



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 16, 2003

Ms. Alice Caruso  
Assistant Disclosure Officer  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778-0001

OR2003-9067

Dear Ms. Caruso:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192777.

The Texas Workforce Commission (the "commission") received a request for "all records in the possession of the [commission] pertaining to [a specified person]." You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample documents.<sup>1</sup>

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested or representative samples of it, if a voluminous amount of the information was requested, labeled to indicate which exceptions apply to which parts of the information. *See Gov't*

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<sup>1</sup> We 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 § 552.301(e). You state that the commission received this request for information on September 25, 2003. Therefore, the commission had until October 16, 2003 to submit to us the responsive audiotape recordings that you acknowledge exist or a representative sample of those audiotape recordings. To date, the commission has not submitted such information to us for our review. Thus, we find that the commission failed to comply with the procedural requirements of section 552.301 in requesting this decision from us with respect to the responsive audiotape recordings.

Because the commission failed to comply with section 552.301 of the Government Code with respect to the responsive audiotape recordings, these recordings are now presumed public. *See* Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The commission must demonstrate a compelling interest in order to overcome the presumption that these recordings are now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the commission claims that these recordings are excepted from disclosure under section 552.103 of the Government Code, we note that this exception is a discretionary exception to disclosure under the Public Information Act (the "Act") that does not constitute a compelling interest that is sufficient to overcome the existing presumption that the recordings are now public.<sup>2</sup> Accordingly, we conclude that the commission may not withhold any portion of the responsive audiotape recordings under section 552.103 of the Government Code. Consequently, the commission must release the responsive audiotape recordings to the requestor in their entirety.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

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:

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<sup>2</sup> Discretionary 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)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases[.]

Gov't Code § 552.022(a)(12). We have marked the portion of the submitted information that is subject to section 552.022(a)(12). The commission must release this marked information to the requestor, unless it is expressly confidential under other law. As noted above, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Accordingly, we conclude that the commission may not withhold any portion of this marked information under section 552.103 of the Government Code.

We now address your section 552.103 claim with respect to the remaining submitted information. Section 552.103 of the Government Code provides in pertinent part:

(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 commission maintains 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 on the date that the commission receives the request for information and (2) the information at issue is related to that pending or reasonably anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also 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). The commission must meet both prongs of this test for information to be excepted from disclosure under 552.103(a).

You indicate that the payday claim file that is the subject of the instant request is also the basis of a lawsuit filed in the 200<sup>th</sup> District Court of Travis County with cause number GN202459. Furthermore, you state that the commission is a party to the lawsuit. Based on your statements, we agree that the remaining submitted information relates to the pending litigation. Accordingly, we conclude that the commission may withhold some of the remaining submitted information pursuant to section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.<sup>3</sup> Portions of the remaining submitted information have been obtained by the opposing party in this matter. Accordingly, we conclude that the commission may not withhold this particular information under section 552.103 of the Government Code.

We note that the submitted information that is not excepted from disclosure under section 552.103 contains social security numbers that may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.<sup>4</sup> The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or 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* Open Records Decision No. 622 (1994). The commission has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers contained within this information are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the commission, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the commission should ensure that they were not obtained and are not maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

In addition, we note that the information that is not excepted from disclosure under section 552.103 contains e-mail addresses that are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

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<sup>3</sup> We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

<sup>4</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 1089, § 1 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the e-mail addresses that are excepted from disclosure under section 552.137(a). Unless the commission has received affirmative consent for the

release of these marked e-mail addresses, we conclude that it must withhold them pursuant to section 552.137(a) of the Government Code.

In summary, the commission must release the responsive audiotape recordings to the requestor in their entirety pursuant to section 552.302 of the Government Code. The commission may withhold some of the submitted information pursuant to section 552.103 of the Government Code. Social security numbers that are contained within the portions of the submitted information which are subject to section 552.022(a)(12) of the Government Code and within the portions of the submitted information which have been obtained by the opposing party in this matter may be confidential under federal law. The commission must withhold some e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the commission has received affirmative consent for their release from the individuals with whom they are associated. The commission must release the remaining 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).

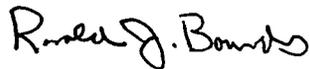
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 192777

Enc. Marked documents

c: Ms. Elizabeth M. Marsh  
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(w/o enclosures)