



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 11, 2006

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

OR2006-04894

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# 248829.

The Texas Department of Transportation (the "department") received a request for a deceased employee's personnel file. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</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. This section encompasses information that is protected from disclosure by other statutes. You claim that a portion of the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations.

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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.

Section 31306 relates to alcohol and controlled substances testing for operators of commercial motor vehicles, and provides in pertinent 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:

[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[.]

*Id.* § 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, [and]

(ii) Records of driver verified positive controlled substances test results[.]

...

(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:

...

(vi) Documents generated in connection with decisions on post-accident tests[.]

*Id.* 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.

...

(h) An employer shall release information regarding a driver's records as directed by the specific written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the

terms of the employee's specific written consent as outlined in § 40.321(b) of this title.

*Id.* § 382.405(a). Section 382.405 also specifies the circumstances under which an employer may release test results. *See id.* § 382.405(b)-(g). Under section 40.321(b)

“Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases” in which an employee agrees to the release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

49 C.F.R. § 40.321(b). You state that a portion of the submitted driver information is maintained by the department in accordance with section 382.401 of title 49 of the Code of Federal Regulations and is subject to section 382.405. You have provided a copy of a completed form submitted by the requestor and signed by the named employee that authorizes the release of “a complete copy of all records pertaining to [the named employee's] employment, including but not limited to all personnel, payroll, medical or hospital records pertaining to [the named employee].” If the form provided by the requestor satisfies the requirements of sections 382.405 and 40.321(b), the information at issue must be released to the requestor. However, if the form provided by the requestor fails to satisfy the requirements for release under federal law, the information at issue, which you have marked, must be withheld under section 552.101 in conjunction with section 31306 of title 49 of the United States Code and under section 382.405 of title 49 of the Code of Federal Regulations.

Section 552.101 of the Government Code also encompasses information protected by common-law privacy. Information is protected from disclosure by the common law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law

privacy). However, as you acknowledge the right of privacy is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.— Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). We therefore conclude that the deceased individual's privacy right in the records has lapsed and so the records may not be withheld on the basis of protecting the deceased individual's privacy.

However, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld under common-law privacy. *See* Attorney General Opinion JM-229. In this case, the submitted information reveals the identity of the deceased employee's designated beneficiary. Beneficiaries have a common-law right of privacy in financial information not relating to a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 373 at 3 (1983). Accordingly, the designated beneficiary's identifying information, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy to protect the beneficiary's privacy interests.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such 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).

You inform us that the employee whose information is at issue made a timely election for confidentiality under section 552.024. As such, the department must withhold the information we have marked pursuant to section 552.117(a)(1). However, section 552.117(a)(1) deems social security numbers confidential only in order to protect the privacy of employees. Thus, the social security number of a deceased employee may not be withheld under section 552.117(a)(1). *Cf.* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Therefore, the information we have marked must be withheld under section 552.117(a)(1).

In summary, to the extent the requestor has provided a document that satisfies the requirements of sections 382.405 and 40.321(b), the information you have marked must be released to the requestor. However, if the form provided by the requestor fails to satisfy the requirements for release under federal law, the information at issue must be withheld under

section 552.101 in conjunction with section 31306 of title 49 of the United States Code and under section 382.405 of title 49 of the Code of Federal Regulations. The identifying information of the named employee's designated beneficiary, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy. Finally, the information we have marked must be withheld under section 552.117(a)(1) of the Government Code. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/er

Ref: ID# 248829

Enc. Submitted documents

c: Mr. Chris Kennedy  
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New Orleans, Louisiana 70130  
(w/o enclosures)