



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 28, 2004

Ms. Sheri Bryce Dye  
Assistant Criminal District Attorney - Civil Section  
Bexar County  
300 Dolorosa, Suite 4049  
San Antonio, Texas 78205-2139

OR2004-9207

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 212109.

The Bexar County Sheriff's Office (the "sheriff's office") received two requests from the same requestor for information related to a specified shooting death, including the 9-1-1 log and audiotapes recording a call for assistance by either of two named deputies, investigative documents, incident reports, reports by sheriff's office personnel in an internal affairs investigation of the shooting, incident reports involving the shooting victim through August 13, 2002, and personnel records of a named deputy. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that some of the submitted information appears to have been obtained pursuant to a grand jury subpoena and therefore constitutes records of the grand jury. This office has concluded that grand juries are not governmental bodies that are subject to the Public Information Act (the "Act"), so that records that are within their actual or constructive possession are not subject to disclosure under the Act. *See Gov't Code*

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<sup>1</sup>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.

§§ 552.003(1)(B), .0035(a); *see also* Open Records Decision Nos. 513 (1988); 398 at 2 (1983) (grand jury is part of judiciary for purposes of predecessor to Act). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* However, "the fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney." *Id.*

In this instance, we are unable to determine whether the sheriff's office maintains these portions of the submitted information on its own behalf or as an agent of the grand jury. Therefore, to the extent the submitted information is maintained by the sheriff's office for or on behalf of the grand jury, it is in the custody of the sheriff's office as agent of the grand jury and not subject to disclosure under the Act. To the extent that it is not so maintained, it is subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent to which the submitted information is maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for this information.

Next, we must address the sheriff's office's obligations under the Act. 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. You state that the sheriff's office received the present request for information on August 11, 2004. The sheriff's office submitted the requested personnel information on August 25, 2004. Although the sheriff's office's correspondence containing the requested investigation materials is dated September 1, 2004, it bears a post office cancellation mark indicating it was mailed on September 2, 2004. Consequently, the sheriff's office failed to comply with the requirements of section 552.301(e) of the Government Code with regard to the responsive information submitted after the fifteen-day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest for nondisclosure 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). You do not demonstrate a compelling reason to withhold the information under section 552.108. *See* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information from disclosure provides compelling reason under section 552.108). Therefore, the sheriff's office may not withhold the information submitted after the fifteen day deadline under section 552.108.

Although the sheriff's office has waived section 552.108 with respect to the untimely responsive information, some of this information is confidential under other law which 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). Accordingly, we will address any information within the untimely submission that is confidential under other laws. We will also address your arguments for the information that was timely submitted.

We next note, however, that the information that the sheriff's office has submitted as responsive to the second request for information is identical to the information that was untimely submitted in response to the first request for information. Information that has been previously released may not be withheld later unless it is confidential. *See* Gov't Code § 552.007. You raise sections 552.103, 552.108, and 552.111 as exceptions to the disclosure of this information. However, these exceptions are discretionary and may be waived. As such, they do not generally constitute compelling reasons to withhold the information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 473 (1987) (statutory predecessor to section 552.111 may be waived), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). This information, therefore, must also be disposed of in accordance with the remainder of this ruling.

Because section 552.108 is potentially broadest, we will first address your argument under this exception for the information that was timely submitted. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

Gov't Code § 552.108(a)(1), (a)(2), (b)(1), (b)(2). Generally speaking, subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsections 552.108(a)(2) and 552.108(b)(2). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while section 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. In contrast, sections 552.108(a)(2) and (b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. We note that a governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

After reviewing your arguments and the information that was timely submitted, we conclude that you have not demonstrated that the release of any of the information at issue would interfere either with the detection, investigation, or prosecution of crime or with law enforcement and crime prevention in general. *See* Gov't Code § 552.108(a)(1), (b)(1). You also have not demonstrated that the information at issue pertains to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.108(a)(2), (b)(2). We also note that section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision Nos. 562 at 10 (1990)

(predecessor to section 552.108(b) inapplicable to employment information in police officer's file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff's department), 350 at 3-4 (1982). Thus, the sheriff's office has failed to demonstrate that the timely-submitted personnel information is excepted from disclosure under section 552.108. See Gov't Code §§ 552.108, .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706. Accordingly, we turn to your remaining arguments for all of the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses laws that make criminal history record information ("CHRI") confidential. CHRI "means 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" but does not include "driving record information maintained by [the Department of Public Safety ("DPS")] 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."). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. Gov't Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. Gov't Code § 411.084; see also Gov't Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies).

