



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2009

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
4616 Howard Lane, Suite 250
Austin, Texas 78728

OR2009-05427

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# 340792 (OIG ORR #OR-2009-00031).

The Texas Department of Criminal Justice (the "department") received a request for "[a]ll documents or records relating to the investigation of [a named department employee], OIG #SC.15.0274.08.GR," and all information collected about that employee. You state that 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) and 552.147 of the Government Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.130,

¹Open Records Letter No. 2005-1067 authorizes the department to withhold the present and former addresses and telephone numbers, social security numbers, and family member information of its current and 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)). Section 552.147 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. Gov't Code § 552.147.

552.134, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us that #SC.15.0274.08.GR concerns an investigation unrelated to the named individual. However, you state that there is an investigation with a case number similar to the requested case number and that you have submitted that investigation. You also inform us that the department does not possess some of the requested information in an unredacted form.² We consider the department to have made a good faith effort to relate the request to responsive information and will address the department's arguments against disclosure.

Next, 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).

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that case numbers 08-3635 and IF.SC.1106.2008.GR relate to pending criminal investigations. Based upon this representation and our review, we conclude that the release of case numbers 08-3635 and IF.SC.11062008.GR would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per*

²The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the county. *See Econ. Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. — San Antonio, 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). However, we also note that a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990).

curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, we agree that section 552.108(a)(1) is applicable to case numbers 08-3635 and IF.SC.1106.2008.GR.

However, as you acknowledge, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88. See Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, the department may withhold case numbers 08-3635 and IF.SC.11062008.GR pursuant to section 552.108(a)(1) of the Government Code.³

Next, we address your argument under section 552.134 of the Government Code. 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, 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). You claim the remaining information is excepted in its entirety from disclosure under section 552.134. Upon review, we agree that case number IF.CC.0148.2004.HV, and the information we have marked in the remaining information, pertain to inmates confined in a facility operated by the department. However, we note that case number IF.CC.0148.2004.HV relates to an alleged crime involving an inmate. Consequently, the department must release basic information about the alleged crime

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

pursuant to section 552.029. With the exception of this basic information, the department must withhold case number IF.CC.0148.2004.HV under section 552.134 of the Government Code. The department must also withhold the information we have marked in the remaining cases under section 552.134 of the Government Code. However, we note that the remaining information does not concern inmates of the department. Therefore, section 552.134 is not applicable to any of the remaining information and the department may not withhold it under this exception. We will address your remaining arguments for the remaining submitted information.⁴

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 1703.306(a) of the Occupations Code provides that "[a] polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]" The department must withhold the polygraph information that we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. However, the remaining information is not polygraph information made confidential under section 1703.306; therefore, the department may not withhold any of the remaining information under section 552.101 on that ground.

Section 552.101 also 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. *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. 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); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, the remaining information is either not highly intimate or embarrassing,

⁴As our ruling is dispositive, we need not address your remaining arguments for this information.

or it is of legitimate public interest; therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it on that ground.

Section 552.117(a)(3) of the Government Code 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).

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

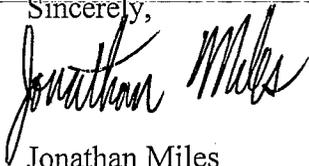
In summary, the department may withhold the submitted shift rosters pursuant to Open Records Letter No. 2004-6370. With the exception of basic information, the department may withhold case numbers 08-3635 and IF.SC.1106.2008.GR pursuant to section 552.108(a)(1) of the Government Code. With the exception of basic information, the department must withhold case number IF.CC.0148.2004.HV under section 552.134 of the Government Code. The department must also withhold the information we have marked in the remaining cases under section 552.134 of the Government Code. The department must withhold the polygraph information that we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code, the information we have marked under section 552.101 in conjunction with common-law privacy, and the personal information we have marked pursuant to section 552.117(a)(3) of the Government Code. The department must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

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,

A handwritten signature in black ink that reads "Jonathan Miles". The signature is written in a cursive style with a large initial "J" and "M".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 340792

Enc. Submitted documents

c: Requestor
(w/o enclosures)