



November 4, 2002

Mr. Chris Kadas
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2002-6262

Dear Mr. Kadas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171628.

The Texas Department of Licensing and Regulation (the "department") received a request for six categories of information related to Trendsetter Staffing, Inc. or Texas Staffing Services, Inc. You state that some responsive information has been released to the requestor. You claim that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 91.014 and 301.081 of the Labor Code, and sections 411.083 and 411.084 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We will first address your responsibilities under the Public Information Act. Subsections 552.301(a) and (b) of the Government Code provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the department received the request for information on August 9, 2002. However, you did not request a decision from this office until August 30, 2001. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code.

You suggest that the ten-day deadline was tolled. You refer to the requestor's letter that you received on August 15, 2002, as an "amended" request. We do not believe that the ten-day deadline was tolled in this instance. The ten-day deadline may be tolled during a clarification process between the requestor and the governmental body when a governmental body seeks clarification because a request is unclear or when the request is too broad. *See* Gov't Code § 552.222(b); Open Records Decision No. 663 at 5 (1999). The ten-day deadline is tolled during the clarification process but resumes upon receipt of the clarification on the day the clarification is received. *See* Open Records Decision No. 663 at 5. Here, you do not indicate that the request was unclear or too broad, or that the department was seeking clarification of the request. Consequently, because the request for a decision was not timely made, the requested information is presumed to be public information. Gov't Code § 552.302.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the deadlines in section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). The department argues that the submitted information is excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because the assertion of section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness, we will address your arguments.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 91.014 of the Labor Code governs certain records held by the department and provides in pertinent part as follows:

(a) An applicant for an original or renewal license must demonstrate a net worth as follows

. . . .

(d) A document submitted to establish net worth must show the net worth on a date not earlier than nine months before the date on which the application is submitted. A document submitted to establish net worth must be prepared or certified by an independent certified public accountant. Information submitted to or maintained by the department is subject to Chapter 552, Government Code, other than information related to:

- (1) identification of client companies;
- (2) net worth;
- (3) financial statements; or
- (4) federal tax returns.

We have reviewed the submitted records and conclude that the information in Exhibit 2 is made confidential under section 91.014(d) of the Labor Code, and must be withheld from disclosure under section 552.101 of the Government Code.

Section 301.081 of the Labor Code governs the release of employment information held by the Texas Workforce Commission (the "commission"). You explain that the department obtained some of the records at issue from the commission.¹ Section 301.081 provides in pertinent part as follows:

(a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be

¹It is the well-settled policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. Attorney General Opinion H-683 (1975). The Texas Public Information Act does not undercut that policy. *Id.* Confidential information may be transferred between state agencies without destroying its confidential character and without constituting a release to the public if the agency to which the information is transferred has authority to obtain the information. Open Records Decision No. 516 (1989), 490 (1988). Consequently, confidential information may be "transferred between state agencies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between state agencies." Attorney General Opinion H-683 at 4. In this regard, you have submitted to this office a copy of an agreement between the department and the commission for the "exchange of information pertinent to the regulation and taxation of staff leasing services."

copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.

....

(c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title.

Labor Code § 301.801(a), (c). We have reviewed the information at issue and conclude that most of the information in Exhibit 3 is made confidential under section 301.081 of the Labor Code. We have marked the few documents in Exhibit 3 that do not appear to be governed by this provision. Because you have raised no other applicable exception for these documents, they must be released.

Finally, you direct our attention to section 91.013 of the Labor Code, which requires the department to "conduct a thorough background investigation of each individual applicant and of each controlling person of each applicant to determine whether that applicant or controlling person is qualified under this chapter." In this regard, the department is specifically authorized to obtain criminal history record information ("CHRI") from the Texas Department of Public Safety. Gov't Code § 411.122. The CHRI that the department obtains from the Texas Department of Public Safety is confidential and may be released only in limited circumstances. Gov't Code § 411.084. No agency or individual shall confirm the existence or nonexistence of CHRI to any person or agency that would not be eligible to receive the information. 28 C.F.R. § 20.21(c)(2). We have marked the CHRI that the department must withhold in the submitted documents.

We also note that the submitted documents include fingerprints. Fingerprints are considered "biometric identifiers," and as such are made confidential under sections 559.001, 559.002, and 559.003 to the Government Code. Sections 559.001, 559.002, and 559.003 of the Government Code provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents in Exhibit 5 include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the department must withhold the fingerprint information that we have marked under section 559.003 of the Government Code.

The submitted documents contain motor vehicle information that is excepted from public disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

The department must withhold Texas driver's license numbers under section 552.130.

Finally, we note that the submitted records contain several social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the

Government Code. A social security number or "related record" may be excepted from disclosure 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 file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information 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 department pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the information in Exhibit 2 is made confidential under section 91.014(d) of the Labor Code, and must be withheld from disclosure under section 552.101 of the Government Code. Most of the information in Exhibit 3 is made confidential under section 301.081 of the Labor Code. We have marked the few documents in Exhibit 3 that do not appear to be governed by this provision and must be released. We have marked the CHRI that the department must withhold in the submitted documents. The department must withhold the fingerprint information that we have marked under section 559.003 of the Government Code. Social security numbers may be confidential under federal law. The department must withhold the Texas driver's license numbers under section 552.130. Social security numbers may be confidential under federal law. The remaining submitted information must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 171628

Enc. Submitted documents

c: Mr. Joseph F. Gilker
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(w/o enclosures)