



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2011-10895

Dear Ms. Alexander:

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# 425634.

The Texas Department of Transportation (the "department") received a request for a complete copy of a named employee's employment records.¹ You state you are releasing most of the requested information. You claim 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 representative sample of information.²

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't

¹We note the department received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Code § 552.101. This exception encompasses information made confidential by other statutes, such as 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[.]

Id. § 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), (h). Under section 40.321(b):

“Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases” in which an employee agrees to the release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

Id. § 40.321(b). You state that Exhibit C consist of commercial driver records of the named employee maintained by the department in accordance with section 382.401 of title 49 of the

Code of Federal Regulations and are subject to section 382.405. You have provided a copy of an employment records authorization form submitted by the requestor and signed by the named employee that authorizes the release of “any and all employment records or personnel files and contents pertaining to [the named employee’s] employment with [the department].” Upon review, we find the form provided by the requestor constitutes a “blanket release” under section 40.321(b) and thus fails to satisfy the requirements for release under federal law. Accordingly, Exhibit C, as well as the information we have marked in Exhibit B, must be withheld under section 552.101 in conjunction with section 31306 of title 49 of the United States Code and under section 382.405 of title 49 of the Code of Federal Regulations.³

Section 552.101 of the Government Code also encompasses the Family Medical Leave Act (the “FMLA”), found in section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You inform us that the remaining information in Exhibit B consists of the confidential medical file of the requestor and that the information is maintained in a separate medical file. Upon review, we agree Exhibit B is confidential under section 825.500 of title 29 of the Code of Federal Regulations. We find that none of the release provisions of the FMLA apply to this information. Thus, we conclude the department must withhold

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

the remaining information in Exhibit B under section 552.101 of the Government Code in conjunction with the FMLA.⁴

In summary, the department must withhold Exhibit C, as well as the information we have marked in Exhibit B, under section 552.101 in conjunction with section 31306 of title 49 of the United States Code and under section 382.405 of title 49 of the Code of Federal Regulations. The department must withhold the remaining information in Exhibit B under section 552.101 of the Government Code in conjunction with the FMLA.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/agn

Ref: ID# 425634

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.