



February 28, 2002

Mr. David Anderson
General Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2002-0991

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159127.

The Texas Education Agency (the "agency") received a request for information concerning two complaints made against All-Pro Defensive Driving and the resulting investigations. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted by the requestor. *See Gov't Code § 552.304* (providing for submission of public comments).

Initially, we note that the requestor also asks the agency to "provide relevant statutory authority for [the agency] to interfere in the legitimate advertising and promotional efforts of a licensed school" and to "provide evidence that [a particular] policy change was published for the public and industry in July or anytime thereafter." We also note that the request poses several questions to the agency. The Public Information Act (the "Act") does not require a governmental body to prepare answers to questions posed by a requestor or to do legal research. *See Open Records Decision Nos. 563 at 8 (1990)* (considering request for federal and state laws and regulations), *555 at 1-2 (1990)* (considering request for answers to fact questions). A governmental body must only make a good faith effort to relate a request to information which it holds. *See Open Records Decision No. 561 at 8 (1990)*. You do not seek a decision from this office with respect to this aspect of the request. Therefore, to the extent any information responsive to this aspect of the request exists, we assume it has been released to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See Gov't Code §§ 552.301(a), .302.*

We also note that the information on the reverse side of one of the submitted documents is not responsive to the present request. You have submitted a page containing an agency employee's hand-written notes. These hand-written notes are related to the investigations at issue and are therefore responsive to the present request. These notes, however, appear to have been made on the back of a personal e-mail message. This e-mail message, which we have marked, does not in any way relate to the complaints and investigations at issue here. As this e-mail message, which we have marked, is not responsive to the present request, this ruling does not address whether it may be withheld from required public disclosure. Further, this e-mail message need not be released to the requestor.

Next, we note that some of the submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

The submitted information contains a completed report, an invoice, and two receipts that are expressly public under section 552.022(a). Therefore, you may withhold this information only if it is confidential under other law. You claim that this information is excepted from disclosure under sections 552.103 and 552.116 of the Government Code. Both sections 552.103 and 552.116 are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022.¹ Therefore, this information, which we have marked, may not be withheld under section 552.103 or section 552.116.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

We will now address your claimed exceptions with respect to the remaining information. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to APA).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state that the issues identified in the complaints received by the agency are the subject of an on-going investigation. You state that, “[a]s a result of this investigation, the Driver Training Division issued a notice of intent to assess civil penalty and notice of intent to condition course provider license on November 28, 2001.” You argue that “[s]ince the parties have taken different positions on the issues present in the intent to assess civil penalty and notice of intent to condition course provider license, this matter can reasonably be anticipated to proceed to litigation.” You do not indicate, however, whether the agency anticipates bringing an enforcement action against All-Pro, or whether the agency anticipates that All-Pro will appeal the actions taken or to be taken by the agency against All-Pro. In this instance, based on the limited information provided this office, we do not believe that you have established that litigation was reasonably anticipated on the date the agency received the present request for information. Thus, you may not withhold the requested information under section 552.103.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, 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 [required 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 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.

A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. Here, you have not identified the applicable statute, if any. Thus, you have not

demonstrated that the requested information was prepared or maintained by the state auditor or the auditor of a state agency or institution of higher education in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code §§ 552.116(a), (b)(1), (b)(2). Therefore, the requested information is not excepted under section 552.116.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies. It also protects the identities of individuals who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981), *citing* Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). Furthermore, as its purpose is to protect the flow of information to the governmental body, rather than to protect the interests of the person who furnishes the information, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See* Open Records Decision Nos. 630 at 4 (1994), 549 at 6 (1990).

You state that the complaints at issue involve violations of article 4413(29c) of Vernon's Texas Civil Statutes. Section 27 of article 4413(29c) provides that a violation of article 4413(29c) can result in both civil and criminal penalties. As it appears that the complaints assert actions that could result in both civil and criminal penalties, we agree that the identifying information about the complainants may be withheld from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege. Thus, you may withhold the complainants' identifying information, which we have marked.

Section 552.117 of the Government Code excepts from 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 piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the agency may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the present request for this information was received. For any employee who timely elected to keep his or her personal information confidential, the agency must withhold the employee's

home address and telephone number, social security number, and any information that reveals whether the employee has family members. The agency may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential.

If an employee or official did not timely elect to withhold his or her social security number as prescribed by section 552.024, the social security number may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the agency pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. We have marked the information in the submitted documents that the agency must withhold pursuant to section 552.130.

We note that the submitted documents contain e-mail addresses that must be withheld under section 552.137 of the Government Code. Section 552.137 requires the agency to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the members of the public whose e-mail addresses are at issue here have consented to the release of their e-mail addresses, the agency must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

To summarize: (1) the agency need not release the private e-mail message we have marked as it is not responsive to the present request; (2) we have marked the information that the agency may withhold under section 552.101 in conjunction with the informer's privilege; (3) the agency must withhold the home address, home telephone number, social security number, and family member information for each employee or official that timely elected to keep such information confidential under section 552.024; (4) prior to releasing any social security number, you should ensure that it was not obtained or is not maintained by the agency pursuant to any provision of law enacted on or after October 1, 1990; (5) we have

marked the information that must be withheld under section 552.130; (6) we have marked the e-mail addresses that must be withheld under section 552.137; and (7) the remaining 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 159127

Enc: Submitted documents

c: Ms. Susan G. Morrison
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(w/o enclosures)