



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2007

Ms. Margo M. Kaiser
Staff Attorney
Open Records Unit
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2007-11453

Dear Ms. Kaiser:

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# 288193.

The Texas Workforce Commission (the "commission") received a request for information related to a named claimant. You state that the commission will redact responsive social security numbers pursuant to section 552.147 of the Government Code.¹ You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²We 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.

office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). As of the date of this ruling, you have not submitted the requested information in your Section 3 to our office for review. Consequently, you have failed to comply with section 552.301 of the Government Code regarding this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of 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); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977).

Although you raise sections 552.103, 552.107, and 552.111 of the Government Code as exceptions to disclosure of the information at issue, these exceptions are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (attorney-client privilege under section 552.107 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 663 at 5 (1999) (governmental body may waive sections 552.103, 552.107, and 552.111), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Accordingly, the commission may not withhold the information at issue in Section 3 pursuant to section 552.103, 552.107, or 552.111 of the Government Code. As you raise no other exceptions to disclosure of this information, the commission must release the information to the requestor.

You claim that the submitted information in Section 1 is excepted from disclosure under section 552.103(a) of the Government Code. This section excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. 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 was pending or reasonably anticipated on the date that the request for information was received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that a lawsuit, Cause Number 4:06-CV-094-Y, has been filed in the United States District Court for the Northern District of Texas and that the commission, the named individual, and the requestor's client are all parties to the lawsuit. You indicate that this litigation was pending on the date the commission received the request for information. Upon review of the information submitted in Section 1, we conclude that it is related to the pending litigation.

We note, however, that the representative sample of information which you have submitted in Section 1 consists of a single document, a "Determination on Payment of Unemployment Benefits," that has been provided to the parties to the pending litigation. 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. *Open Records Decision* Nos. 349 (1982), 320 (1982). Thus, because the document which you have submitted as a representative sample in Section 1 has been provided to the opposing parties in the pending litigation, the information at issue is not excepted from disclosure under section 552.103(a), and it must be disclosed.

You state that the submitted information in Section 2 consists of confidential unemployment insurance claim information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. The regulations found at section 603 of title 20 of the Code of Federal Regulations send a clear message that "claim information" in the files of a state unemployment compensation agency is to be disclosed only to a "receiving agency," as defined in the regulations, or to other specified parties. *See* 20 C.F.R. § 603.1 *et seq.*; *see also* *Open Records Decision* No. 476 at 4 (1987). Otherwise, pursuant to section 603.4(c) of title 20 of the Code of Federal Regulations, state unemployment compensation agencies, such as the commission, must protect the confidentiality of claim information. "Claim information" means information regarding whether an individual is receiving, has received, or has applied for unemployment compensation, the amount of compensation the individual is receiving, as well as "[a]ny other information contained in the records of the State agency that is needed by the requesting agency to verify eligibility for, and the amount of, benefits." 20 C.F.R. § 603.2(a). We also note that the names of employers and employees who file unemployment compensation appeals fall within the definition of "claim information" and that the federal regulations prohibit the commission from disclosing this information. *See id.* § 603.4(b); *Open Records Decision* No. 476 at 4 (1987).

The federal Social Security Act requires states to comply with the directives of the United States Department of Labor in administering state unemployment insurance (“UI”) programs. Section 603.5 specifies the conditions under which such claim information may be released. *See* 20 C.F.R. § 603.5 (lists permissible disclosures of confidential claim information). You state that the records at issue consist of UI claim information pertaining to employers other than the requestor’s client. You also state that the requestor does not fall into any of the exceptions to the confidentiality requirements imposed by the applicable federal and state laws and regulations. Based on your representations and our review, we conclude that the commission must withhold the claim information in Section 2 under section 552.101 of the Government Code in conjunction with federal law.

In summary, the commission must withhold the claim information in Section 2 under section 552.101 of the Government Code in conjunction with federal law. The remaining 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 288193

Enc. Submitted documents

c: Ms. Lynn Boyk
Paralegal
Blaies & Hightower, L.L.P.
777 Main Street, Suite 1900
Fort Worth, Texas 76102
(w/o enclosures)