



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2005

Ms. Amy D. Smith
Assistant General Counsel
Texas Department of Criminal Justice
Office of the General Counsel
P. O. Box 4004
Huntsville, Texas 77342-4004

Mr. John C. West
General Counsel
Texas Department of Criminal Justice
Office of the Inspector General
P. O. Box 13084
Austin, Texas 78711

OR2005-09429

Dear Ms. Smith and Mr. West:

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# 234359.

The Texas Department of Criminal Justice (the "department") received a request for eleven categories of information related to a named department officer. You inform us that the department is releasing some requested information but claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's procedural obligations under the Act. Within fifteen business days of receiving a request for information, a governmental body that wishes to withhold information from public disclosure must submit to this office: (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. Gov't Code § 552.301(e)(1)(A)-(D). You inform us that the department received this request for information on August 1, 2005. As such, the fifteenth business day following the department's receipt of the request was August 22, 2005. You submitted copies of some of the requested documents for which the department claims sections 552.101 and 552.134 via a letter that indicates it was deposited with UPS on August 23, 2005. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, we find that the department failed to comply with the procedural requirements of section 552.301 with respect to this portion of the submitted information.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). Because the applicability of sections 552.101 and 552.134 can provide compelling reasons to withhold information, we will address your claims under these sections with respect to the information that was not timely submitted, as well as for the remaining submitted information for which you claim these exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. You contend that some of the submitted documents are medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides 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.

Occ. Code. § 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, .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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Upon review, we agree that one of the submitted documents at issue constitutes a medical record that is subject to the MPA. We have marked this document that may only be released in accordance with the MPA. However, we find that the "TDCJ Employee Performance Log" is not a medical record, and it may not be withheld from disclosure on this basis.

Next, you claim that the submitted W-2 and W-4 tax forms are confidential under federal law. Section 552.101 of the Government Code also encompasses federal law. 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 the W-2 and W-4 tax forms pursuant to section 552.101 in conjunction with section 6103(a) of Title 26 of the United States Code.

You also raise federal law with respect to the submitted I-9 forms (Employment Eligibility Verification). I-9 forms are governed by section 1324a of Title 8 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 forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the I-9 forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Next, you claim that some of the remaining information is excepted under section 552.101 as criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the

DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Upon review, however, we find that none of this information constitutes confidential CHRI, and it therefore may not be withheld under section 552.101 on that basis.

Next, you also claim that some of the remaining submitted information pertaining to the named department officer is protected under the doctrine of constitutional privacy. Constitutional privacy, which is also encompassed by section 552.101, consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently; and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). We have considered your arguments and reviewed the information at issue. We conclude, however, that you have not shown that any of the remaining information at issue comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444, 423 at 2. We therefore conclude that this information may not be withheld under section 552.101 on the basis of constitutional privacy.

We next address your claim under section 552.117 of the Government Code. Section 552.117(a)(3) excepts from public disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current and former employees of the department, regardless of whether the employees complied with section 552.1175.¹ Thus, the department must withhold the above listed information of current or former department employees contained in the submitted records pursuant to section 552.117(a)(3). We have marked this information that must be withheld under this exception.

Next, we note that some of the remaining information is subject to section 552.130 of the Government Code.² This section excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't

¹We note that Open Records Letter No. 2005-1067(2005) was issued earlier this year and serves as a previous determination for this type of information maintained by the department.

²The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code § 552.130. Accordingly, the department must withhold the Texas driver's license number that we have marked pursuant to section 552.130.

Lastly, you claim that some the remaining information at issue is subject to section 552.134 of the Government Code. This section relates to information about inmates of the department and provides in relevant part as follows:

Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] 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). Section 552.134 is explicitly made subject to section 552.029 of the Government Code, which provides in relevant part as follo

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] is subject to required disclosure under Section 552.021:

...

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving an inmate.

Id. § 552.029(8). Upon review, we agree that the information for which you claim section 552.134 constitutes information about an inmate confined in a facility operated by the department. We note, however, that these documents contain information regarding use of force incidents and alleged crimes involving inmates. Thus, pursuant to section 552.029(8), the department must release basic information concerning any use of force incident and alleged crime involving an inmate. 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 department must withhold the remaining information for which you claim section 552.134. Because we reach this conclusion, we need not address your arguments regarding section 552.108 of the Government Code.³

³We note that the information that is subject to section 552.029(8) corresponds to the basic front-page information that is made public under section 552.108(c). See Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-188 (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 at 3-4 (1976) (summarizing types of information deemed public in *Houston Chronicle*).

In summary: (1) the medical record, which we have marked, may only be released in accordance with the MPA; (2) the W-2 and W-4 tax forms must be withheld under section 552.101 of the Government Code in conjunction with federal law; (3) the I-9 forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system; (4) the information we have marked must be withheld under section 552.117(a)(3) of the Government Code; (5) the Texas driver's license number we have marked must be withheld under section 552.130 of the Government Code; (6) except for the basic information required to be released under section 552.029(8) of the Government Code, the department must withhold the information for which you claim section 552.134 of the Government Code in accordance with that exception; and (7) the remaining submitted information must be released to the requestor.

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 ten 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); *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 Office of the Attorney General 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 234359

Enc. Submitted documents

c: Ms. Yolanda Torres
P. O. Box 515
Huntsville, Texas 77342-0515
(w/o enclosures)