



August 7, 2002

Ms. J. Middlebrooks
Assistant City Attorney
City of Dallas
2014 Main Street, Room 501
Dallas, Texas 75201

OR2002-4363

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166781.

The City of Dallas Fire Department (the "department") received two requests for information about the death of a department employee. You have submitted for our review a representative sample of the information that you indicate to be responsive to the requests.¹ You assert that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered written comments submitted by one of the requestors. *See Gov't Code § 552.304.*

We first address your assertion of section 552.108 of the Government Code, the law enforcement exception. Your only comments in support of this exception state:

Section 552.108 provides that information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime is excepted from disclosure if it is information that relates to the detection,

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.

investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication. This matter was investigated by the Dallas Fire Department Arson Unit, which consists of law enforcement officers. No suspect has been arrested or prosecuted for this offense. Section 552.108 applies to the requested information since the investigation into this matter has not resulted in a conviction or deferred adjudication.

As you acknowledge in the language quoted above, section 552.108(a)(2) excepts from disclosure information concerning "an investigation that *did not* result in conviction or deferred adjudication." Gov't Code § 552.108(a)(2) (emphasis added). Thus, this office has held that a governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded *in a final result* other than a conviction or deferred adjudication. You do not state, nor does any of the submitted information indicate, whether the investigation has concluded in a final result. Indeed, in your representations above that no suspect "has been" arrested or prosecuted, and that the investigation "has not" resulted in a conviction or deferred adjudication, you imply that investigation and/or prosecution of the matter may be pending. Because none of the information you have provided this office demonstrates the status of the case, and because you have not otherwise demonstrated that the matter has reached a final result other than a conviction or deferred adjudication, we cannot conclude that section 552.108(a)(2) of the Government Code applies in this instance. As you have neither asserted nor argued any other aspect of the law enforcement exception, we have no choice but to conclude that the department may not withhold any of the requested information on the basis of section 552.108 of the Government Code. *See, e.g.,* Open Records Decision No. 363 (1983) (if governmental body does not establish how and why exception applies to requested information, attorney general has no basis on which to pronounce it protected). We next address each of the remaining exceptions you have asserted.

You assert the common-law right to privacy for certain information you have marked. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and, thereby, incorporates the common-law right to 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).

This office has found that certain personal financial information not relating to a financial transaction between an individual and a governmental body generally meets the above two-part test and thus is confidential on the basis of common-law privacy. *See, e.g.,* Open Records Decision Nos. 600 (1992), 545 (1990). This office has also concluded that 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 have accordingly marked certain information in the submitted documents that we find the department must withhold under section 552.101 in conjunction with the common-law right to privacy. We note, however, that unlike individual human beings, legal business entities such as corporations do not have a right to privacy. Open Records Decision No. 620 at 4 (1993). We conclude that only the specific information we have marked in the submitted documents is excepted from disclosure under section 552.101 in conjunction with common-law privacy. None of the remaining submitted information may be withheld on that basis.

Section 552.101, as noted above, also encompasses information that is confidential by statute. You assert that criminal history record information ("CHRI") must be withheld on this basis. 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, such as the department, 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 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We agree that a portion of the submitted records, which we have marked, constitutes CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). We further agree that this information is confidential and that the department must therefore withhold this information under section 552.101.

For portions of the information, you assert section 552.130 of the Government Code. This exception states 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[.]

Gov't Code § 552.130(a). In accordance with this provision, we conclude that the department must withhold the Texas driver's license numbers, vehicle identification numbers, license plate numbers, and certain other related information contained in the submitted documents, all of which we have marked.

You also assert the applicability of section 772.318 of the Health and Safety Code for certain addresses and telephone numbers you have marked. Chapter 772 of the Health and Safety Code authorizes the development of local emergency communications districts. Sections 772.118, 772.218, and 772.318 apply only to an emergency 9-1-1 district established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These statutes make confidential the originating telephone numbers and addresses of 9-1-1 callers when such information is furnished by a telephone service supplier. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million.² Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000. Subchapter E, which applies to counties with populations over 1.5 million, does not contain a confidentiality provision regarding 911 telephone numbers and addresses. Health & Safety Code § 772.401, *et seq.* Thus, if the emergency communication district here is subject to section 772.118, 772.218 or 772.318, then in those instances where the caller's address and phone number were obtained from the service supplier, the information is excepted from public disclosure based on section 552.101 as information deemed confidential by statute. If, on the other hand, the emergency communication district here is not subject to section 772.118, 772.218 or 772.318, or if the particular information at issue was not obtained from the service supplier, then the caller's address and phone number are not protected under section 552.101 and must be released.

Your final assertion pertains to the social security numbers in the submitted documents. A social security number is excepted from required public 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), *but only if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990.* *See* Open Records Decision No. 622 (1994). You assert that all of the submitted social security numbers are confidential pursuant to section 405(c)(2)(C)(viii)(I), but you do not advise this office of any provision of law under which any of this information was obtained or is being maintained. Thus, we have no basis to conclude that any of the submitted social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public

²We note that, according to the 2000 census, the population of Dallas County exceeds two million. We thus assume that section 772.118, rather than the asserted section 772.318, would be the applicable confidentiality statute in this instance.

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. Therefore, prior to releasing any of the social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

In addition to your assertions, we find that certain portions of the information must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code. Section 1703.306 prohibits the public disclosure of the results of polygraph examinations. *See* Occ. Code § 1703.306. Accordingly, the department must withhold the information we have marked that pertains to polygraph results.

The submitted materials also include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. In pertinent part, these statutes provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or

more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 559.003 of the Government Code.

We also note that the home address of a former department employee, which we have marked, may be subject to required withholding under section 552.117(1) of the Government Code. Among other information, section 552.117(1) excepts from disclosure the home address of current or former officials or employees of a governmental body *who request that this information be kept confidential under section 552.024*. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department must withhold the marked home address under section 552.117(1) on behalf of the former employee only if he requested confidentiality for this information prior to the department's receipt of the present requests. The department may not withhold this information under section 552.117(1) if the employee did not make a timely election to keep the information confidential.

We also note that the submitted documents contain e-mail address of members of the public. The Seventy-seventh Legislature added section 552.137³ to chapter 552 of the Government Code, which provides:

- (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.

Gov't Code §552.137. You do not inform us that any member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. We thus conclude that the department must withhold, pursuant to section 552.137, the e-mail addresses we have marked.

³House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (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.

Finally, we note that a portion of the submitted documents indicate they are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must, however, allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department may not withhold any of the information under section 552.108. However, portions of the information, which we have marked, must be withheld under sections 552.101, 552.130, and 552.137, as discussed above. The originating telephone number and address of a 9-1-1 caller is confidential, and therefore must be withheld, but only if the particular information at issue meets the conditions set forth above. The marked home address of a former department employee must be withheld under section 552.117(1), but only if he timely elected confidentiality for this information. To the extent the department obtained or maintains any of the requested social security numbers pursuant to a provision of law enacted on or after October 1, 1990, such information is confidential and must be withheld. Otherwise, however, the social security numbers must be released. As to all of the remaining requested information, none of it is excepted from required disclosure and it must be released, subject to copyright law where applicable.

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

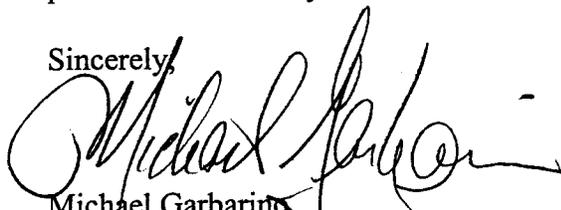
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The 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,



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Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 166781

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