



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2011

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

OR2011-15242

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# 433565.

The Texas Department of Transportation (the "department") received two requests from the same requestor for the personnel file of a named employee and information relating to a specified Management Directed Review ("MDR"). You state some information has been released to the requestor. We note you have redacted information as permitted by Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from

¹Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information, including a driver's license number under section 552.130 of the Government Code and an insurance policy number under section 552.136 of the Government Code without the necessity of requesting an attorney general decision. *See* ORD 684 at 14-15. However, we note on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) and 552.136(b), without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22, 27 (to be codified at Gov't Code §§ 552.130(c) and 552.136(c)). If a governmental body redacts such information, it must notify the requestor in accordance with sections 552.130(e) and 552.136(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22, 27 (to be codified at Gov't Code §§ 552.130(d)-(e) and 552.136(d)-(e)). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) and 552.136(b), in accordance with sections 552.130 and 552.136, not Open Records Decision No. 684.

disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code.² We have considered the claimed exceptions and reviewed the submitted representative sample of information.³

Section 552.101 of the Government Code 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, 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[.]

²Although you also raise Texas Rule of Evidence 503, we note section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to required disclosure under section 552.022 of the Government Code. See Open Records Decision No. 677 (2002), 676 (2002).

³We assume 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 those records contain substantially different types of information than that submitted to this office.

Id. § 31306(c)(7). Therefore, pursuant to section 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.

(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver's use of alcohol or controlled substances, including any records pertaining to his or her alcohol or controlled substances tests. The employer shall promptly provide the records requested by the driver. Access to a driver's records shall not be contingent upon payment for records other than those specifically requested.

Id. § 382.405(a)-(b). You state Exhibit C consists of commercial driver records regarding alcohol and controlled substance testing of the named employee maintained by the department in accordance with section 382.401 of title 49 of the Code of Federal Regulations that are therefore confidential under section 382.405. Upon review, we agree section 382.405 generally applies to Exhibit C. However, a driver is entitled to his own records under section 382.405(b). *See id.* 382.405(b). We note the requestor is an attorney representing the named employee at issue; thus, the department may not withhold the information at issue from this requestor. As you raise no additional exceptions to disclosure for Exhibit C, it must be released to the requestor.

Section 552.101 of the Government Code also encompasses the Family Medical Leave Act (the “FMLA”), 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. Section 825.500 provides in part:

(g) Records 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 the [Americans with Disabilities Act (the “ADA”)], as amended, 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) (internal citation omitted). You assert Exhibit D is confidential under the FMLA. Upon review, we find none of the information at issue relates to medical certification, recertifications, or medical histories of employees or employees’ families created for the purpose of the FMLA. Consequently, Exhibit D may not be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient’s signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we find a portion of Exhibit D, which we have marked, consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created by a physician. Therefore, the marked information constitutes confidential medical records and may be released only upon receipt of consent in accordance with sections 159.004-.005 of the Occupations Code. As you raise no additional exceptions for the remaining information in Exhibit D, it must be released to the requestor.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the

rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert section 552.107 for the information you have marked in Exhibit E. You state the marked information documents communications between department attorneys and employees. You state the communications were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the department may withhold the marked information in Exhibit E under section 552.107 of the Government Code.

Section 552.116 of the Government Code provides:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also

maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Act of May 29, 2011, 82nd Leg., R.S., H.B. 2947, §§ 1, 2 (to be codified as amendment to Gov't Code § 552.116(a), (b)(1)); Gov't Code § 552.116(b)(2). You state Exhibit B consists of audit working papers prepared or maintained in the course of an audit authorized by chapter 2102 of the Government Code. *See* Transp. Code § 201.108 (Texas Transportation Commission shall appoint internal auditor for department); *see also* Gov't Code §§ 321.0131-.0136 (defining types of audits for purposes of chapter 2101 of the Government Code), 2102.007 (relating to duties of the internal auditor). You state the final audit report was released. Based on your representations and our review, we conclude the department may withhold Exhibit B under section 552.116.

In summary, the department may release the information we have marked in Exhibit D only in accordance with the MPA. The department may withhold the information you have marked in Exhibit E under section 552.107(1). The department may withhold Exhibit B under section 552.116. The remaining information must be released to the requestor.

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,

A handwritten signature in cursive script that reads "Misty Haberer Barham".

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 433565

Enc. Submitted documents

c: Requestor
(w/o enclosures)