



August 29, 2000

Ms. Regina Grimes
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 13401, Capitol Station
Austin, Texas 78711

OR2000-3327

Dear Ms. Grimes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138586.

The Texas Department of Criminal Justice ("TDCJ") received a request for information regarding placement of offenders in the Comstock Transitional Treatment Center. You indicate that you will release some of the responsive information, but that you seek to withhold materials from "investigations into incidents involving allegations of a failure to comply with Comstock rules, regulations and procedures by staff or offenders; and the BPP transmittals that established the child safety zones for the Comstock offenders." You have submitted the information that you seek to withhold to this office for review as attachments C and D. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. This section encompasses information protected by other statutes. You claim that the responsive documents are made confidential by section 508.313 of the Government Code, which accords confidentiality to certain records of the Board of Pardons and Paroles. Open Records Decision No. 190 at 2 (1978); *see also* Attorney General Opinion H-427 (1974); Open Records Decision No. 33 (1974). Section 508.313 provides:

All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

You inform us that the submitted information is “included in release plan records obtained and maintained by the Board of Pardons and Paroles which relate to releasees.” After reviewing your arguments and the submitted information, we agree that the information submitted as attachment C is made confidential by section 508.313 and may only be released in accordance with that statute. Because we find that none of the release provisions of section 508.313 apply to this information, we find that the information submitted as attachment C must be withheld under section 552.101 of the Government Code.

Attachment D also include social security numbers. 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 records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 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 pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.101 of the Government Code also encompasses the common law right of privacy. This right 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 of no 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). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that 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. 540 S.W.2d at 683; *see also*, Open Records Decision Nos. 470 (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 422 (1984) (concluding that details

of self-inflicted injuries are presumed protected by common law privacy) 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common law privacy). However, because the work behavior of an employee and the conditions for his continued employment are matters of legitimate public interest, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. *See* Open Records Decision Nos. 438 (1986), 219 (1978), 230 (1979). From our review of the materials submitted as attachment D, we conclude that a portion of this information is protected by the common law right of privacy. We have marked the information to indicate that which must be withheld under section 552.101 in conjunction with the common law of privacy.

You also contend that attachment D is excepted from disclosure by section 552.103 of the Government Code. This section excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code §552.103(c). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986) Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and where a potential party threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). In this case, you base your contention that litigation is reasonably anticipated on the observation that the requestors "are in the process of gathering information to determine the pursuit of legal action." You have not indicated that any concrete steps have been taken toward litigation. Further, you relate that "the offenders have been moved." We construe this as an indication that the matter in controversy has been resolved. We conclude that you have not demonstrated that litigation is reasonably anticipated in this matter. Therefore, no information may be withheld under section 552.103 of the Government Code.

You also assert that section 552.108 of the Government Code excepts the information in attachment D from public disclosure. This section excepts certain information that deals with the detection, investigation, or prosecution of crime. Investigations into non-criminal matters are not excepted from disclosure by Government Code section 552.108. *Morales v.*

Ellen, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). Here, the investigations are into allegations of rule violations rather than criminal violations. Where those rule violations implicate criminal activity, the criminal investigation is separate from the rule violation investigation and is not included in the submitted materials. We conclude that none of the information in attachment D is excepted from disclosure by section 552.108 of the Government Code.

Finally, you raise section 552.111. This section excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. Open Records Decision No. 613 (1993); *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (personnel communications not relating to agency's policymaking not excepted from public disclosure pursuant to section 552.111). Here, none of the submitted materials involve policymaking decisions. All of the materials of attachment D address internal administrative matters. We conclude that none of the information in attachment D is excepted from disclosure by section 552.111 of the Government Code.

In conclusion, TDCJ must withhold all of the information in attachment C, and that portion of attachment D which we have marked as protected by the common law right of privacy. Submitted social security numbers that have been obtained or maintained by TDCJ under any provision of law enacted on or after October 1, 1990 must also be withheld. The remaining information must be released.

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).

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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 138586

Encl Submitted documents

cc: Mr. William Hilgers
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(w/o enclosures)