



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 25, 2012

Mr. John Ferguson  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2012-01244

Dear Mr. Ferguson:

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# 443420 (DPS PIR# 11-2763).

The Texas Department of Public Safety (the "department") received a request for six categories of information: (1) correspondence between the department and a named federal agency for a specified time period regarding "quality assurance and oversight for private garages that inspect commercial motor vehicles"; (2) documents describing any program the department considers "quality assurance and oversight for private garages that inspect commercial motor vehicles"; (3) information pertaining to a specified incident; (4) correspondence between the department and any investigating agency pertaining to the specified incident; (5) information pertaining to investigations of commercial vehicles inspected by a specified business; and (6) information pertaining to the specified business. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note you have submitted only a toxicology report pertaining to the specified incident. Thus, to the extent information responsive to the remainder of the request for information existed and was maintained by the department on the date the department received the request, we presume the department has released it. If not, the department must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision

No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

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 exception encompasses information made confidential by other statutes, such as section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations. Section 31306 relates to alcohol and controlled substances testing for operators of commercial motor vehicles and provides, in relevant 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, in part:

(c) Testing and laboratory requirements. -- In 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,

(ii) Records of driver verified positive controlled substances test results,

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests,

(iv) Driver evaluation and referrals,

(v) Calibration documentation,

(vi) Records related to the administration of the alcohol and controlled substances testing programs, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).

(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:

...

(ii) Documents relating to the random selection process;

...

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests; [and]

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

*Id.* § 382.401(a), (b)(1)-(3), (c)(1)(ii), (v)-(vi). 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.

...

(d) Each employer shall make available copies of all results for employer alcohol and/or controlled substances testing conducted under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

...

(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.

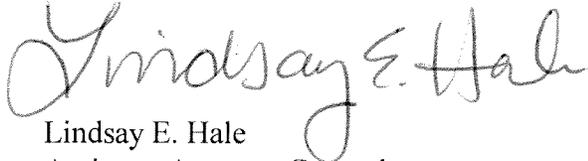
*Id.* § 382.405(a), (d), (h). Section 382.405 also specifies other circumstances under which an employer may release test results. *See id.* § 382.405(b)-(c), (e)-(g).

You state the submitted information is governed by these federal laws and the department obtained the submitted information pursuant to its regulatory authority under section 382.405 of title 49 of the Code of Federal Regulations. *See id.* § 382.405(d). You further state the driver at issue has not provided written consent for disclosure of this information. *See id.* § 382.405(h). Based on your representations and upon review, we conclude the submitted information is confidential under section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations. Therefore, the department must withhold the submitted information under section 552.101 of the Government Code 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.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 443420

Enc. Submitted documents

c: Requestor  
(w/o enclosures)