



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 4, 2003

Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority of Harris County, Texas
1201 Louisiana, 16th Floor
Houston, Texas 77002

OR2003-5395

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# 185310.

The Metropolitan Transit Authority of Harris County ("METRO") received two requests for information from an individual. Specifically, the requestor seeks a list of on board accidents/injuries/incidents for a three-year period of time, information relating to the driving records of a specified individual and the requestor, and reported on-board incidents and injuries on METRO's employee shuttle. You inform us that METRO will release the requestor's driving record to her. You assert the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We reviewed the information you submitted and considered the exception you claim.

Section 552.103 of the Government Code, the "litigation exception," provides, in relevant part, 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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish that section 552.103 applies to the information at issue. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). To withhold information under this exception, both prongs of this test must be met. *Id.* A contested case under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, constitutes “litigation” for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to APA).

You inform this office that the information at issue relates to a claim by the requestor against METRO that is pending before the Texas Workers’ Compensation Commission. You provide supporting documentation which indicates that this matter is scheduled for a benefit review conference. You argue that the pending benefit review conference is governed by the APA pursuant to section 145.1 of title 28 of the Texas Administrative Code.

Section 410.021 of the Labor Code describes a benefit review conference as “a nonadversarial, informal resolution proceeding.” *See* Labor Code § 410.021. Section 410.003 states that “[e]xcept as otherwise provided by this chapter, Chapter 2001, Government Code [the APA], *does not apply* to a proceeding under this chapter.” *Id.* § 410.003 (emphasis added). Section 410.027 provides that “[t]he commission shall adopt rules for conducting benefit review conferences.” *Id.* § 410.027.

You cite to section 145.1 of title 28 of the Texas Administrative Code as a rule that applies to benefit review conferences. This section governs “all hearings provided by the Commission to adjudicate disputes arising under the Texas Workers’ Compensation Act [the “TWCA”] . . . , where the first day of a hearing in which evidence is admitted occurs *prior to January 1, 1996* or where pre-evidentiary-hearing procedures occur *prior to January 1, 1996*[.]” except for specified benefit disputes. *See* 28 T.A.C. § 145.1 (emphasis added). In this case, the dispute at issue arose after January 1, 1996. Therefore, section 145.1 does not apply in this instance. However, a similar provision, section 148.1 of title 28 of the Texas Administrative Code, governs “all *hearings* where the first day of a

hearing in which evidence is admitted occurs *on or after January 1, 1996[.]*” except for specified benefit disputes. *See* 28 T.A.C. § 148.1 (emphasis added). Therefore, we will address your arguments in relation to this provision.

Section 148.1 states the APA applies to hearings governed by chapter 148. 28 T.A.C. § 148.1. Thus, we must determine whether a benefit review conference is a hearing governed by chapter 148. Subchapter B of chapter 410 of the Labor Code contains provisions governing benefit review conferences. *See* Labor Code §§ 410.021-.034. Upon review of the relevant statutory provisions, it does not appear to this office, nor have you explained, that a benefit review conference constitutes a hearing governed by section 148.1 of title 28 of the Texas Administrative Code. Therefore, we do not believe the APA applies to a benefit review conference. Thus, as you base your argument to establish prong one of the litigation exception only on the pending benefit review conference, we find you have not adequately established the existence of pending litigation. Thus, we conclude METRO may not withhold Exhibit F under section 552.103 of the Government Code.

Next, we note federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. *See* Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). However, the definition of CHRI does not include driving history record information maintained by the DPS under subchapter C of chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2)(B). Accordingly, to the extent that the submitted information includes CHRI that is confidential under federal law or chapter 411 of the Government Code, we conclude that METRO must withhold such information pursuant to section 552.101 of the Government Code.

Last, we note section 552.130 of the Government Code applies to information contained in one of the submitted documents. This provision excepts from public disclosure information relating to a driver’s license or a motor vehicle title or registration issued by an agency of this state. *See* Gov’t Code § 552.130. In this case, the submitted information contains a driver’s license number and class type. Therefore, METRO must withhold the information pertaining to motor vehicle records, which we have marked, under section 552.130 of the Government Code.

In summary, METRO must withhold the information we have marked under section 552.130 of the Government Code. To the extent it exists, METRO must withhold CHRI under

section 552.101 in conjunction with state and federal laws. METRO must release the remainder of the submitted information 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 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 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,

A handwritten signature in black ink that reads "Christen Sorrell". The signature is written in a cursive, flowing style.

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 185310

Enc: Submitted documents

c: Ms. Deborah Smith
11331 Lockgate
Houston, Texas 77048
(w/o enclosures)