



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2008

Mr. John C. West
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Office of the Inspector General
Texas Department of Criminal Justice
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OR2008-11876

Dear Mr. West and Mr. DeFriend:

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# 320120.

The Texas Department of Criminal Justice (the "department") received a request for fourteen categories of information pertaining to a named inmate who died during his incarceration and to four named department employees. The department's Office of the General Counsel (the "OGC") and its office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents, that each seeks to withhold from disclosure. The OGC states that it will release some of the responsive information. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. The OIG states that it will release 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).¹ The OIG also states that it is withholding social security numbers under section 552.147(b) of the Government Code.² The OIG further states that some of its responsive information has been destroyed according to the OIG's record retention guidelines.³ The OIG claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the exceptions claimed and reviewed the submitted information.

Initially, we note that some of the submitted information was created after the date of the department's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request.⁴ Thus, the information that did not exist when the department received this request is not responsive to the requests. This decision does not address the public availability of that information, which we have marked, and it need not be released to the requestor.

Next, we must address the OGC's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) states, within fifteen business days of receiving the request, the governmental body must submit to this office (1) 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. *Id.* § 552.301(e)(1)(A)-(D). The OGC timely submitted an initial brief and set of documents for our review on June 24, 2008. Subsequently, the OGC found additional responsive documents and submitted them and a brief on

¹Open Records Letter No. 2005-01067 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.

²Section 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.

³The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

⁴*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

June 26, 2008, complying with the procedural requirements of section 552.310(e). However, the OGC submitted a final set of documents, and an accompanying brief, on July 16, 2008, beyond the fifteen-day deadline for submitting this information. Consequently, we conclude that the OGC failed to comply with the requirements of section 552.301 of the Government Code with respect to the third set of documents and comments.

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 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at state or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.134 can provide a compelling reason to withhold information, we will address your argument under this section for the information at issue. In addition, we will consider your arguments for the timely submitted information.

Next, we note that section 552.022 of the Government Code is applicable to some of the information at issue. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(17) provides that information filed with a court is generally a matter of public record that cannot be withheld from disclosure. *Id.* § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). In this instance, some of the submitted information includes completed reports that are subject to section 552.022(a)(1) and documents filed with a court that are subject to section 552.022(a)(17). However, because sections 552.101, 552.108, and 552.134 of the Government Code are other law for the purpose of section 552.022(a)(1) and sections 552.101 and 552.134 are other law for the purpose of section 552.022(a)(17), we will consider the OGC's and OIG's claims under these exceptions for the information subject to 552.022 as well as the remaining information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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. We have marked documents in the OGC's and OIG's submitted information that constitute medical records that are subject to the MPA. We note that as the authorized representative of the inmate whose medical records are at issue, the requestor may have a right of access to that inmate's marked medical records under the MPA. *See id.* § 159.005(a)(2).⁵ The marked medical records may only be released in accordance with the MPA. *See* ORD 598.

The OGC and OIG assert that portions of their submitted records are confidential under section 611.002(a) of the Health and Safety Code, which pertains to mental health records. Section 552.101 also encompasses section 611.002(a), which provides that "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. We have marked information in the OGC's and OIG's submitted documents that is confidential under section 611.002 of the Health and Safety Code. However, as the authorized representative of the person whose mental health records

⁵The OIG informs us that it has released the medical records pertaining to the named inmate, for which a properly executed release was provided, to the requestor.

are at issue, the requestor may have a right of access to the marked information. *See id.* §§ 611.004, .0045.⁶ Thus, the OGC and OIG may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

The OGC contends that a portion of its remaining submitted information is exempt under section 552.101 in conjunction with section 560.003 of the Government Code. The public availability of fingerprints is governed by chapter 560 of the Government Code. *See Gov't Code* §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore the OGC must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

The OGC and OIG assert that the remaining submitted information is excepted under section 552.134 of the Government Code. Section 552.134 (a) relates to inmates of the department and provides:

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

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.

Id. § 552.029(8). Upon review, we find that most of the remaining information relates to inmates confined in a facility operated by the department. We note, however, that much of this information relates to the death of an inmate in custody, incidents involving the use of

⁶The OIG informs us that it has released the mental health records pertaining to the named inmate, for which a properly executed release was provided, to the requestor.

force, or alleged crimes involving inmates. Therefore, basic information concerning these incidents must be released. *See id.* § 552.029(8). 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. Accordingly, with the exception of basic information, the OIG and OGC must withhold the remaining information, except where we have marked for release, under section 552.134 of the Government Code.⁷ However, we find that the information we have marked for release does not relate to an inmate confined in a facility operated by the department. Thus, the remaining information may not be withheld under section 552.134. For this information, we will address the additional exceptions raised.

The OIG informs us that a portion of the remaining information is the subject of a previous determination. This office issued Open Records Letter No. 2004-6370 (2004), which serves as a previous determination under section 552.301(a) of the Government Code for the department with respect to shift rosters. Therefore, pursuant to that previous determination, the OIG may withhold the submitted shift rosters in case #06-1591 under section 552.108(b)(1) of the Government Code. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, the OIG raises section 552.108(b)(1) of the Government Code for part of the remaining information not subject to section 552.134. Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) 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) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't

⁷As our ruling is dispositive, we need not address the OGC's or the OIG's remaining arguments for this information.

Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The OIG states that portions of the remaining submitted information reveals offender housing assignments and information regarding an escape that describes specifics on perimeter fencing systems and other security measures. You state that this information was gathered by OIG to further the detection and investigation of a crime and that release of the information at issue “could be used by others in the planning and execution of a crime” and that knowledge of this information could compromise prison security by being “used to facilitate an escape plan.” Based on your representations and our review, we find that the information at issue, which we have marked in report SC.14.2937.99.E2, would interfere with law enforcement. Accordingly, the OIG may withhold the information we have marked under section 552.108(b)(1) of the Government Code.

Finally, we note that some of the OGC’s and OIG’s remaining submitted information contains information that is subject to section 552.117 of the Government Code.⁸ Section 552.117(a)(3) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of the department or of the predecessor in function of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(3). In Open Records Letter No. 2005-01067 (2005), we issued a previous determination that authorizes the department to withhold information under section 552.117(a)(3) without the necessity of requesting a decision from this office under the Act. *See id.* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). Therefore, the OGC and OIG must withhold the information we have marked under section 552.117(a)(3).

In summary, The OGC and OIG may only release the medical records we have marked in accordance with the MPA and the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The OGC must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. With the exception of basic information, which the OIG states it has released, the OGC and OIG must withhold the remaining information under section 552.134

⁸The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but will ordinarily not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of the Government Code, except where we have marked for release. For the information not subject to section 552.134, the OIG may withhold the submitted shift rosters under section 552.108(b)(1) pursuant to the previous determination issued by this office in Open Records Letter No. 2004-6370 and may also withhold the additional information we have marked under section 552.108(b)(1) of the Government Code. The OGC and OIG must withhold the information we have marked under section 552.117(a)(3). 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 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). If the governmental body does not file suit over 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).

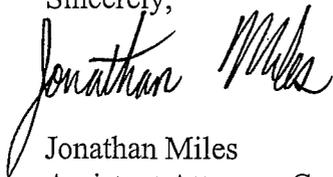
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned to the left of the typed name.

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 320120

Enc. Submitted documents

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