



November 15, 2002

Ms. Ruth H. Soucy
Deputy General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2002-6527

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172229.

The Comptroller of Public Accounts (the “comptroller”) received two requests for information related to Request for Proposal 140f, including videotapes. You state that some responsive information has been released to the requestors. You state, and provide documentation showing, that you notified the third parties whose proprietary interests may be implicated of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ See Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You raise no exception to disclosure on behalf of the comptroller and make no arguments regarding the proprietary nature of the third parties’ information.

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov’t Code §552.305(d)(2)(B). As of the date of this ruling, we have not received any arguments from the following third parties: McDonald Technologies International, Inc.; Skaggs Companies, Inc.; Alpha Controls, Inc.; IBM;

¹The third parties that were sent notice under section 552.305 are the following: Mobile-Vision, Inc.; McDonald Technologies International, Inc.; Skaggs Companies, Inc.; Alpha Controls, Inc.; MPH Industries, Inc.; IBM; McCoy’s Law Line, Inc.; International Police Technologies, Inc.; Video Systems Plus; and Prosecutor of Texas, L.L.C

McCoy's Law Line, Inc.; International Police Technologies, Inc.; Video Systems Plus²; and Prosecutor of Texas, L.L.C. Because these companies did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that their information is excepted from disclosure under section 552.110. See Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, responsive information of these companies may not be withheld from disclosure under section 552.110.

Mobile-Vision, Inc. ("Mobile") and MPH Industries, Inc. ("MPH") responded to the notice. MPH asserts that section 552.110(b) of the Government Code excepts certain financial information contained in its proposal from public disclosure. Mobile claims that its videotapes are excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note that Mobile and MPH both state that they submitted their proposals to the comptroller with a statement indicating that certain information was to remain confidential. However, information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. Cf. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising

²We note that Video Systems Plus is one of the requestors.

section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

MPH seeks to withhold from disclosure the audited financial statement for MPD, Inc. ("MPD"), a privately-held company that is the parent company of MPH. MPH states that it is a wholly-owned subsidiary of MPD, and explains that its finances are not independently reported, but instead are "lumped into MPD's financial statement." MPH asserts that MPD "closely guards its financial condition," and that "release of this information could cause MPH 'substantial competitive harm'."

We find that MPH has failed to provide a specific factual or evidentiary showing that substantial competitive injury to MPH would likely result from disclosure of the requested information. Thus, we conclude that MPH has not adequately demonstrated that release of the information at issue would harm its competitive interests. Consequently, the submitted information in MPH's proposal is not excepted from disclosure under section 552.110.

We next address Mobile's claim under section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes, and also encompasses the doctrines of common-law and constitutional privacy. Mobile fails to argue that any specific law is applicable.

However, we note that the submitted videos contain criminal history record information ("CHRI"), which is confidential and not subject to disclosure. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by 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 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. The submitted videotapes contain criminal history information that appears to have been obtained from DPS or another criminal justice agency. Although this information originally may have been improperly transferred to the third parties, subchapter F followed the information into the hands of the comptroller. *See* Open Records Decision No. 387 (1983). Therefore, the comptroller must withhold any CHRI contained in the videotapes from the requestors under section 552.101 of the Government Code.

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). 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). Thus, to the extent that the submitted videotapes contain an individual's criminal history information that has been compiled by a governmental entity, we conclude that the comptroller must withhold this information under common-law privacy as encompassed by section 552.101 of the Government Code. *See id.*

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

Certain motor vehicle information is excepted from public disclosure under section 552.130 of the Government Code. 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[.]

Therefore, under section 552.130 of the Government Code, the comptroller must withhold any portion of the videotapes that includes motor vehicle information issued by an agency of this state. The remainder of the videotapes, however, is not protected under section 552.130.

Section 552.119 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.³ 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). Portions of the submitted videotapes appear to include the images of peace officers. 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 videotape executed a written consent to disclosure of their pictures. Therefore, under section 552.119 of the Government Code, the comptroller must withhold any portion of the videotapes that includes the image of a peace officer. The remainder of the videotapes, however, is not protected under section 552.119.

The submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.⁴ Section 552.137 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.

³A "peace officer" is defined in article 2.12 of the Code of Criminal Procedure.

⁴House 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.

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. We have marked a representative sample of the type of e-mail addresses of members of the public that the comptroller must withhold under section 552.137.

Finally, we note that some of the materials at issue 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 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, to the extent that the submitted videotapes contain an individual's criminal history information, the comptroller must withhold this information under section 552.101 of the Government Code. Social security numbers may be confidential under federal law. The comptroller must withhold motor vehicle information issued by an agency of this state under section 552.130. Any portion of the videotapes that includes the image of a peace officer must be withheld from disclosure under section 552.119. The remaining submitted information must be released to the requestors in compliance with federal copyright law.

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

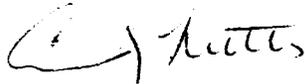
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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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Open Records Division

CN/seg

Ref: ID# 172229

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