for which you claim this exception. Section 552.136 also appears to be applicable to one other item of information. You have not demonstrated, however, and it is not otherwise clear to this office that section 552.136 is applicable to any of the remaining information for which you claim this exception. We have marked the information that the district must withhold under section 552.136.

In summary: (1) all of the information encompassed by the district's claim under section 161.032 of the Health and Safety Code is excepted from disclosure under section 552.101 of the Government Code; (2) the district must withhold the information that is confidential under section 550.065 of the Transportation Code; (3) the information that we have marked under section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations must be withheld under section 552.101 of the Government Code to the extent that the marked information is maintained by the district under section 382.401 of title 49 of the Code of Federal Regulations; (4) Texas driver's license and motor vehicle information must be withheld under section 552.130; and (5) the district must withhold the information that is confidential under section 552.136. The rest of the submitted 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

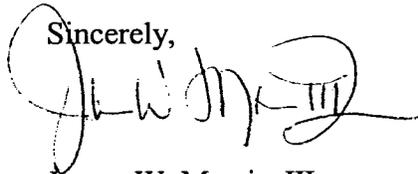
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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); *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 Office of the Attorney General 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. 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 "J. W. Morris, III". The signature is written in a cursive style with a large, stylized initial "J".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 235791

Enc: Submitted documents

c: Ms. Sharon L. Hill
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(w/o enclosures)