



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 7, 2008

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

OR2008-13739

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# 322502.

The Texas Department of Criminal Justice (the "department") received a request for all records pertaining to a named death row inmate while he was on death row, especially for the week prior to his execution. You state you have provided or will provide some of the requested information to the requestor. You claim portions of the submitted inmate records are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e), the governmental body 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. Gov't Code § 552.301(e). You state the department received the request for information on July 7, 2008. Although you submitted some of the responsive information in accordance with the deadline set forth in section 552.301(e), you did not submit the remainder of the responsive information until August 4, 2008.

Consequently, we find the department failed to comply with the requirements of section 552.301(e) for the information submitted on August 4, 2008.

A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the untimely submitted information 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). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). You have raised section 552.101 for portions of the information submitted on August 4, 2008. Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider whether or not this exception is applicable to the information submitted on August 4, 2008.

You assert the employee names listed in the submitted inmate execution watch log are excepted under section 552.108 of the Government Code. Section 552.108(b)(1) 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." *See City of Ft. 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 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 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). You argue releasing the names of employees who monitor, advise, or supervise the death-row inmate on the days immediately prior to his execution would jeopardize the security of the

execution process. Based on your arguments and our review, we agree, in this instance, the employee names on the submitted inmate execution watch log may be withheld under section 552.108(b)(1).<sup>1</sup> You have also marked dates and times listed on the watch log and indicated this information is excepted under section 552.108(b)(1). However, you have not provided any arguments explaining how this exception applies to the marked dates and times. Therefore, we find you have failed to demonstrate how section 552.108(b)(1) applies to the marked dates and times in the inmate execution watch log.

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 the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of this test must be established. *Id.* at 681-82. You contend the dates and times listed on the submitted inmate execution watch log are protected by common-law privacy based on special circumstances. This office has found information may be withheld under section 552.101 in conjunction with common-law privacy upon a showing of “special circumstances.” *See Open Records Decision No. 169* (1977). This office considers “special circumstances” to refer to a very narrow set of situations in which the release of information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. Such “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.*

Upon review of your arguments and the remaining information, we find you have failed to demonstrate how releasing the dates and times you have marked on the watch log would place department employees in imminent threat of physical danger. Accordingly, the department may not withhold the marked dates and times on the submitted execution watch log under section 552.101 of the Government Code in conjunction with the “special circumstances” aspect of common-law privacy. As you have provided no further arguments against the disclosure of this information, it must be released.

You also contend the inmate’s trust account balance in the submitted records is protected from disclosure under common-law privacy. In Open Records Decision No. 396, we determined information regarding inmate trust account balances is protected under common-law privacy. *See Open Records Decision No. 396* at 1 (1983). We note, however, the right of privacy lapses at death; thus, information may not be withheld on the basis of the privacy interests of a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); *see also Justice*

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<sup>1</sup> Because our ruling is dispositive for this information, we need not address your remaining argument against disclosure for this information.

*v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984), H-917 (1976); Open Records Decision No. 272 at 1 (1981). In this instance, the inmate whose trust account balance is at issue is deceased. Thus, the inmate's trust account balance may not be withheld under section 552.101 in conjunction with common-law privacy based on the privacy interests of the deceased inmate. As you have not claimed any further exceptions to disclosure for this information, it must be released.

The constitutional right to privacy is also encompassed by section 552.101. 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 have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. 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 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure," and this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. Our office found "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Thus, the department must withhold the identities of the inmate's visitors in the submitted records under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. You also seek to withhold under section 552.101 in conjunction with constitutional privacy information relating to the

inmate's family members when those family members are not listed as visitors, but only as relatives of the inmate. However, you have failed to demonstrate how this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the remaining information you seek to withhold under constitutional privacy may not be withheld under section 552.101 on this basis. As you have claimed no further exceptions to the disclosure of this information, it must be released.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential under federal and state law. 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 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Although you claim portions of the remaining inmate records are excepted under chapter 411 of the Government Code, you have not identified, nor does the submitted information indicate, any information that was generated by the NCIC or TCIC. Accordingly, we find you have not demonstrated how any portion of the remaining inmate records constitutes CHRI for purposes of chapter 411, and no portion of these records may be withheld on this basis.

In summary, the department may withhold the employee names listed on the submitted execution watch log under section 552.108(b)(1) of the Government Code. The department must withhold the identities of the inmate's visitors in the submitted inmate records under section 552.101 of the Government Code in conjunction with constitutional 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 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

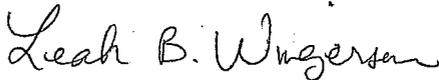
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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,



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Assistant Attorney General  
Open Records Division

LBW/ma

Ref: ID# 322502

Enc. Submitted documents

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(w/o enclosures)