



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2007

Mr. A. Duane Waddill
Executive Director
Texas Residential Construction Commission
P. O. Box 13144
Austin, Texas 78711

OR2007-03457

Dear Mr. Waddill:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID#274337.

The Texas Residential Construction Commission (the "commission") received a request for information pertaining to Meritage Homes.¹ You claim that the submitted 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 must address the commission's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't*

¹You inform us that the commission sought and received clarification from the requestor and that pursuant to an agreement, the requestor will exclude social security numbers, bank account numbers, charge card account numbers, Texas driver's license numbers and email addresses from the request. *See Gov't Code* § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). Accordingly, any such information is not responsive to the request and need not be released to the requestor.

Code § 552.301(b). If a governmental body does not comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). We note that the requestor initially made his request for information on December 13, 2006; however, you explain that the commission required the requestor to make a deposit for payment of the anticipated costs in accordance with section 552.263 of the Government Code, and that, on December 28, 2006, the requestor submitted the deposit. *See Gov't Code 552.263(e)* (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). Thus, we agree that December 28, 2006, is the date the commission received this specific request for information. Accordingly, the ten-business-day deadline was January 18, 2007. We received the information in interagency mail, however, on January 22, 2007. We find that the commission has provided no evidence that its request for a ruling was deposited in interagency mail within the ten business-day deadline. *See Gov't Code § 552.308(b)(2)* (state agency can meet the ten-day requirement if the request is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within that period). Thus, we conclude that the commission did not request this decision within the ten-business-day period prescribed by subsection 552.301(b), and the submitted information is therefore presumed to be public under section 552.302 of the Government Code. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. The application of section 552.101 of the Government Code can provide a compelling reason for non-disclosure, and thus, we will address whether section 552.101 is applicable in this instance.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes. The commission argues that the public availability of the submitted information is governed by section 416.002 of the Property Code. Section 416.002 of the Property Code provides, in relevant part, the following:

(d) The commission may, on receipt of an application, conduct a criminal background check of the applicant or any person responsible for the application. The commission may obtain criminal history record information maintained by the Department of Public Safety, the Federal Bureau of Investigation, or any other local, state, or national government entity. *Unless the information is a public record at the time the commission obtains the information under this subsection*, the information is confidential, and the commission may not release or disclose the information to any person except

under a court order or with the permission of the applicant. [Emphasis added].

Property Code § 416.002(d). The commission explains that it contracts with Lexis-Nexis and backgroundcheck.com to provide online access to databases through which background checks are conducted. The commission characterizes the submitted information as “commercial background” information, and states that this information “was public record at the time it was obtained.” Based upon this representation and our review, we agree that the criminal history record information within the submitted documents is not confidential under section 416.002(d), and it may not be withheld under section 552.101 on this basis.

However, the commission further states that “[it] interprets Property Code section 416.002(d) to implicitly authorize the release of criminal history information obtained from a public record.” We disagree with this interpretation. Rather, we determine that the language italicized above merely limits the confidentiality afforded under the statute to criminal history record information obtained from non-public records. The statute does not by its terms additionally require that criminal history record information acquired from public records therefore be released to the public. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (stating that a court construes a statute by looking to the plain meaning of the statute's language). Accordingly, because we conclude that the submitted criminal history record information is not expressly public under section 416.002(d), we will address the application of section 552.101 and common-law privacy to that information as well as the remaining submitted information.

Section 552.101 also encompasses the common-law right to privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. This office has also determined that personal financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 545 at 4* (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to

generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Upon review, we determine that a portion of the submitted information is protected under section 552.101 of the Government Code in conjunction with common-law privacy. Accordingly, the commission must withhold the information we have marked on this basis. As you raise no further exceptions to disclosure, the remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/krl

Ref: ID# 274337

Enc. Submitted documents

c: Mr. Christopher Dupuy
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(w/o enclosures)