



November 9, 2001

Mr. David Zimmerman
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2001-5180

Dear Mr. Zimmerman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154646.

The Office of the Governor (the "governor") received a request for all appointment files related to "individuals appointed or reappointed by the Governor of Texas from December 21, 2000 to the present." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general 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, labeled to indicate which exceptions apply to which parts of the documents. As for your October 9, 2001 submissions, however, you did not timely submit to this office written comments stating the reasons why each exception that you raised would allow the information to be withheld, nor representative samples of all of the information the governor seeks to withhold.

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). 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.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). Thus, the portion of the information at issue that you submitted to this office on October 9, 2001 is presumed public under 552.302. You argue that the information at issue is excepted under the attorney-client privilege as encompassed in Rule 503 of the Texas Rules of Evidence. This office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted by a governmental body. *See Open Records Decision No. 416 (1984)*. We acknowledge that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The submitted documents, however, do not fall into the categories of information in section 552.022. Because the information at issue does not fall into a section 552.022 category, we conclude that the information submitted to this office on October 9, 2001 may not be withheld on the basis of Rule 503 of the Texas Rules of Evidence. You also argue that the burden and scope of the request is a compelling reason to withhold the information which is presumed public under section 552.302. We have considered this argument, and do not find it compelling. Therefore, we conclude that you must release the portion of the information submitted to this office on October 9, 2001 to the requestor.

We will next address your arguments regarding public disclosure of the remainder of the submitted information. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Criminal history record information ("CHRI") is confidential and not subject to disclosure. Section 411.082 of the Government Code defines CHRI as follows:

(2) . . . information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions. The term does not include:

...

(B) driving record information maintained by the department under Subchapter C, Chapter 521, Transportation Code.

Gov't Code §411.082(2). 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 Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *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). Therefore, assuming that you have CHRI about a prospective appointee in your possession and it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor.

You also raise chapter 730 of the Transportation Code. Section 730.004 of the Transportation Code prohibits the release of "personal information" about any person obtained in connection with a motor vehicle record by an agency that maintains or compiles motor vehicle records, except under certain circumstances not present here.² However, the governor is not an "agency" of the state that compiles or maintains motor vehicle records for purposes of section 730.004. *See* Transp. Code § 730.003(1) (defining "agency"). Accordingly, we conclude that chapter 730 of the Transportation Code is not applicable in this case.

You claim that section 33.032 of the Government Code will except certain information from public disclosure. While section 33.032 provides that "the papers filed with and proceedings before the [State Commission on Judicial Conduct] are confidential prior to the convening of a formal hearing,"³ none of the information at issue constitutes "papers filed with" the State Commission on Judicial Conduct (the "commission") nor records of "proceedings before" the commission. Section 33.032 is thus not applicable here.

Similarly, you argue that rule 6.07 of the Texas Rules of Disciplinary Procedure excepts from public disclosure private reprimands of attorneys. However, you have not explained how Texas Rules of Disciplinary Procedure constitute "law, either constitutional, statutory, or . . . judicial decision," that would make the information at issue confidential for purposes of section 552.101 of the Government Code.⁴

²"Personal information" is defined as including an individual's social security number, driver identification number, name, address, and telephone number. *See* Transp. Code § 730.003(6).

³Gov't Code §33.032(a).

⁴We note that a document you have submitted as representative of this type of information is dated August 29, 2001, after the date of the request for information, and is therefore not responsive to the request.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *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. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Additionally, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We find that the marked information must be withheld from disclosure under section 552.101 in conjunction with common law privacy. In addition, we note that home telephone numbers, home addresses, and personal information are ordinarily not private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986); *but see* Open Records Decision 169 (1977) (describing special circumstances under which certain home addresses are private).

The requested records contain information that is excepted from disclosure under sections 552.117(2) and 552.117(3). You represent that the members of the Texas Board of Criminal Justice and the Board of Pardons and Paroles are employees of the Texas Department of Criminal Justice. The governor must withhold those portions of the records that reveal the home addresses, home telephone numbers, social security numbers, and family member information of peace officers and employees of the Texas Department of Criminal Justice contained in the submitted records. *See* Open Records Decision No. 532 (1989) (construing predecessor statute to 552.117(2), held language not contingent upon whether individual at issue employed by a governmental body; but contingent only upon whether individual was "peace officer" at time request was received).

We note that the submitted information contains Texas driver's license numbers. 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[.]

The governor must withhold the Texas driver's license numbers under section 552.130.

The submitted information also contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.⁵ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) 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.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The governor must, therefore, withhold e-mail addresses of members of the public under section 552.137.

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

⁵House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

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, the governor should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

The remainder of the requested information must be released to the requestor.

In summary, CHRI is confidential and not subject to disclosure. The governor must withhold the marked information from public disclosure under section 552.101 in conjunction with common law privacy. The governor must withhold Texas driver's license numbers under section 552.130, and e-mail addresses of members of the public under section 552.137. For officers or employees of the Department of Criminal Justice, the governor must withhold the marked information subject to section 552.117(2), (3). Prior to releasing any social security number information, the governor should ensure that no such information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990. The remainder of the requested information must be released 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 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,



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Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 154646

Enc. Submitted documents

c: Mr. Adrian Rodriguez
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(w/o enclosures)