



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 27, 2002

Ms. Allyson Mitchell
Assistant Criminal District Attorney
Anderson County
500 North Church
Palestine, Texas 75801

OR2002-7389

Dear Ms. Mitchell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174187.

The Anderson County Criminal District Attorney's Office (the "district attorney") received a request for information pertaining to "hot check cases." According to your representation, the requestor subsequently clarified that he was only seeking certain information pertaining to "pending hot check collection files . . . where no arrest warrant has been obtained[.]" See Gov't Code § 552.222 (providing that if large amount of information has been requested, governmental body may discuss with requestor how scope of request might be narrowed); see also Open Records Decision No. 31 (1974). You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹ We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

¹ 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.

First, you state that the requestor's narrowed request is overbroad and unduly burdensome on the district attorney because of the magnitude of responsive information that exists and because such information is "scattered" throughout the district attorney's files. We note, however, that the administrative inconvenience of providing public records to a requestor in response to an open records request does not constitute sufficient grounds for denying such a request. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, we do not agree that the district attorney may withhold any such responsive information from the requestor on the grounds that complying with the request would be unduly burdensome on the district attorney.

Furthermore, you assert that the district attorney cannot allow the requestor to view the files containing the responsive information because the files "are considered active" and are used daily by the district attorney's hot check department. We note, however, that a governmental body must promptly produce public information to a requestor for inspection, duplication, or both to the extent that the information is not subject to an exception to disclosure under the Act and to the extent that the information is not in *immediate* active use. *See* Gov't Code § 552.221(a); *see also* Open Records Decision No. 467 at 6 (1987). If requested information is temporarily unavailable because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be made available for inspection or duplication. *See* Gov't Code § 552.221(c). In promptly producing such information to a requestor, a governmental body may only take a reasonable amount of time to produce the information. *See id.* What constitutes a reasonable amount of time depends on the facts in each case and the volume of the information that has been requested. *See id.* Thus, we do not agree with the district attorney's assertion that the requestor may not be allowed to view the files containing the responsive information because the files are "considered active" and are used daily by the district attorney's office. To the extent that such files are not in immediate active use by the district attorney and the information contained therein is not subject to an exception to disclosure under the Act, the district attorney must promptly provide the requestor with access to these files.

Next, we address the district attorney's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply to information that is requested of a governmental body not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). You state that the district attorney received the requestor's request for information on September 16, 2002. You also state, and provide documentation showing, that the district attorney asked the requestor to clarify his request on September 20, 2002. *See* Gov't Code § 552.222. Thus, the ten business day time period to request a decision from our office under section 552.301(b) with respect to the requested information was tolled on the date you sought clarification from the requestor. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). You state that the district attorney "met

with [the requestor] on October 1, 2002, and [was] able to clarify his request.” Accordingly, we conclude that the ten business day time period for requesting a decision from our office with respect to the requested information resumed on October 2, 2002. Thus, the deadline for submitting a request to our office was October 9, 2002. You submitted your request for decision to our office on October 15, 2002. Consequently, the district attorney failed to comply with section 552.301 of the Government Code in requesting a decision from our office with respect to the requested information.²

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with 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; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov’t Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the district attorney claims that the requested information is excepted from disclosure under section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act that may be waived by the district attorney.³ Accordingly, we conclude that the district attorney may not withhold any portion of the requested information under section 552.103 of the Government Code. Furthermore, we find that the district attorney has not provided our office with a compelling reason under section 552.108 to overcome the presumption of openness. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). On the other hand, since you also claim that the requested information, or portions thereof, are excepted from disclosure pursuant to sections 552.101 and 552.130 of the Government Code, we will address your claims with regard to these exceptions to disclosure. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome

² Although you state that the district attorney and the requestor agreed that the “starting date” with respect to this request for decision would be October 7, 2002, we note that a governmental body and a requestor cannot agree to circumvent the procedural requirements of the Act. *See* Gov’t Code § 552.301 (describing ten and fifteen business day requirements in requesting attorney general decision).

³ 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 section 552.111). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

by a showing that the information is made confidential by another source of law or affects third party interests).

You claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy.⁴ We note that common-law privacy protects information if (1) it contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. After carefully reviewing the information at issue, we find that no portion of this information is protected from disclosure under the common-law right to privacy since there is a legitimate public interest in the identity of hot check offenders. Accordingly, we conclude that the district attorney may not withhold any portion of this information under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We note that a portion of the information at issue, which we have marked, is excepted from disclosure pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. Section 552.101 also encompasses information that is protected from disclosure by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the DPS is confidential. *See* Gov't Code § 411.083(a). Similarly, CHRI obtained from the Department of Public Safety (the "DPS") pursuant to statute is also confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Accordingly, we conclude that the district attorney must withhold this marked information pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See id.*; *see also* Gov't Code § 411.106(b), .082(2) (defining criminal history record information).

⁴ 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 protected from disclosure under the common-law rights to privacy.

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130.* Accordingly, we conclude that the district attorney must withhold the Texas driver's license numbers that are contained within the information at issue pursuant to section 552.130 of the Government Code. We have marked a representative sample of this type of information.

We also note that portions of the information at issue are excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the district attorney must withhold all bank account numbers that are contained within the information at issue pursuant to section 552.136 of the Government Code. We have marked a representative sample of these bank account numbers.

In summary, the district attorney must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The district attorney must withhold the Texas driver's license numbers that are contained within the information at issue pursuant to section 552.130 of the Government Code. The district attorney must withhold all bank account numbers that are contained within the information at issue pursuant to section 552.136 of the Government Code. The district attorney must release the entirety of the remaining requested 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).

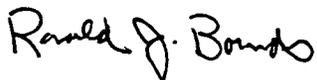
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 black ink that reads "Ronald J. Bounds". The signature is written in a cursive style with a large initial "R".

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 174187

Enc. Marked documents

cc: Mr. Gerald Moore
The Clarion
309 West Oak
Palestine, Texas 75801
(w/o enclosures)