



September 14, 2000

Mr. Hugh Emerson Coleman
Assistant District Attorney
Denton County Criminal District Attorney's Office
127 North Woodrow Lane
Denton, Texas 76205

OR2000-3543

Dear Mr. Coleman

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139178.

The Denton County Sheriff's Office (the "office") received a request to review the entire criminal investigation file related to a boating accident. You state that you are providing the requestor a copy of the documents that have already been released to the public and withholding the portions of the investigative file which were submitted to this office and withheld under section 552.108(a)(1) in Open Records Letter No. 98-3101 (1998). You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples.

¹You explain that the you seek a decision for the remaining portion of the investigation file since ORL 98-3101. Thus, we assume that you are requesting a decision for information not addressed in ORL 98-3101.

²In reaching our conclusion here, 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.

labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). Because you have failed to submit a copy of the written request for information, you failed to request a decision as mandated by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) 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; *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). You argue that section 552.108 excepts the requested information from required disclosure and ORL 98-3101 (1998) in which this office permitted the sheriff to withhold from disclosure under section 552.108(a)(1) portions of the information at issue. Section 552.108 does not provide a compelling reason for withholding the requested information in this case. *See, e.g.* Open Records Decision No. 473 (1987). Thus, your office may not withhold the information from disclosure under section 552.108 or ORL 98-3101 (1998). You also argue that portions of the submitted information are excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we will address the applicability of section 552.101.

You assert that criminal history record information ("CHRI") must be withheld under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. CHRI generated by the National Crime Information Center ("NCIC") and 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 52.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Thus, you must withhold the CHRI.

We note that the submitted information contains polygraph results. Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306 generally provides:

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

Occ. Code § 1703.306. While section 1703.306 provides various exceptions to confidentiality, none of the exceptions applies here. Accordingly, your office must withhold the polygraph results that are contained in the submitted documents under section 1703.306 as encompassed by section 552.101 of the Government Code. We have marked the information to be withheld.

Further, the submitted information also contains information that appears to have been obtained pursuant to a grand jury subpoena. The Public Information Act (the "act") does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive possession. *Id.* Information not held or maintained in this manner is not exempt from coverage of the act and may be withheld only if one of the act's specific exceptions applies to the information. *Id.* Furthermore, information obtained pursuant to a grand jury subpoena issued in connection with the prosecution is within the grand jury's constructive possession and is not subject to the act. *Id.*; *see also* Gov't Code § 552.003. Because the submitted information contains a grand jury subpoena and records obtained pursuant to the grand jury subpoena, it appears that the information is within the constructive possession of the grand jury. As such, the grand jury documents, which we have marked as excepted under section 552.003, are not subject to disclosure under the act.

Further, the submitted information contains driver's license numbers, license plate numbers, and VIN numbers. Section 552.130(a) of the Government Code excepts from disclosure 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. Therefore, you must withhold the marked information under section 552.130(a) of the Government Code.

We note that the submitted information also contains social security numbers. Social security numbers 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.* However, it is not apparent to us that the social security numbers were obtained or maintained by your office pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes your office to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution your office, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, your office should ensure that these numbers were not obtained or maintained by your office pursuant to any provision of law enacted on or after October 1, 1990.

In conclusion, you may not withhold the submitted information under section 552.108, but you must withhold CHRI under section 552.101 and various state and federal laws. You must also withhold the polygraph results under section 552.101 in conjunction with section 1703.306 of the Occupations Code. Records obtained pursuant to a grand jury subpoena are not subject to disclosure under the act and must be withheld. Further, you must withhold the marked information under section 552.130.

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 the General Services 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. 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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/er

Ref: ID# 139178

Encl: Marked documents

cc: Mr. Charles Siderius
Denton Publishing Company
P.O. Box 369
Denton, Texas 76202
(w/o enclosures)