



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2004

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2004-9521

Dear Mr. Frazier:

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# 212566.

The Texas Department of Criminal Justice (the "department") received a request for various types of information relating to the death of an inmate, including the complete jail records file of the inmate, the personnel files of a number of individuals, department insurance policies, department medical contracts, and a related "policies and procedures manual" of the department. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.115, 552.117, 552.130, and 552.134 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments

¹Although you did not timely raise section 552.115, this provision can constitute a compelling reason to withhold information, and we will address your arguments on this issue. See Gov't Code §§ 552.301, 552.302.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, it appears that you have redacted certain information from the submitted documents. You do not assert, nor has our review of our records indicated, that you have been granted a previous determination to withhold any such information without seeking a ruling from this office. Because we can discern the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See id.* § 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested").

Next, we note that the submitted information contains medical records, access to which is governed by the Medical Practice Act ("MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

The submitted information also contains records that are subject to Chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (a)(2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records, and that may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.

The submitted information also includes dental records that are subject to chapter 258 of the Occupations Code. Section 258.102 provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this article:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See Id.* § 258.101. We have marked documents created or maintained by a dentist that relate to the history or treatment of the patient. These documents may only be released in accordance with the access provisions of chapter 258 of the Occupations Code.

The submitted records also contain information pertaining to emergency medical service (“EMS”). Section 773.091 of the Health and Safety Code provides as follows:

Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b). Section 773.091(g) provides, however, that this confidentiality “does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.” *Id.* § 773.091(g).

We have marked documents that constitute EMS records of the identity, evaluation, or treatment of a patient by emergency medical services personnel. We note that none of the exceptions to confidentiality listed in section 773.092 appears to apply in this instance. Thus, these documents may only be released in accordance with the access provisions of section 773.093 of the Health and Safety Code. *See id.* § 773.093 (listing elements of consent for release of EMS records); Open Records Decision No. 598 (1991) (access to records created under EMS statute governed by statute rather than the Act).

The submitted information also contains a custodial death report. In Open Records Decision No. 521, this office addressed the confidentiality of custodial death reports and their attachments. Specifically, this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, Part I of a custodial death report filed with this office is public information, but Parts II through V of the report, including any attachments, are confidential. *See* Open Records Decision No. 521 at 4-5 (1989); *see also* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Article 49.18 requires that a custodial death report be filed “with the attorney general no later than the 30th day after the date on which the person in custody or the incarcerated person died.” Code Crim. Proc. art. 49.18(b). More than thirty days passed between the death of the inmate and the date when the department received this request. Thus, the department must release the entirety of Part I of the submitted custodial death report as information made public by statute. *See generally* Open Records Decision No. 525 (1989) (exceptions found in statutory predecessor to Act do not apply to information that is made public by other statutes). Parts II through V of the report, including any attachments, are confidential and must not be released.

We turn now to your claim regarding section 552.134 of the Government Code, which is the broadest of the exceptions you claim. Section 552.134(a) relates to inmates of the department and provides in relevant part the following:

(a) 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.

Gov't Code § 552.134(a).

Section 552.029 of the Government Code provides that, notwithstanding section 552.134, eight specified categories of “information about an inmate who is confined in a facility operated by or under a contract with [the department are] subject to required disclosure[.]” These eight categories of information include “basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.” *Id.* § 552.029.

The legislature explicitly made section 552.134 subject to section 552.029. On review, we find that the remaining records you have marked “552.134” constitute information about an inmate for the purposes of section 552.134. However, these records contain information about the death of the inmate in custody and an alleged crime involving inmates. Thus, basic information concerning the death and the crime must be released. 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. The remaining information that you have marked “552.134” must be withheld pursuant to section 552.134.³

You assert that some of the remaining information is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. The submitted materials include fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. They provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

³Because we are able to resolve this under section 552.134, we do not address your other arguments for exception regarding this information.

