



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 8, 2008

Mr. John C. West  
Office of the Inspector General  
Texas Department of Criminal Justice  
P.O. Box 13084  
Austin, Texas 78711

OR2008-13809

Dear 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# 322656.

The Texas Department of Criminal Justice's Office of the Inspector General (the "OIG") received a request for all information on the investigation into the death of an inmate on death-row. You state that the OIG will release some 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> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that a portion of the submitted 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 under section 552.108(b)(1) of the

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<sup>1</sup>Open Records Letter No. 2005-01067 authorizes the OIG to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the Texas Department of Criminal Justice (the "department") under section 552.117(a)(3) of the Government Code without the necessity of requesting an attorney general decision with regard to the applicability of that exception. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

Government Code without requesting an attorney general decision under that exception. *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, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made for or by the OIG. The OIG must release the completed investigation under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.107 of the Government Code is a discretionary exception that protects a governmental body's interests and may be waived. As such, it is not other law that make information confidential for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived). Therefore, the information at issue may not be withheld on the basis of section 552.107. However, the attorney-client privilege, which you raise for a portion of the information at issue, is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Accordingly, we will consider your arguments under Texas Rule of Evidence 503. In addition, because information subject to section 552.022(a)(1) may be withheld under sections 552.101 and 552.108, we will address these claims.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ).

You state that the investigative notes were created by an investigator for the purposes of documenting conversations with the OIG. You state that the confidentiality of these communications have been maintained. Based on your representations and our review of the information at issue, the OIG may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, we determine that the OIG has failed to demonstrate that any portion of the remaining information constitutes a privileged attorney-client communication. Thus, no portion of the remaining information may be withheld on this basis.

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 encompasses information made confidential by statute. Medical records are governed by the Medical Practice Act (the "MPA"), subtitle B of title 3

of the Occupations Code, which is also encompassed by section 552.101. *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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We note that section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a "patient" under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the diagnosis, evaluation, or treatment.

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. Occ. Code §§ 159.004, .005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). 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 the medical records that may only be released in accordance with the MPA.

Section 611.002 of the Health and Safety Code governs the public availability of mental health records and provides in part:

(a) Communications 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; ORD 565. We have marked mental health records that the OIG must withhold under section 611.002, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045 of the Health and Safety Code. *See id.* § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased).

Section 552.101 also encompasses section 258.102 of the Occupations Code, which provides in pertinent part:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

Occupation Code § 258.102(a). A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* §258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). When the patient is deceased, as is the case here, consent for the release of privileged information must be signed by a personal representative of the patient. *See id.* § 258.104(b)(5). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. We have marked the submitted dental records that are privileged under section 258.102 of the Occupations Code. The dental records may only be released in accordance with chapter 258 of the Occupations Code.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* Gov't Code § 411.083. 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 id.* Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-127. We note that because the laws that govern the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. The OIG must withhold the CHRI that we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if it (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* at 683. Generally, only highly intimate information that implicates the privacy of an individual is withheld.

Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 (1992), 478 (1987), 455 (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 Fado v. Coon*, 633 F.2d 1172 (5<sup>th</sup> 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 (5<sup>th</sup> 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 has held that 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 that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185 at 2. The information at issue in Open Records Decision No. 185 was the identity of individuals who had corresponded with inmates. This office found that "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 that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, this office determined that inmate visitor and mail logs which 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 at 6. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The outsider's rights to anonymity were 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).

Some of the responsive information is subject to section 552.101 of the Government Code in conjunction with constitutional privacy. Thus, the OIG must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. You also seek to withhold information relating to the inmate's family members under section 552.101 in conjunction with constitutional privacy. However, you have failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

You also assert that the photographs of the deceased inmate are protected by common-law privacy under section 552.101. We note that the right of privacy lapses at death; thus information may not be withheld on the basis of the privacy interests of a deceased individual. However, the United States Supreme Court recognized that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). You state that you have not been able to contact the family of the deceased individual to notify them of the request and of their right to assert a privacy interest in the remaining submitted photographs, which pertain to their deceased family member. Thus, because we do not have a representation

from the family of the deceased individual, we have no basis for determining that the family has any privacy interest in the submitted photographs. Therefore, common-law privacy is not applicable to the photographs at issue. We further find that none of the remaining submitted responsive information constitutes highly intimate or embarrassing information that is of no legitimate concern to the public.

Section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor 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.) (section 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). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information from Department of Public Safety would hamper departmental efforts to detect forgeries of drivers’ licenses), 252 (1980) (statutory predecessor was 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). The statutory predecessor to section 552.108(b)(1) was 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 that the submitted documents contain security threat group or gang information, the release of which would compromise OIG security measures and investigative techniques. You also state that the submitted information contains documents concerning unit security operation which was gathered to further the detection and investigation of a crime. You state that releasing this information could be used by others to facilitate an escape plan. Having considered your arguments, we conclude that a portion of the submitted information, which we have marked, is excepted from disclosure under section 552.108(b)(1). However, we find that you have not explained how or why release of any of the remaining information would interfere with law enforcement or crime prevention. We therefore conclude that the OIG may not withhold any of the remaining information under section 552.108(b)(1).

In summary, the OIG may withhold the information we have marked under Rule 503 of the Texas Rules of Evidence. The OIG may only release (1) the marked medical records in accordance with the MPA, (2) the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code, and (3) the marked dental records in accordance with chapter 258 of the Occupations Code. The OIG must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code, and constitutional privacy. The OIG may withhold the information we have marked under section 552.108(b)(1). 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,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/jh

Ref: ID# 322656

Enc. Submitted documents

c: Mr. Christopher Hill  
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(w/o enclosures)