



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2003

Mr. Mark E. Dempsey
Mr. Mark G. Mann
Assistant City Attorney
City of Garland
P. O. Box 469002
Garland, Texas 75046-9002

OR2003-8620

Dear Mr. Dempsey and Mr. Mann:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191865.

The Garland Police Department (the "department") received two requests from different requestors for a specified department investigation file. You state that the department has provided each of the requestors with some responsive information. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed and state the exceptions to disclosure that apply to the requested information not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code § 552.301(b)*. In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general: (1) written comments stating the reasons why the stated exceptions to disclosure apply that would allow the requested information to be withheld; (2) a copy of the written request for information; (3) a signed statement of or evidence sufficient to establish

the date that the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e).

You indicate that the department received the first request for information on August 21, 2003 and the second request for information on September 12, 2003. You state that the department sent both requestors an estimate of charges for compiling the requested information in accordance with section 552.2615 of the Government Code. *See id.* §§ 552.2615 (requiring governmental body to provide requestor with estimate of charges when request to inspect paper record will result in imposition of charge that will exceed forty dollars), .271 (providing that governmental body may charge for anticipated personnel costs for making available for inspection information that exists in paper records only if information specifically requested is older than five years or will completely fill six or more archival boxes and more than five hours will be required to make information available for inspection). You also state that the department advised both requestors that it would not begin gathering the responsive information until it received a deposit in the amount of the estimated costs pursuant to section 552.263 of the Government Code. *See id.* § 552.263 (providing that officer for public information or officer's agent may require deposit or bond for payment of anticipated costs for preparation of copy of public information if officer or officer's agent has provided requestor with required written itemized statement detailing estimated charge for providing copy and if charge is estimated to exceed \$100, if governmental body has more than 15 full-time employees or \$50, if governmental body has fewer than 16 full-time employees). You advise us that the department received the deposit concerning the first request on September 9, 2003 and the deposit concerning the second request on October 2, 2003. Thus, you contend that the department timely submitted both requests for decision to us.

We note, however, that the procedural deadlines imposed by section 552.2615 did not affect the department's procedural deadlines for requesting a decision from this office with regard to the information that is responsive to both requests and that is sought to be withheld by the department. *See id.* § 552.2615(g). Further, we note that section 552.263 provides, in relevant part, that "[f]or purposes of *Subchapter E*, a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs or unpaid amount . . ." Gov't Code § 552.263(e) (emphasis added). Section 552.301 of the Government Code is found in subchapter G of chapter 552 of the Government Code. While the legislature expressly indicated that the requirements of subchapter E do not take effect until the governmental body requesting a deposit or bond under section 552.263 receives the deposit or bond, the legislature did not specifically provide for the same result regarding the deadlines found in subchapter G of section 552.301. We find that the legislature's inclusion of a specific provision allowing for the tolling of the requirements in subchapter E coupled with its omission of a specific provision allowing for the tolling of deadlines under subchapter G reveals that the legislature did not intend for the deadlines of subchapter G, and

specifically section 552.301, to be tolled until a governmental body receives a deposit or bond required under section 552.263. *See Maley v. 7111 Southwest Freeway, Inc.*, 843 S.W.2d 229, 231 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (“an express listing of certain persons, things, consequences, or classes is equivalent to an express exclusion of all others”); *see also Tex. Real Estate Comm’n v. Century 21 Security Realty, Inc.*, 598 S.W.2d 920, 922 (Tex. Civ. App.--El Paso 1980, writ ref’d n.r.e.) (same); *State v. Jones*, 570 S.W.2d 122, 123 (Tex. App.--Austin 1978, no pet.). Consequently, we find that a governmental body is required to request a decision from this office within ten business days of the date it receives a request for information, even if the governmental body has not yet received a deposit or bond required of the requestor under section 552.263 of the Government Code. The department did not request a decision from this office concerning the first request for information until September 23, 2003 and did not request a decision from this office concerning the second request for information until October 16, 2003. Accordingly, we conclude that the department failed to comply with the procedural requirements of section 552.301 of the Government Code with regard to both requests for information.

Because the department failed to comply with the procedural requirements of section 552.301 in requesting these decisions from us, the information at issue is now presumed public. *See Gov’t Code § 552.302*; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ’g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or when third party interests are at stake. *See Open Records Decision No. 150 at 2 (1977)*. Although the department claims that the information at issue is excepted from disclosure pursuant to section 552.108 of the Government Code, we note that the department has not demonstrated a compelling interest under this exception to disclosure in this instance that would allow any portion of the information at issue to be withheld from the requestors. *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 in certain circumstances). Accordingly, we conclude that the department may not withhold any portion of the information at issue under section 552.108 of the Government Code. However, since the department also claims that portions of the information at issue are excepted from disclosure under section 552.101 of the Government Code, we will address this claim.