- (A) the individual consents to the disclosure;
- (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
- (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, we agree that the department must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses information made confidential under federal law. The submitted information contains an Employment Eligibility Verification, Form I-9, which is governed by title 8, section 1324a of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that this document is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.⁴

The submitted information also contains W-2 and W-4 forms. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the department must withhold these forms

⁴Because we are able to resolve this under section 552.101, we do not address your other arguments for exception regarding this information.

pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.⁵

The submitted information also contains an I-94 form. Section 1304 of title 8 of the United States Code addresses the confidentiality of the registration of aliens under section 1301 of the United States Code. Section 1304(b) provides as follows:

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

(1) pursuant to section 1357(f)(2) of this title, and

(2) to such persons or agencies as may be designated by the Attorney General.

8 U.S.C. § 1304(b). Section 264.1 of title 8 of the Code of Federal Regulations provides that an I-94 form is a registration form. 8 C.F.R. § 264.1(a). The requestor does not have a right of access to this information. Accordingly, the department must withhold the submitted I-94 form pursuant to section 552.101 of the Government Code in conjunction with section 1304 of title 26 of the United States Code.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information 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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986),

⁵Because we are able to resolve this under section 552.101, we do not address your other arguments for exception regarding this information.

393 (1983), 339 (1982). We have marked the information that is confidential under common law privacy and that you must withhold under section 552.101.⁶

You assert that the submitted post orders are excepted under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from 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: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You explain that the submitted post orders for cell block picket officers and back gate officers contain “minute information” about unit operations that could be used to compromise the physical safety of the unit. You contend that release of this information “could help inmates in their future attempts to circumvent the security of the unit.” After review of your arguments and the information at issue, we agree that release of the submitted post orders for cell block picket officers and back gate officers would interfere with law enforcement. Therefore, this information may be withheld pursuant to section 552.108(b)(1).

You also assert that the submitted birth certificate is excepted under section 552.115 of the Government Code. Section 552.115(a) provides that “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]” Because section 552.115

⁶Because we are able to resolve this under section 552.101, we do not address your other arguments for exception regarding this information.

only applies to a information maintained by the bureau of vital statistics or local registration official, the department may not withhold the birth certificate pursuant to that provision. *See* Open Records Decision No. 338 (1982).

You also assert that section 552.117 of the Government Code is applicable to some of the submitted information. Section 552.117(a)(3) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former department employees "regardless of whether the current or former employee complies with Section 552.1175." We conclude that the department must withhold the information we have marked under section 552.117.

Finally, the remaining information contains Texas motor vehicle record information. Section 552.130 of the Government Code provides in relevant part the following:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas motor vehicle record information we have marked under section 552.130.

To conclude, (1) the marked medical records may only be released in accordance with the MPA, (2) the marked mental health records may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code, (3) the marked dental records may only be released in accordance with chapter 258 of the Occupations Code, (4) the marked EMS records may only be released in accordance with section 773.093 of the Health and Safety Code, and (5) Part I of the custodian death report must be released, but the remaining parts of the report, including any attachments, are confidential. The department must release the basic information pertaining to the death of the inmate and a crime involving inmates, but it must withhold the remaining information pertaining to the inmate under section 552.134. The department must withhold the following information under section 552.101 of the Government Code: (1) the marked fingerprint information that is confidential under chapter 560 of the Government Code; (2) the I-9, W-2, W-4, and I-94 forms, which are confidential under federal law; and (3) the information that is confidential under common law privacy. The department may withhold the submitted post orders under section 552.108. Finally, the department must withhold the marked

section 552.117 information and the marked motor vehicle record information under section 552.130. 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).

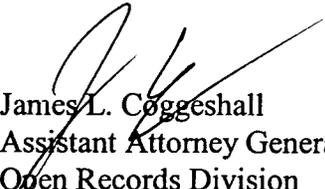
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 212566

Enc. Submitted documents

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