



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 12, 2009

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

OR2009-01934

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# 334768 (OIG ORR File: #OR-2008-0337).

The Texas Department of Criminal Justice's Office of the Inspector General (the "department") received a request for information regarding investigations into department employees accused of smuggling contraband into the prison system from January 1, 2007 to the present, excluding ongoing investigations. You state you have released some of the requested information with redactions pursuant to the previous determination issued to the department in Open Records Letter No. 2005-01067 (2005)¹ and section 552.147 of the Government Code.² You claim some of the submitted information is excepted from

¹Open Records Letter No. 2005-01067 authorizes the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of its current or former employees under section 552.117(a)(3) of the Government Code, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, without the necessity of requesting a decision under the Act. *See* Open Records Decision No. 673 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

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. *See* Gov't Code § 552.147(b).

disclosure under sections 552.101, 552.108, 552.130, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state 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 department may withhold the submitted shift rosters under section 552.108(b)(1) of the 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 address your argument under section 552.134 of the Government Code, as this is the most encompassing exception you raise. Section 552.134 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 552.134 is explicitly made subject to section 552.029 of the Government Code. You claim most of the submitted investigation files are excepted from disclosure under section 552.134. You state the department will release information subject to section 552.029 from the files at issue to the requestor. *See id.* § 552.029. Upon review, we agree that most of the information at issue pertains to inmates confined in a facility operated by the department. However, we note that file #IF.CC.0159.2007.JA does not concern inmates of the department. Therefore, section 552.134 is not applicable to this information, which we have marked, and the department may not withhold it on that basis. Accordingly, with the exception of file #IF.CC.0159.2007.JA, the department must withhold the information at issue under section 552.134 of the Government Code.³

We now address your arguments against disclosure for the remaining 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." *Id.* § 552.101. This exception encompasses information that other statutes make confidential.

³As our ruling for this information is dispositive, we do not address your remaining arguments for this information.

Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are 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 fingerprint information in the remaining information. Therefore, the department must withhold the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. 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. 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. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, information relating to routine traffic violations is not excepted from release under section 552.101 of the Government Code on this basis. *Cf. id.* § 411.082(2)(B). Upon review, we agree that portions of the remaining information, which we have marked, consist of CHRI, and must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Next, you assert some of the remaining information is confidential under section 552.101 in conjunction with the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent 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.

Occ. Code § 159.002(a), (b), (c). 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). Upon review, we find the information at issue does not consist of communications between a physician and a patient, nor is it records of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, we conclude the department may not withhold any portion of the remaining information under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses common-law privacy, which 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 type 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. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 545 (1990); and personal financial information not relating to a financial transaction between an individual and a governmental body, *See* Open Records Decision Nos. 545, 523 (1989) (individuals' mortgage payments, assets, bills, and credit history). We have marked portions of the remaining information that are confidential under common-law privacy. Accordingly, the marked information must be withheld under section 552.101 of the Government Code.

You claim some of the remaining information in investigation files #07-1707 and #07-2369 is excepted under section 552.108(b)(1) of the Government Code, which 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 pet.). 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 (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.*, ORD 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).

You state that release of the diagrams and photographs of a prison unit, the “Daily Picket, Weapons, and Ammunitions Log,” the “Picket Equipment Log,” and the related employee and visitor log in investigation file #07-1707 and the photo line-up in investigation file #07-2369 would interfere with ongoing law enforcement activities. You further state the information at issue in investigation file #07-1707 “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 release of the diagrams, photographs, and logs in investigation file #07-1707, which we have marked, would interfere with law enforcement. Accordingly, the department may withhold the marked information under section 552.108(b)(1) of the Government Code.⁴ However, we find you have failed to demonstrate how release of the photo line-up in investigation file #07-2369 would interfere with law enforcement or crime prevention. Therefore, the department may not withhold any of the remaining information under section 552.108(b)(1).

You also raise section 552.108(b)(2) for a portion of the remaining information contained in investigation file #07-2369. Section 552.108(b)(2) 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 . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). You assert that the

⁴As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

release of "photo line-ups to facilitate the identification of suspects" would compromise security measures and interfere with future investigations. Having considered your representations, we find that you have not shown that the information at issue relates to an investigation that concluded in a result other than conviction or deferred adjudication. We therefore conclude that the department may not withhold the information at issue under section 552.108(b)(2) of the Government Code.

Next, you assert some of the remaining information is excepted from disclosure under section 552.130 of the Government Code. This section excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Accordingly, the department must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

We note some of the remaining information is confidential pursuant to section 552.117 of the Government Code.⁵ Section 552.117(a)(3) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department or 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. *Id.* § 552.117(a)(3). Therefore, the department must withhold the information we have marked pursuant to section 552.117(a)(3).

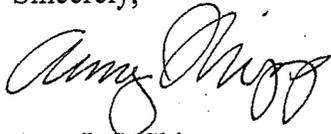
In summary, the department may withhold the submitted shift rosters pursuant to Open Records Letter No. 2004-6370. With the exception of file #IF.CC.0159.2007.JA, the department must withhold the investigation files it has identified under section 552.134 of the Government Code. The department must withhold the following information under section 552.101 of the Government Code: 1) the fingerprint information we have marked in conjunction section 560.003 of the Government Code; 2) the criminal history record information we have marked in conjunction with chapter 411 of the Government Code; and 3) the information we have marked in conjunction with common-law privacy. The department may withhold the information we have marked in investigation file #07-1707 under section 552.108(b)(1) of the Government Code. The department must withhold the Texas motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code. The department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code. The remaining information must be released to the requestor.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 334768

Enc. Submitted documents

cc: Requestor
(w/o enclosures)