



September 21, 2001

Mr. Leonard Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-4250

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152258.

The Texas Department of Criminal Justice (the "department") received a request for a department employee's "personnel file, his PM log, and any papers involving him in a possible [use of force] on 6-22-01 . . . any allegations since that date that are being investigated and a copy of the IOC containing everything that was confiscated during the investigation on 7-6-01." You state that you have released some of the requested information to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.108, 552.117, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not submitted the department employee's personnel file or "PM log" for our review. Therefore, to the extent such information exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. See Gov't Code §§ 552.301(a), .302.

Next, we address the exceptions you raise with respect to the submitted information. You contend that the information in Exhibits 1 and 2 must be withheld under section 552.131 of the Government Code. Please note that Section 552.131 of the Government Code, as added by chapter 783, Act of the 76th Legislature, relating to inmates of the department, has been renumbered as section 552.134 of the Government Code. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, § 21.001(53) (codified at Gov't Code § 552.134). Section 552.134(a) of the Government Code provides:

¹You also initially raised section 552.101 and 552.103 of the Government Code, but subsequently submitted no comments in support of these exceptions. See Gov't Code § 552.301(e)(1)(A). We therefore do not address these exceptions.

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Section 552.029 of the Government Code provides:

Notwithstanding Section 508.313 or 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

- (1) the inmate's name, identification number, age, birthplace, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;
- (2) the inmate's assigned unit or the date on which the unit received the inmate, unless disclosure of the information would violate federal law relating to the confidentiality of substance abuse treatment;
- (3) the offense for which the inmate was convicted or the judgment and sentence for that offense;
- (4) the county and court in which the inmate was convicted;
- (5) the inmate's earliest or latest possible release dates;
- (6) the inmate's parole date or earliest possible parole date;
- (7) any prior confinement of the inmate by the Texas Department of Criminal Justice or its predecessor; or
- (8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Section 552.134 is explicitly made subject to section 552.029. Under section 552.029, basic information regarding the death of an inmate in custody, an alleged crime involving an inmate, and an incident involving the use of force is subject to required disclosure. The information in Exhibits 1 and 2 and the submitted videotape pertain to an incident involving the use of force against a department inmate. Accordingly, while the department may generally withhold the information in Exhibits 1 and 2, and the submitted videotape,

under section 552.134, it must release all basic information in Exhibits 1 and 2 regarding this incident pursuant to section 552.029(8). Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. You state that the department has released the basic information regarding this incident by providing the requestor with a copy of your August 1, 2001 brief, which included some pertinent information about the incident. We emphasize that the Public Information Act requires a governmental body to release a copy of the actual requested record, with excepted information redacted, unless the requestor agrees otherwise. *See* Open Records Decision No. 606 (1992).

You also assert that the information in Exhibits 1 and 2 is excepted from disclosure under section 552.108. Section 552.108 does not except the basic information delineated under section 552.029(8). *See generally* Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Accordingly, the basic information under section 552.029(8) is not excepted from disclosure by section 552.108.

Next, you argue that the highlighted information in Exhibit 3 may be withheld under section 552.108(b) of the Government Code. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). The department is a law-enforcement agency for purposes of section 552.108. When this exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would interfere with law enforcement. Open Records Decision No. 434 at 3 (1986).

This office has concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for execution). You argue that releasing the highlighted information may "chill the willingness of future employees to come forward" with information regarding future investigations of employee conduct. Upon review of the submitted information, we conclude that the information in Exhibit 3 does not supply an explanation on its face of how release would interfere with law enforcement. As to this information, we conclude that you have not adequately demonstrated how its release to the public would interfere with law enforcement. Because you have not provided an adequate particularized explanation, you may not withhold the information you have highlighted in Exhibit 3 from public disclosure pursuant to section 552.108(b)(1) of the Government Code.

Section 552.108(b)(2) excepts from required public disclosure “[a]n 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 . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. It is not clear to this office, nor have you explained, how or if the investigation at issue in Exhibit 3 has actually concluded. Further, because the information in Exhibit 3 relates to an internal investigation of employee misconduct that did not result in a criminal investigation, we conclude that the department may not withhold the information you highlighted in Exhibit 3 under section 552.108(b)(2). See *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (section 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to IAD investigation file when no criminal charge against officer results from investigation of complaint against police officer).

You also argue that release of the names of certain witnesses and statements that may identify them, which you have highlighted, should be withheld from Exhibit 3 because “identifying all of them may expose them to retaliation and certainly may increase their fears of retaliation.” This office has held that information may be withheld from disclosure under section 552.101 in conjunction with the common law right to privacy upon a showing of certain “special circumstances.”² See Open Records Decision No. 169 (1977). This office considers “special circumstances” to refer to a very narrow set of situations in which the release of information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. Such “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.* In this case we find that you have not demonstrated an imminent physical danger that would constitute such “special circumstances.” Thus, based on our careful review of your arguments and the submitted information, we conclude that you may not withhold the highlighted information in Exhibit 3 under section 552.101 of the Government Code in conjunction with the common law right to privacy.

We note, however, that section 552.117(3) of the Government Code excepts from public disclosure, among other things, the social security number of department employees. Therefore, the department must withhold the social security numbers in Exhibit 3, which we have marked, pursuant to section 552.117(3).

²Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

Further, section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, the department must withhold the license plate number we have marked in Exhibit 3 from public disclosure pursuant to section 552.130.

Lastly, we note that information protected under sections 552.117(3) and 552.130 are intended to protect a person's privacy. Therefore, under section 552.023 of the Government Code, a person who is the subject of the information or the person's authorized representative has a special right of access to such information. Here, the requestor is the spouse of the person who is the subject of the information protected by the exceptions enumerated above. Although no such document was submitted to this office, the requestor indicates that she has a "power of attorney." Therefore, if the requestor is in fact acting as her husband's authorized representative, then section 552.023 provides the requestor a special right of access to her husband's license plate number and social security number in Exhibit 3.

To summarize, we conclude that: (1) with the exception of basic information, which must be released pursuant to section 552.029(8), the department must withhold the information in Exhibits 1 and 2, including the submitted videotape, under section 552.134; (2) the social security numbers we have marked in Exhibit 3 must be withheld under section 552.117(3); (3) the license plate number we have marked in Exhibit 3 must be withheld under section 552.130; (4) if the requestor is in fact acting as her husband's authorized representative, then the department must release her husband's license plate number and social security number in Exhibit 3; and (5) the remaining information in Exhibit 3 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).

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 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 152258

Enc: Marked documents

c: Ms. Wendy Herron
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(w/o enclosures)