



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2007

Ms. Patricia Fleming
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2007-16322

Dear Ms. Fleming:

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# 296436.

The Texas Department of Criminal Justice (the "department") received a request for fifteen categories of information pertaining to the department and the Geo Group, Inc. ("Geo"). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.108, 552.110, 552.134, and 552.136 of the Government Code. You also state that releasing a portion of the submitted information may implicate the interests of a third party. Accordingly, you have notified Geo of the request and of its opportunity to submit arguments to this office. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Act 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. The department received the request for information on September 17, 2007. However, the department failed to submit a portion of the submitted information until October 10, 2007. Thus, the department failed to comply with the requirements mandated by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 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). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You assert that a third party has an interest in the information that you submitted after the fifteen business day deadline. Thus, we will address the disclosure of the information submitted on October 30, 2007, as well as the timely submitted information.

We note that this office has received comments from Geo. Geo indicates that no portion of the information submitted on October 30, 2007 is proprietary, and Geo does not object to release of any portion of the submitted information. As no other exception to disclosure of this information is raised, the information pertaining to Geo, which we have marked, must be released to the requestor.

Next we address the department's arguments against disclosure of 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. Section 552.101 of the Government Code encompasses section 290dd-2 of title 42 of the United States Code, which provides in relevant part:

(a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be

confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see also* 42 C.F.R. § 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential). We understand that the department operates a federally funded substance abuse treatment program. We note that federal law allows for the release of a patient's substance abuse records upon proper written consent. 42 C.F.R. §§ 2.15, .31, .33; *see* 42 U.S.C. § 290dd-2(b)(1). Accordingly, the substance abuse information, which you have marked, may be released only as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations.

Section 552.101 also encompasses criminal history record information ("CHRI") that is generated by the National Crime Information Center or by the Texas Crime Information Center 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. However, in this instance none of the information you have marked constitutes CHRI generated by the NCIC or TCIC.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, that information is not private under *Reporters Committee* when it relates to an alleged offense for which an individual is currently involved in the criminal justice system. *Cf. Gov't Code*

§ 411.081(b). Therefore, the department must withhold only the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.134 of the Government Code relates to inmates of the department and provides in relevant 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.

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

Notwithstanding Section 508.313 or 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.

Gov't Code § 552.029(8). A portion of the submitted information concerns inmates who were confined in a facility operated by the department. However, we note that some of the information at issue involves investigations into an alleged crime involving an inmate and a correctional officer and use of force incidents. Under section 552.029, basic information regarding an alleged crime involving an inmate and incidents involving a use of force is subject to required disclosure. 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. We also note that a portion of the information you have marked under section 552.134 pertains solely to department policy and administrative information, and does not reference department inmates. Thus, we find that this information, which we have marked for release, may not be withheld under section 552.134. Accordingly, with the exception of basic information and the information we have marked for release, the department must withhold the information involving an inmate that we have marked under section 552.134 of the Government Code.

Next, you claim that a portion of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure

“information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). However, in some situations section 552.104 will operate to protect from disclosure bid information that is submitted by successful bidders. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

You indicate that the department is preparing to solicit bids for maintenance of six specified correctional centers. You state that, although the source selection plan and related materials you have submitted were used in selecting the winning bid for a 2003 procurement, release of this information would place the department at a disadvantage in negotiating the upcoming maintenance contracts. You state that the same source selection plan and evaluation processes depicted in the submitted information and used in 2003 will be used again in the upcoming procurement. You contend that the release of this information would put the department at a disadvantage and allow bidders to specifically tailor their bids to meet the criteria outlined in the source selection plan. Based on our review of your arguments and the submitted information, we find in this instance that the department has adequately demonstrated that the release of the information you have marked under section 552.104 would cause potential harm to its interests in the upcoming facility procurements. Accordingly, we conclude that the department may withhold the information you have marked under section 552.104 of the Government Code.

Next, you state that a portion of the submitted information is excepted from disclosure under section 552.108(b)(1) 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.” Gov’t Code § 552.108(b)(1); *see also 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 which, 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). Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement and crime

prevention. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that predecessor to section 552.108 excepts detailed guidelines regarding police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution). You argue that the release of the information you have marked under section 552.108(b)(1) would compromise prison security. Based on your arguments and our review of the information at issue, we agree that the release of a portion of the information you have marked would interfere with law enforcement and crime prevention. However, the remaining information consists of administrative information and commonly-know information. Thus, after considering your arguments, we conclude that the department has failed to demonstrate how release of this information, which we have marked for release, would interfere with law enforcement and crime prevention. Accordingly, the department may only withhold the marked information under section 552.108(b)(1) of the Government Code.

We note that the submitted information contains insurance policy numbers. Section 552.136 states that "[n]otwithstanding 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(b). The department must withhold the policy number that we have marked under section 552.136 of the Government Code.

Finally, we note that some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the substance abuse information, which you have marked, may be released only as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations. You must withhold the information we have marked under common-law privacy. With the exception of the information that we have marked for release, you must withhold the information that you have marked under section 552.134. You may withhold the information that you have

marked under section 552.104. With the exception of the information that we have marked for release, you may withhold the information that you have marked under section 552.108(b)(1). You must withhold the insurance policy number we have marked under section 552.136. The remaining information must be released in accordance with copyright.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

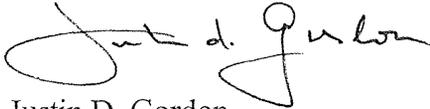
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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 "Justin D. Gordon". The signature is fluid and cursive, with the first name "Justin" being the most prominent.

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 296436

Enc. Submitted documents

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