



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2008

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

OR2008-15565

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# 325816.

The Texas Department of Criminal Justice (the “department”) received a request for the visitor logs for each inmate executed and for those death row inmates who died from causes other than execution from December 1, 1982 to the present. The requestor also seeks the names of all witnesses to executions and the names and roles of all people in the execution chamber from December 7, 1982 to the present.¹ You state you have released a portion of the requested information. You claim the submitted information is 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 representative sample of information.²

¹The requestor states “the present” means the day the requestor is given access to the requested information. We note information created after the date the request was received is nonresponsive to the present request. This decision does not address the public availability nonresponsive information, and the department need not release such information.

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we address the department's contention that only the names of the providers of service in the submitted contracts are responsive to the request. In this instance, the requestor seeks the names and the roles of the individuals present in the death chamber during an execution. We note the submitted contracts contain sections entitled "Statement of Services to be Performed," which describe the roles of the providers of services. Thus, we conclude the submitted contracts contain the roles of the providers of services, and this information is also responsive to the request. The remaining information in the submitted contracts, however, is not responsive to the request and the department need not release it.

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 constitutional right to privacy. 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); Open Records Decision No. 455 at 3-7 (1987). 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 constitutional 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 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. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. In Open Records Decision No. 185, our 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, our 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. 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 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). Upon review of the information at issue, we find the department must withhold the visitor information under section 552.101 of the Government Code in conjunction with the constitutional right to privacy.³

Next, we note the remaining information falls within the scope of section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). In this instance, the remaining information consists of contracts relating to the expenditure of public funds. Although you assert this information, which we have marked, is excepted under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Therefore, the department may not withhold the information we have marked under section 552.108. Because section 552.101 is other law for section 552.022(a)(3) purposes, we will address your argument under this exception for the remaining information.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that 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

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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.*

The department explains that the concerns it has for the security of participants in the execution process, such as security personnel and medical providers, extends to department employees and contractors that are present in the death chamber during the execution. The department asserts releasing the names of individuals present in the death chamber during the execution could place such individuals at risk of physical harm. Based on the department’s representations and our review, we find releasing the names of the individuals in the death chamber during an execution would place such individuals in imminent threat of physical danger. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the “special circumstances” aspect of common-law privacy. For the information explaining the roles of the individuals in the death chamber, you have failed to demonstrate how releasing this information would place the individuals at issue in imminent threat of physical danger. Accordingly, the department may not withhold roles of the individuals at issue under section 552.101 of the Government Code in conjunction with the “special circumstances” aspect of common-law privacy.

In summary, the department must withhold the submitted inmate visitor information under section 552.101 in conjunction with constitutional privacy. The department also must withhold the information we have marked under section 552.101 in conjunction with “special circumstances” aspect of common-law privacy. The remaining responsive 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