



September 17, 2002

Mr. Duncan R. Fox
Deputy General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2002-5234

Dear Mr. Fox:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167993.

The Texas Department of Public Safety (the "department") received a request for all documents relating to the shooting death of Leslie Eugene Gentry in Bridge City, Texas, on April 29, 2002. You inform us that the department has released some of the information responsive to this request. You claim that the remainder of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department has failed to request a decision from this office within the ten business day time period prescribed by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *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 governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your argument under section 552.101 of the Government Code.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This office has previously held that certain portions of custodial death reports submitted to the Attorney General pursuant to article 49.18 of the Code of Criminal Procedure are confidential. Open Records Decision No. 521 at 5 (1989). You contend that all of the submitted investigative documents are confidential under article 49.18 because the documents are attached to the custodial death report submitted to the Attorney General. However, a document is not confidential under article 49.18 simply because the document is also attached to a custodial death report submitted to the Attorney General. *Id.* Indeed, when "a governmental body receives a request for information maintained as part of its ordinary responsibilities, the documents may be withheld only if one of the [Public Information Act's] exceptions or another specific law protects them." *Id.* Here, the requestor asks for information relating to the department's investigation, not the custodial death report pertaining to the shooting incident. Since the department collected the investigatory information at issue as part of its ordinary responsibilities, we determine that this information is not protected from disclosure under article 49.18. *Id.*

We note you have submitted autopsy photographs, disclosure of which is governed by section 11 of article 49.25 of the Code of Criminal Procedure. Section 11 provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. The department must withhold the autopsy photographs under section 11 of article 49.25, Code of Criminal Procedure.

Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under

federal law and subchapter F of chapter 411 of the Government Code. 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.") and (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 of the Government Code provides that any CHRI maintained by the department is confidential. *See* Gov't Code §411.083(a); *see also id.* §§ 411.106(b), .082(2) (defining criminal history record information). Similarly, CHRI obtained from the department pursuant to statute also is confidential and may be disclosed only in very limited instances. *See id.* §411.084; *see also id.* §411.087 (restrictions on disclosure of CHRI obtained from [the department] also apply to CHRI obtained from other criminal justice agencies). Thus, to the extent that the records at issue contain any criminal history record information obtained from the TCIC or NCIC networks, that information must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

The submitted documents also contain social security numbers of members of the public. 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 pursuant to any provision of law enacted on or after October 1, 1990. *See id.* Because this federal provision is intended to protect the privacy interests of individuals, this provision does not encompass the social security number of a deceased individual. *See* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). However, the submitted information contains social security numbers of living individuals that may be confidential under section 552.101 in conjunction with the federal law. We have no basis for concluding that any of these social security numbers 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 these social security numbers, the department should ensure that this information was not obtained or maintained by it pursuant to any provision of law, enacted on or after October 1, 1990.

The records at issue also contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.

Section 552.117(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note that most of the individuals at issue are commissioned peace officers. Accordingly, the department must withhold the marked personal information pertaining to these individuals under section 552.117(2) of the Government Code. With respect to an animal control officer among the individuals at issue, we are unable to determine from the information provided whether this individual is a "peace officer" as defined in article 2.12. Accordingly, if the animal control officer is not a "peace officer," and elected to keep personal information confidential pursuant to section 552.024, we determine that the department must withhold the marked personal information pertaining to this individual under section 552.117(1) of the Government Code.

The documents also contain photographs of peace officers. Furthermore, portions of the submitted videotapes include images of several peace officers. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer, that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that any of the peace officers depicted in the photographs and videotapes executed a written consent to disclosure of their images. Thus, the department must withhold photographs of peace officers, and any portion of the submitted videotapes that includes the image of a peace officer, under section 552.119, unless the department obtains written consent from the peace officers for their disclosure. The remaining portions of the videotapes are not protected under section 552.119 of the Government Code and must be released to the requestor. If, however, the department is unable to obscure the faces of peace officers on the videotapes, or otherwise remove the portions of the videotapes that include the images of peace officers, then the department must withhold the videotapes in their entirety under section 552.119.

Finally, section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130(a). This office has concluded that section 552.130 does not encompass motor vehicle information that pertains exclusively to a deceased individual. *See* Open Records Decision No. 272 (1981). However, the submitted records contain other motor vehicle license, registration, and identification card information pertaining to living individuals. We

have marked a sample of the information the department must withhold pursuant to section 552.130 of the Government Code.

In summary, autopsy photographs must be withheld under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. To the extent the documents contain criminal history record information, such information must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code and federal law. With the exception of the social security number of the deceased, social security numbers of members of the public may be confidential under section 552.101 and federal law. The marked peace officer personal information must be withheld under section 552.117(2) of the Government Code. If an animal control officer is not a peace officer and has elected to keep personal information confidential pursuant to section 552.024, this individual's personal information must be withheld under section 552.117(1) of the Government Code. Photographs and video images of peace officers must be withheld under section 552.119 of the Government Code. If the department cannot remove the video images of peace officers from the videotapes at issue, the videotapes must be withheld in their entirety under section 552.119. With the exception of information pertaining to the deceased, Texas driver's license, identification card, and motor vehicle registration information must be withheld under section 552.130 of the Government Code. The remainder of the 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 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 167993

Enc: Submitted documents

c: Mr. Neil Harrison
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