



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2012

Ms. Kerri Butcher
Interim Chief Counsel
Capital Metropolitan Transit Authority
2910 East Fifth Street
Austin, Texas 78702

OR2012-10690

Dear Ms. Butcher:

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# 459369.

The Capital Metropolitan Transportation Authority (the "authority") received a request for all background checks conducted on three named authority operators and information related to three specified incidents. The authority claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the authority claims and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. *See* Gov't Code § 411.082(2). 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 DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. The authority states it is authorized to obtain CHRI from DPS. *See id.* §§ 411.083(b)(2) (authorizing DPS to grant access to CHRI to noncriminal justice agencies authorized to receive CHRI by state statute), .124 (authorizing political subdivision that employs drivers of public transportation vehicles to obtain CHRI related to those drivers). The authority states it obtains CHRI via the DPS criminal history clearinghouse pursuant to section 411.0845, which provides in relevant part:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide [CHRI] to a particular person entitled to receive [CHRI] and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for [CHRI] from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the [CHRI] reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any [CHRI] reported to [DPS] or the Federal Bureau of Investigation.

...

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain [CHRI] under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

Id. § 411.0845(a)-(b), (d). We note CHRI does not include driving record information maintained by DPS under subchapter C of chapter 521 of the Transportation Code. *See id.* § 411.082(2)(B). The authority states the submitted information consists of CHRI it obtained through the DPS criminal history clearinghouse. Upon review, we agree a portion of the submitted information, which we have marked, is confidential under chapter 411 of the Government Code, and the authority must withhold it under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *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) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy as it is highly intimate or embarrassing and of no legitimate public concern.

We note a portion of the remaining information is subject to section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court considered the applicability of section 552.102 and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 347-48 (Tex. 2010). We have marked the named operators' dates of birth that the authority must withhold under section 552.102 of the Government Code.

A portion of the remaining information is subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). 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 authority may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which request for this information was made. We have marked the information the authority must withhold under section 552.117(a)(1) of the Government Code if the operators made timely elections under section 552.024.

Section 552.130 of the Government Code excepts from public release information related to a motor vehicle operator's or driver's license issued by a Texas agency or an agency

of another state or country. Gov't Code § 552.130(a)(1). The authority must withhold the driver's license information we have marked under section 552.130 of the Government Code.

Lastly, we note the requestor in this instance may be the authorized representative of the individuals whose information is at issue. Section 552.023 of the Government Code gives a person's authorized representative a special right of access beyond that of the general public to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect personal privacy. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual's authorized representative requests information concerning the individual). In this instance, because it is not clear whether the requestor is the authorized representative of the named operators, we must rule conditionally. Accordingly, if the requestor is the authorized representative, he has a right of access to the information subject to section 552.101 in conjunction with common-law privacy and sections 552.102, 552.117(a)(1), and 552.130. Because these exceptions protect personal privacy, the authority may not withhold the information subject to these exceptions from this requestor. However, if the requestor is not the individuals' authorized representative and does not have a right of access to the information, then the authority must withhold said information.

In summary, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. To the extent the requestor does not have a right of access to the information, the authority must withhold the information we have marked under: 1) section 552.101 of the Government Code in conjunction with common-law privacy; 2) section 552.102 of the Government Code; and 3) section 552.130 of the Government Code. To the extent the requestor does not have a right of access to the information and the operators timely elected to keep such information confidential, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The authority must release the remaining information.¹

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

¹As discussed above, the requestor may have a right of access to some of the information being released in this instance. *See* Gov't Code § 552.023. Because such information would be confidential with respect to the general public, if the authority receives another request for this information from a different requestor it must again seek a ruling from this office.

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/bs

Ref: ID# 459369

Enc. Marked documents

c: Requestor
(w/o enclosures)