Next, we note that the submitted information includes arrest warrants and arrest warrant affidavits. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, Tex. Sess. Laws Serv. 1631 (to be codified as amendment to Code Crim. Proc. art. 15.26). Thus, the arrest warrants that we have marked are public under article 15.26 and must be released to the requestors. However, the arrest warrant affidavits that we have marked give no indication on their face whether they were in fact presented to a magistrate in support of the issuance of an associated arrest warrant. Because we are unable to determine whether the affidavits were presented to a magistrate in support of the issuance of an arrest warrant, we must rule in the alternative. If the marked arrest warrant affidavits were in fact presented to a magistrate in support of the issuance of an arrest warrant, they are made public by article 15.26 and must be released to the requestors. However, if they were not so presented, they are not made public by article 15.26 and must be disposed of in accordance with the remainder of this ruling.

Further, we note that criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See 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. *See 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). However, the definition of CHRI does not include driving history record information maintained by the DPS under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B). Further, when a governmental entity compiles information that relates to a specific individual as a suspect, arrestee, or defendant in a case, the compiled information takes on a character that implicates the individual's right of privacy in a manner

that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). Accordingly, to the extent that the requested records contain CHRI, the department must withhold that information pursuant to section 552.101 of the Government Code.¹

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. Information is protected from disclosure under the common-law right to privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas 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.

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

We note, however, that the right of privacy is purely personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.- Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM- 229 (1984); H-917 (1976). Further, we note that this office has previously determined that the common-law right to privacy does not protect social security numbers from disclosure. *See* Open Records Decision Nos. 226 (1979) (noting social security numbers not protected under privacy), 169 (1977). Based on your arguments and our review of the information at issue, we find that portions of this information are protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the department must withhold

¹ 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 that is protected from disclosure by other statutes and the common-law right to privacy.

the information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy.

However, you also claim that social security numbers that are contained within the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or 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* Open Records Decision No. 622 (1994). The department has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the department should ensure that they were not obtained and are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. Again, we note, however, that because the laws regarding the confidentiality of social security numbers are intended to protect the privacy of living individuals, and not deceased persons, the right of privacy is purely personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.-Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Accordingly, as the individuals with whom some of the social security numbers at issue are associated are deceased, we conclude that the department may not withhold these particular social security numbers under section 552.101 in conjunction with federal law.

In addition, we note that portions of the information at issue are subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to: "(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; (2) a motor vehicle title or registration issued by an agency of this state; or (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document." Gov't Code § 552.130(a)(1)-(3). We have marked the portions of the information at issue that are excepted from disclosure pursuant to section 552.130, if the numbers have been issued by an agency of this state. Further, we note that the department must redact all images of Texas license plate numbers that are depicted in some of the submitted photographs pursuant to section 552.130. However, we again note that a deceased individual's section 552.130 information may not be withheld under this exception to disclosure, since the right to privacy is purely personal and lapses at death. *See Moore*, 589 S.W.2d 489 (Tex. Civ. App.-Texarkana 1979, writ ref'd n.r.e.).

Finally, we note that some e-mail addresses that are contained within the information at issue are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail

address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the e-mail addresses that are excepted from disclosure under section 552.137(a). Unless the department has received affirmative consent for the release of these marked e-mail addresses, we conclude that it must withhold the addresses pursuant to section 552.137(a) of the Government Code.

In summary, the department must release to the requestors the arrest warrants that we have marked pursuant to article 15.26 of the Code of Criminal Procedure. The department must also release to the requestors the arrest warrant affidavits contained within the submitted information, if they were in fact presented to a magistrate in support of the issuance of an arrest warrant. If the affidavits were not so presented, portions of the affidavits must be withheld by the department pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. To the extent that the requested records contain CHRI, the department must withhold such information pursuant to section 552.101 of the Government Code. The department must withhold the additional information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. Some of the social security numbers contained within the information at issue may be confidential under federal law. The department must withhold the portions of the information at issue that we have marked pursuant to section 552.130 of the Government Code, if the numbers have been issued by an agency of this state. The department must also redact all images of Texas license plate numbers that are depicted in some of the submitted photographs pursuant to section 552.130. The department must also withhold the e-mail addresses that we have marked pursuant to section 552.137(a) of the Government Code, unless the department has received affirmative consent for their release. The department must release to the requestors the remaining information at issue not previously released, to include the remaining portions of the submitted photographs and the entirety of the submitted videotapes.

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).

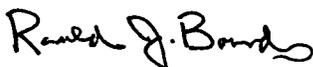
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 191865

Enc. Marked documents, photographs, and videotapes

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