



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 31, 2005

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

OR2005-08017

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# 231337.

The Texas Department of Criminal Justice (the "department") received a request for any information that relates to the requestor. You state that you will release some of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that any person may submit comments stating why information should or should not be released).

Initially we must address the department's obligations under the Act. 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 within ten business days after receiving the request. *See Gov't Code § 552.301(a), (b)*. Additionally, under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the 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. In this instance, you did not raise the attorney work product privilege within the ten business day period mandated by section 552.301(b). Further, as you acknowledge, you submitted some of the responsive information past the fifteen business day deadline. *See* Gov't Code § 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and 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 held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Section 552.111, which incorporates the attorney work product privilege into the Act, is a discretionary exception to disclosure that does not provide a compelling reason for non-disclosure under section 552.302 of the Government Code. *See* Open Records Decision Nos. 630 at 3 (1994); 325 at 2 (1982). Therefore, the department may not withhold any of the submitted information under the attorney work product privilege. However, the department claims sections 552.101 and 552.134 for the untimely submitted information. Since sections 552.101 and 552.134 can constitute compelling reasons for non-disclosure, we will consider whether these exceptions apply to the untimely submitted information.

You claim that the marked bundle of documents and portions of other documents are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives,

lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information at issue consists of confidential communications between department attorneys or attorney representatives and employees of the department. You also state that the information at issue was made in confidence, intended for the sole use of the department, and has not been shared or distributed to others. Upon review, we find that you have demonstrated the applicability of the attorney-client privilege to most the information at issue. However, some of the information you seek to withhold does not consist of communications between department attorneys or attorney representatives and employees of the department. Accordingly, the department may withhold the bundle of documents and the portions of other documents we have marked under section 552.107 of the Government Code. The remaining information at issue here may not be withheld under section 552.107 and must be released.

Next, you claim that the submitted visitation lists are protected from public disclosure 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.” Gov’t Code § 552.101. This section encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights

involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

In Open Records Decision No. 430 (1985), our office determined that the list of inmate visitors is protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See also Open Records Decision No. 185 (1978). Here, the information at issue consists of the visitation records of several inmates, including some on death row. We note that although the requestor is one of the visitors, the requestor does not have a right of access to this information under section 552.023 of the Government Code because the constitutional rights of the inmates and other visitors are also implicated.<sup>1</sup> See ORD No. 430. Thus, you must withhold the visitation records in their entirety under section 552.101 of the Government Code.<sup>2</sup>

Next, you claim that the submitted photograph is excepted from disclosure under common-law privacy and constitutional privacy. Section 552.101 also encompasses common-law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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. Here, the submitted photograph was confiscated as contraband when mailed to a department inmate. We note that the public has an interest in knowing the nature of contraband being confiscated by the department. However, we also note that the document accompanying the

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<sup>1</sup>Government Code section 552.023(a) states that a person or a person's authorized representative has a special right of access, beyond the right 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 that person's privacy interests. We note that the right to privacy is a personal right that lapses at death, and therefore constitutional privacy does not encompass information that relates to a deceased individual. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). Accordingly, the requestor would have a right of access to information that relates to him if the inmates he visited are deceased.

<sup>2</sup>Because our ruling is dispositive as to the information at issue, we need address your other argument for this information.

photograph, which describes the nature of the contraband, who mailed it, and the final disposition of the incident, was released. Upon review, we find that the photograph is inmate and embarrassing, and that the public's interest has been satisfied by the released document. Accordingly, the department must withhold the photograph under section 552.101 of the Government Code in conjunction with common-law privacy.

Finally, you claim that portions of the submitted documents are excepted from disclosure under section 552.134 of the Government Code. This section relates to information about inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 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). Upon review, we find that you have failed to explain how the remaining documents contain information that is protected by section 552.134. Therefore, you may not withhold any of the remaining information under section 552.134(a) of the Government Code.

In summary, the department may withhold the information we have marked under section 552.107 of the Government Code. The department must withhold the visitation lists under section 552.101 of the Government Code in conjunction with constitutional privacy. The department must withhold the photograph under section 552.101 of the Government Code in conjunction with common-law privacy. 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).

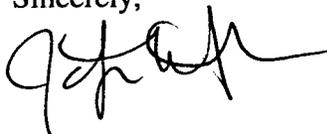
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Jaclyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/krl

Ref: ID# 231337

Enc. Submitted documents

c: Ward Larkin  
15327 Pebble Bend Dr.  
Houston, Texas 77068-1839  
(w/o enclosures)