



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 19, 2007

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OR2007-09162

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# 284446.

The Texas Department of Criminal Justice (the "department") received a request for the personnel and disciplinary files for a named former department employee. The Office of the General Counsel (the "OGC") and the Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG indicates that it is releasing some of the requested information to the requestor with redactions pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).<sup>1</sup> The OIG also states that it is withholding

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<sup>1</sup>Open Records Letter No. 2005-01067 (2005) serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

social security numbers under section 552.147 of the Government Code.<sup>2</sup> The OIG claims that the remaining information it has submitted is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.107, 552.134, and 552.136<sup>3</sup> of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

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. This section encompasses information made confidential by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . ., or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). The OGC must withhold the W-2 and W-4 forms we have marked pursuant to federal law.

The submitted information contains fingerprint information. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. See Gov’t Code §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). The OGC does not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information at issue. Therefore, the OGC must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

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<sup>2</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

<sup>3</sup>Although the OGC does not timely raise section 552.136, we consider its arguments under this section because section 552.136 can provide a compelling reason to withhold information. See Gov’t Code § § 552.301, .302.

Section 552.101 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. 540 S.W.2d at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, the OGC must withhold the information we have marked under section 552.101 in conjunction with common law privacy.<sup>4</sup> However, we determine that no part of the remaining information submitted by the OGC is private, and thus it may not be withheld on this basis.

The OGC asserts that a small part of the information it submitted is excepted from disclosure under section 552.107. Section 552.107 of the Government Code protects information within the attorney-client privilege. Gov't Code § 552.107. 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,

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<sup>4</sup>As our ruling for this information is dispositive, we do not address your argument under section 552.136.

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).

In this instance, the OGC states that the information it identifies constitutes a confidential attorney-client communication between the department’s general counsel and a department employee. Further, the OGC states that the communication was made for the purpose of giving legal representation and advice to the department employee. Although the OGC states that the communication at issue has not been made available to the public, it acknowledges, and the information reflects, that the communication has been disclosed to third parties. The OGC makes no assertion that the other third parties are clients, client representatives, lawyers, or lawyer representatives. Accordingly, no part of the information for which the OGC claims this privilege may be withheld on this basis.

We note that some of the information submitted by the OGC is confidential under section 552.117(a)(3).<sup>5</sup> Section 552.117(a)(3) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175. Thus, you must withhold the information we have marked under section 552.117(a)(3).

Both the OGC and the OIG raise section 552.134 of the Government Code, which 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

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions like section 552.117 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . Section 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:

...

(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). Some of the information submitted by the OGC, and all of the information submitted by the OIG, concerns inmates confined in a facility operated by or under contract with the department. The OGC must withhold the information we have marked pursuant to section 552.134.<sup>6</sup> Further, section 552.134 is applicable to the information submitted by the OIG, and this information must generally be withheld on that basis.<sup>7</sup> However, the submitted documents contain information regarding incidents involving the use of force and alleged criminal conduct involving inmates. As the OIG acknowledges, and we note to the OGC, under section 552.029(8), basic information regarding these incidents is subject to required disclosure. *Id.*

Although not excepted from disclosure under section 552.134, some of the basic information in SC.12.2616.95.N4 is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy. Information that tends to identify a victim of sexual assault is protected under common law privacy. *See* Open Records Decision No. 339 (1982); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Thus, the OIG must withhold the identifying information of an inmate who is an alleged victim of sexual assault pursuant to section 552.101 of the Government Code in conjunction

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<sup>6</sup>As our ruling for this information is dispositive, we do not address your other arguments against disclosure of this information.

<sup>7</sup>As our ruling for this information is dispositive, we do not address your argument under section 552.108(a)(2).

with common law privacy. The remaining basic information 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.

In summary, the OGC must withhold the W-2 and W-4 forms we have marked under section 552.101 of the Government Code in conjunction with federal law. The OGC must withhold the fingerprint information marked under section 552.101 in conjunction with section 560.003 of the Government Code. The OGC must withhold the information we have marked under section 552.101 in conjunction with common law privacy. The OGC must withhold the information we have marked under section 552.117(a)(3). With the exception of basic information, the OGC must withhold the information we have marked under section 552.134. With the exception of basic information, the OIG must withhold its submitted information pursuant to section 552.134. The basic private information identifying a sexual assault victim in SC.12.2616.95.N4 must be withheld under section 552.101 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); *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,



Kara A. Batey  
Assistant Attorney General  
Open Records Division

KAB/eeg

Ref: ID# 284446

Enc. Submitted documents

c: Mr. Greg Jones  
The Dallas Morning News  
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(w/o enclosures)