



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 11, 2006

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OR2006-03620

Dear Mr. Frazier 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# 245886.

The Texas Department of Criminal Justice (the "department") received a request for information relating to (1) audits of department programs since 1999; (2) investigations by the Inspector General's Office of alleged misconduct regarding wardens at five named units since 1995; (3) regional personnel files for special investigations involving all wardens since January 1, 2001; (4) incidents on department premises involving alleged victims other than department inmates or employees; and (5) audits indicating that any department program is not in compliance with department customs, policies, or practices since January 1, 2000. You inform us that the department will release some of the requested information. You also state that social security numbers and certain other information will be withheld under

sections 552.117 and 552.147 of the Government Code.<sup>1</sup> On behalf of the Office of General Counsel (the “OGC”) and the Office of Inspector General (the “OIG”), you have submitted information that you claim is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.<sup>2</sup>

We first note that most of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov’t Code § 552.022(a)(1). Section 552.103 of the Government Code is a discretionary exception to public disclosure that protects a governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov’t Code § 552.103 may be waived by governmental body); Open Records Decision Nos. 665 at 2 n.5) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov’t Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the information contained in the completed investigations that the OIG has submitted may not be withheld under section 552.103 of the Government Code. However, we will consider the department’s claims under sections 552.101, 552.108, and 552.134 of the Government Code, as information that is subject to section 552.022(a)(1) may be withheld under these exceptions.

As section 552.134 of the Government Code is the most inclusive exception you claim, we address this exception first. Section 552.134 is applicable to information that relates to inmates of the department and provides in part:

(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.

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<sup>1</sup>See Gov’t Code § 552.147(b) (authorizing governmental body to redact living person’s social security number from public release under Gov’t Code § 552.147 without necessity of requesting attorney general decision under Act); Open Records Letter No. 2005-01067 (2005) (authorizing department to withhold information relating to its current or former employees under Gov’t Code § 552.117(a)(3) without necessity of requesting attorney general decision).

<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Gov't Code § 552.134(a). Section 552.029 of the Government Code provides, however, that

[n]otwithstanding . . . 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 the inmate.

*Id.* § 552.029(8). Thus, the legislature explicitly made section 552.134 subject to section 552.029.

We have marked information submitted by the OGC and information in one of the reports submitted by the OIG that relates to inmates of the department and must be withheld under section 552.134. We also find that section 552.134 is applicable to the remaining records that the OIG has submitted. We note, however, that the remaining records submitted by the OIG include information about incidents that involved uses of force and alleged crimes involving inmates. Basic information about those incidents must be released under section 552.029(8). The basic information that must be released includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. With the exception of the information that must be released under section 552.029, the department must withhold the rest of the information submitted by the OIG under section 552.134 of the Government Code.

Next, we address section 552.101 of the Government Code. This section excepts from public 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 that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on 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. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked information that is confidential under the MPA. The department may release that information only if it has authorization under the MPA to do so. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked information relating to polygraph examinations that is confidential under section 1703.306. As there is no indication that the requestor would have a right of access to the marked information, the department must withhold the polygraph information under section 552.101 of the Government Code.

The OIG also raises section 552.101 in conjunction with section 58.005 of the Family Code. Section 58.005 provides in part that “[i]nformation obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to [certain listed individuals].” Fam. Code § 58.005(a). The OIG asserts that information in one of its investigations is confidential under section 58.005. The OIG has not demonstrated, however, and the submitted information does not itself reflect that any of the information in question was “obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child.” *Id.* We therefore conclude that the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code.

Section 552.101 also encompasses constitutional and common law rights to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education that the United States Supreme Court has recognized. *See Fado v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* Open Records Decision No. 455 at 7. Constitutional privacy is reserved for “the most intimate aspects of human affairs.” Open Records Decision No. 455 at 8 (quoting *Ramie*, 765 F.2d at 492). The inmate visitor information that we have marked must be withheld from the requestor under section 552.101 in conjunction with constitutional privacy. *See* Open Records Decision No. 430 (1985) (list of inmate’s visitors protected by constitutional law); *cf.* Open Records Decision No. 428 (1985) (list of inmate’s correspondents protected by constitutional privacy).

Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is highly intimate or embarrassing, such that its

release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked information that the department must withhold under section 552.101 in conjunction with common law privacy.

The OIG also raises section 552.108 of the Government Code. Section 552.108(b)(1) excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if “release of the internal record or notation would interfere with law enforcement or prosecution.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov’t Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). A governmental body that relies on section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See* Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989); *see also* Open Records Decision No. 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement). The OIG seeks to withhold some of the submitted information under section 552.108(b)(1) because it “could be used by others in the planning and execution of crimes and could compromise [u]nit security.” Based on the OIG’s arguments and our review of the remaining information that the OIG has submitted, we have marked information that the department may withhold under section 552.108(b)(1) of the Government Code.

We note that the rest of the submitted information includes Texas driver’s license numbers. Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.<sup>3</sup> *See* Gov’t Code § 552.130(a)(1). We have marked Texas driver’s license information that must be withheld under section 552.130.

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<sup>3</sup>Unlike other exceptions to disclosure, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

We also note that section 552.136 of the Government Code is applicable to some of the remaining information.<sup>4</sup> This exception provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked information that the department must withhold under section 552.136.

In summary: (1) except for the basic information that must be released under section 552.029(8), the information that relates to inmates of the department must be withheld under section 552.134 of the Government Code; (2) the department must not release the information that is confidential under the MPA unless it has authorization under the MPA to do so; (3) the department must withhold the information that relates to polygraph examinations under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (4) the department must withhold the information that is confidential under section 552.101 in conjunction with constitutional and common law privacy; (5) the department may withhold the information that is excepted from disclosure under section 552.108(b)(1); (6) the department must withhold the information that is excepted from disclosure under section 552.130; and (7) the department must withhold the information that is excepted from disclosure under section 552.136. The rest of the submitted 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

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<sup>4</sup>Section 552.136 is also a mandatory exception that may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

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).

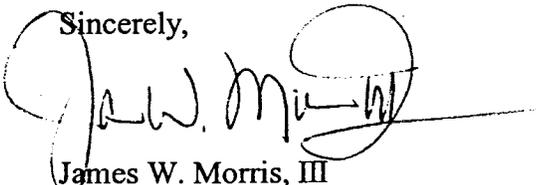
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 245886

Enc: Submitted documents

c: Mr. Charles L. Brown  
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(w/o enclosures)