



September 15, 2000

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P. O. Box 4044
Huntsville, Texas 77342

OR2000-3558

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139034.

The Texas Department of Criminal Justice (the "department") received a request for information, as follows:

1. The number of prison guard assaults on prisoners that occurred in TDCJ facilities for the years 1997, 1998 and 1999, and from January 1, 2000 to July 1, 2000.
2. The number of prison guard assaults on prisoners at the Estelle Main Unit for the years 1997, 1998 and 1999, and from January 1, 2000 to July 1, 2000.
3. The number of prison guard assaults on prisoners at the Estelle High Security Unit for the years 1997, 1998 and 1999, and from January 1, 2000 to July 1, 2000.
4. The number of times TDCJ Executive Director Wayne Scott has referred prison guards to county authorities pursuant to section 501.002 of the Texas [G]overnment [C]ode and its predecessors for each of the years that Wayne Scott has been the Executive Director of the TDCJ.

You explain that the information responsive to items 1 through 3 above has been released to the requestor. You have therefore withdrawn your request for our decision as to that information. As to item 4, you assert that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107(2) of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply no later than the 10th business day after the date of receiving the written request. Pursuant to section 552.301(e), a governmental body is also 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 did not, however, submit to this office copies or representative samples of the specific information that was requested. Additionally, you did not state the section 552.101 and 552.107(2) assertions within ten business days from the date the department received the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to request a decision of this office as provided by section 552.301 results in the legal presumption that the information is public and must be released. *See* Gov't Code § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has long held that a compelling reason to withhold information exists, sufficient to overcome the section 552.302 presumption of openness, where the information at issue is made confidential by another source of law. Open Records Decision Nos. 26 (1974), 150 (1977).

As to the section 552.103 assertion, we note this is a discretionary exception which does not constitute a compelling reason to withhold information from the public. Open Records Decision No. 473 (1987). However, because a compelling reason sufficient to overcome the section 552.302 presumption of openness exists where the information at issue is made confidential by another source of law, we shall consider the section 552.101 and 552.107(2) assertions.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.107(2) provides that information is excepted from required public disclosure if "a court by order has prohibited disclosure of the information." In support of the applicability of these provisions, you have demonstrated that the requestor, an attorney in litigation with the department, made a motion before the court in the pending litigation to compel production of the information that is responsive to item 4 of the present request. You have also demonstrated that the court

denied the motion to compel production of the information. However, having reviewed the excerpt you have provided of the court transcript as well as your arguments, we have no indication that the court in denying the motion has *prohibited* the department from releasing the information at issue to the public, nor do we have any indication that the court found the information to be confidential. The mere fact that the court has denied discovery of the information in the context of pending litigation does not alone demonstrate a compelling reason under section 552.302 of the Government Code for the information to be withheld from the public. Because the Public Information Act and the procedures for discovery in litigation serve distinct purposes, information that is privileged from discovery is not necessarily protected from required public disclosure under the Public Information Act. *See* Open Records Decision No. 647 (1996); *see also* Gov't Code §§ 552.005, .0055. Because you have not shown a compelling interest to overcome the presumption that the information at issue is public, we conclude that you must release the information to the requestor.¹

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

¹We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352. However, because you have not submitted the information at issue for our review, and as explained above, we have no basis for concluding that any of the responsive information is confidential. We have no choice but to order, pursuant to section 552.302 of the Government Code, the release of all of the information that is responsive to the request. If you believe that the responsive information or any portion thereof is confidential and cannot lawfully be released to the requestor, you must challenge this decision in court as outlined below.

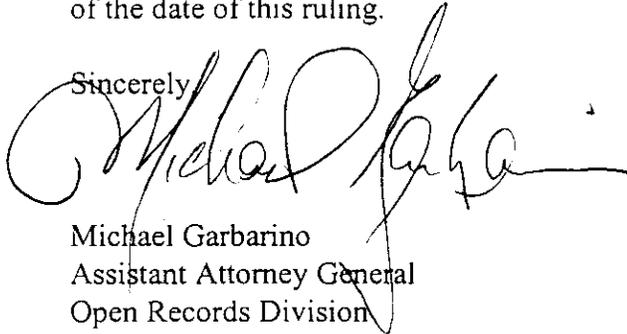
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may 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 the General Services 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. 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 Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 139034

Encl. Submitted documents

cc: Ms. Yolanda Torres
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(w/o enclosures)