



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 5, 2003

Mr. Terrence S. Welch
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2003-0765

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176074.

The City of Flower Mound (the "city"), which you represent, received a request for any documents related to a specified traffic fatality. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.115, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of representative samples.¹

First, we note that the submitted medical records, Exhibits 11 and 12, appear to constitute grand jury records. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code and that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988); *see also* Gov't Code § 553.003. When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* Exhibits 11 and 12 were apparently obtained pursuant to a grand jury subpoena. As this information is in the city's custody as agent of the grand jury, it is not subject to disclosure under chapter 552. *Id.* at 4.

¹We 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The submitted information also contains accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4)). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In reviewing the information you have submitted to us, the requestor has provided the city with all three pieces of information required by the statute. Thus, the city must release the accident reports we have marked in Exhibits 6, 7, and 9 under section 550.065(c)(4) of the Transportation Code in conjunction with section 552.101 of the Government Code.²

In regard to the remaining submitted information, you assert section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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 is pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Further, section 552.103 only applies where the litigation

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983)(finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest). You claim that the submitted information is related to a pending criminal prosecution and should, therefore, be excepted from disclosure under section 552.103. You state, however, that the case is pending with the Denton County Criminal District Attorney's Office for grand jury review. Consequently, the city has no section 552.103 interest with respect to the pending criminal prosecution. *See* Open Records Decision No. 392 (1983). In this type of situation, we require an affirmative representation from the governmental body that would be a party to the litigation that it wants the requested information withheld from disclosure under section 552.103. You have failed to provide this office with an affirmative representation from the prosecuting entity that it wants the submitted information withheld from public disclosure. Thus, the submitted information may not be withheld under section 552.103 of the Government Code.

However, the submitted information contains social security numbers which may be withheld in some circumstances 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 the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act (the "Act") on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the city should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

We note, however, that the laws making social security numbers and related records confidential are designed to protect an individual's privacy interests, and the privacy rights of an individual lapse upon death. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d). Accordingly, the deceased individual's social security number may not be withheld under section 552.101.

You also assert that the birth record in Exhibit 9 is excepted under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115. However, because the city is not the bureau of vital statistics or a local registration official, a birth certificate held by the city may not be withheld under section 552.115.

Additionally, you claim that a portion of the submitted information is excepted from disclosure under section 552.130 of the Government Code. That section prohibits the release of information 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. This provision was enacted to protect the privacy of an individual, and therefore, the protection extinguishes at the individual's death. *See Moore*, 589 S.W.2d at 491. Accordingly, the city must withhold the Texas driver's license and motor vehicle information, except for that pertaining to a deceased individual, pursuant to section 552.130 of the Government Code. We have marked a representative sample of this information.

In summary, we conclude that: 1) Exhibits 11 and 12 are not subject to disclosure under chapter 552 of the Government Code; 2) the submitted social security numbers of living individuals may be excepted from disclosure under section 552.101 in conjunction with federal law; and 3) you must withhold the Texas driver's license and motor vehicle information of living individuals pursuant to section 552.130. All remaining information must be released.

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).

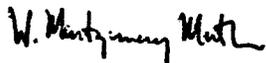
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 176074

Enc: Submitted documents

c: Mr. Cliff Despres
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(w/o enclosures)