



July 9, 2002

Ms. Bonnie Lee Goldstein
Brown & Hoffmeister, LLP
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2002-3695

Dear Ms. Goldstein:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165481.

The City of McKinney Police Department (the "department") received a request for information surrounding a particular police officer and for reports and supplemental reports regarding three specific case numbers. 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 information.

We note initially that the documents you have marked as exhibits 1 and 3 are completed reports and investigations, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is not excepted from disclosure unless expressly confidential under other law or as provided by section 552.108. You do not assert that section 552.108 applies to the submitted information. Furthermore, section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" for purposes of section 552.022.¹ *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in

¹ 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 No. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

litigation and does not itself make information confidential). We do find, however, that portions of the submitted documents are confidential and not required to be released under section 552.022(a)(1).

First, section 552.130 serves as "other law" for purposes of section 552.022 of the Act. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers, vehicle identification numbers, and license plate numbers contained in exhibits 1 and 3 that we have marked under section 552.130.

A second instance of "other law" excepting some of the requested information from mandatory release under 552.022(a)(1) relates to the social security numbers contained in exhibits 1 and 3. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and 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 id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Third, section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code provides another source of "other law" excepting some of the information in exhibit 3 from release under section 552.022(a)(1). As noted, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential. Chapter 1703 of the Occupations Code

codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. The submitted documents contain information acquired from a polygraph examination. The requestor is not a person to whom section 1703.306 grants access to this information. We have marked the information that the department must withhold under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Fourth, section 552.117 may provide a source of "other law" excepting some of the information in exhibit 3 from release under section 552.022(a)(1). Section 552.117(2) generally requires the department to withhold the following categories of information pertaining to a peace officer, as defined by article 2.12, Code of Criminal Procedure: the officer's current and former home address and home telephone number, social security number, and information revealing whether the officer has family members. Open Records Decision No. 622 (1994). Section 552.117(2), however, does not apply to former peace officers. We note that the submitted information indicates that the peace officer under investigation was terminated. If the individual was not a peace officer at the time the

department received the present request, the information at issue is not excepted under section 552.117(2). Nevertheless, a former peace officer's section 552.117 information may be subject to required withholding under section 552.117(1), *but only if* the individual elected confidentiality for the information under section 552.024 prior to the department's receipt of the present request.

Finally, section 552.101 in conjunction with section 411.083 of the Government Code provides a fifth source of "other law" that excepts some of the requested information in exhibit 3 from release under section 552.022(a)(1). Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See Open Records Decision No. 565 (1990).* Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Some of the information in exhibit 3 submitted for our review is CHRI generated by TCIC and NCIC. Accordingly, the information we have marked in exhibit 3 is excepted from required public disclosure by section 552.101 of the Government Code.

As there is no "other law" removing the remaining portions of exhibits 1 and 3 from the ambit of section 552.022(a)(1), the remainder of exhibits 1 and 3 must be released.

We now consider whether exhibits 2 and 4 are excepted from release under section 552.103. You contend that the requested information is excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure 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. Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party

to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The 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 is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). Therefore, the governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the defendant is presently seeking habeas relief. You also represent that the U.S. Attorney in charge of the Sherman Division, a party to the litigation, wants the information withheld. After reviewing the submitted material, we find that litigation is pending. We also conclude that the documents you have submitted relate to the litigation, and so the requested information may be withheld.

Additionally, 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, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). You state that you are in the process of determining which of the requested information has been produced in prior trials, and represent that you will release such information to the requestor. We therefore conclude that, except for information seen by the opposing party, section 552.103 of the Government Code excepts exhibits 2 and 4 from required public disclosure. Furthermore, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we find that exhibits 1 and 3 are made public by section 552.022(a)(1) as completed investigations. However, the driver's license, license plate, and vehicle identification numbers contained in exhibits 1 and 3 are made confidential by section 552.130 and therefore must be withheld. Social security numbers in exhibits 1 and 3 may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), in which case the social security numbers would have to be withheld. Next, the polygraph information that we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. Also, the home address, home phone number, and social security number of an employee of a governmental body in exhibit 3 may be required to be withheld under section 552.117. Finally, the CHRI information contained in exhibit 3 must be withheld under section 552.101 in conjunction with section 411.083. Exhibits 2 and 4, on the other hand, are excepted from release in their entirety under section 552.103.

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).

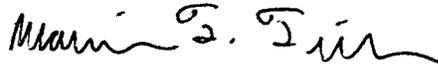
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 cursive script that reads "Maverick F. Fisher".

Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 165481

Enc. Submitted documents

c: Mr. Mike Christopher
P.I.C. Investigations
P.O. Box 13087
Arlington, Texas 76094
(w/o enclosures)