We note that section 411.083 does not distinguish between the CHRI of a person who is living and one who has died. Furthermore, we do not believe that section 411.083 is intended solely to protect the privacy interest of the subject individual. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (maintenance of criminal history record information essential for investigation of crime). Therefore, any CHRI that falls within the ambit of the above cited state and federal regulations must be withheld pursuant to section 552.101 of the Government Code.

We note that the submitted information contains social security numbers that may be confidential. A social security number may be withheld in some circumstances 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

or 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 other social security numbers that may be confidential under section 552.101 in conjunction with the federal law. We have no basis for concluding that the social security numbers at issue 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 Government Code 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 sheriff's office pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.101 also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); 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); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Having reviewed the submitted information, we find that a small portion is protected by common-law privacy and must be withheld under section 552.101 on that basis. We note, however, that the right of privacy is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). We have marked the information that must be withheld under section 552.101 on the basis of common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal pager and cell phone numbers, social security number, and

family member information of a peace officer, regardless of whether the peace officer complies with section 552.024 or 552.1175.<sup>2</sup> Gov't Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the types of information that must be withheld under section 552.117(a)(2).

Section 552.1175 also may be applicable to a portion of the submitted information. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

....

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). To the extent that the information that we have marked under section 552.1175 relates to a peace officer of another governmental entity, the sheriff's office must withhold the information under section 552.1175 if the individual to whom it pertains elects to restrict access to the information in accordance with section 552.1175(b).

You also raise section 552.119 of the Government Code. 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. Gov't Code

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<sup>2</sup>We note that section 552.117 is applicable only to a personal pager or cell phone number paid for by the peace officer. See Open Records Decision No. 670 at 6(2001) (statutory predecessor to section 552.117(a)(2) encompassed personal cellular phone numbers and personal pager numbers of peace officers who purchased cellular or pager service with their personal funds). A pager or cell phone number provided to a peace officer at public expense may not be withheld under section 552.117. See Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular mobile phone numbers provided and paid for by governmental body and intended for official use).

§ 552.119. 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. In this instance, you have not demonstrated that release of the tape would endanger the life or physical safety of any officer. We therefore determine that the sheriff's office may not withhold any of the submitted information under section 552.119 of the Government Code.

Section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We note, however, that section 552.130 is designed to protect individuals' privacy and that the right to privacy expires at death. *See Moore*, 589 S.W.2d 489; *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, the sheriff's office must withhold Texas driver's license and motor vehicle record information that pertains to persons who are living and vehicles in which living individuals have an ownership interest under section 552.130. Texas driver's license information and information from motor vehicle records that were issued to persons who are now deceased may not be withheld under section 552.130. We have marked the information that must be withheld under section 552.130. You must also withhold all images of license plates from the submitted videotape.<sup>3</sup>

Finally, we note that some of the submitted information appears to be 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, we first conclude that to the extent the submitted information is maintained by the sheriff's office for or on behalf of the grand jury, it is in the custody of the sheriff's office as agent of the grand jury and not subject to disclosure under the Act. To the extent that it is not so maintained, it is subject to the Act and may be withheld only if an exception under the Act is shown to apply. We also conclude that any CHRI that falls within the ambit of the above cited state and federal regulations must be withheld pursuant to section 552.101 of the Government Code. Prior to releasing any social security number information, you should

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<sup>3</sup>If the sheriff's office is unable to redact the images of license plates, however, the sheriff's office must withhold the portions of the videotape containing the images of license plates in their entirety under section 552.130 of the Government Code. The remainder of the submitted videotape must be released.

ensure that no such information was obtained or is maintained by the sheriff's office pursuant to any provision of law enacted on or after October 1, 1990. Finally, the sheriff's office must withhold the information we have marked under: (1) section 552.101 in conjunction with common-law privacy; (2) section 552.117(a)(2); (3) section 552.1175 if the individual to whom it pertains elects to restrict access to the information in accordance with section 552.1175(b); and (4) section 552.130. The remaining information must be released, except that you must comply with the applicable copyright law for any information protected by copyright.

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).

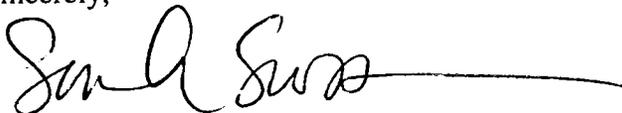
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "Sarah I. Swanson", followed by a long horizontal line extending to the right.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/krl

Ref: ID# 212109

Enc. Submitted documents

c: Mr. Tom Honeycutt  
Investigator  
P. O. Box 6196  
San Antonio, Texas 78209  
(w/o enclosures)