



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 3, 2010

Mr. James Mu  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR2010-01685

Dear Mr. Mu:

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# 372384.

The Texas Department of Criminal Justice (the "department") received a request for information involving a named member of the Texas House of Representatives and five named inmates. You indicate that some of the requested information either has been or will be released. You have submitted information that the department seeks to withhold under sections 552.101 and 552.134 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the information you submitted.

We first note that the department failed to comply with section 552.301(e) of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) provides that the governmental body must submit to this office, not later

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<sup>1</sup>Although the department also initially raised other exceptions to disclosure, you have submitted no arguments in support of the applicability of any of those exceptions. Accordingly, this decision does not address any of the other exceptions that the department also initially raised. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why claimed exceptions apply so as to allow information at issue to be withheld).

than the fifteenth business day after the date of its receipt of the request for information, (1) written comments stating why the governmental body's claimed exceptions apply to the information it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date of the governmental body's receipt of the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You state that the department received the instant request for information on December 8, 2009. You inform us that the department requested clarification of the request on December 10 and received the requestor's response on December 15. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999). You also explain that the department observed holidays on December 24 and 25 and January 1. Thus, the department's fifteen-business-day deadline under section 552.301(e) was January 6. The shipping documentation you have provided reflects, however, that the department's arguments against disclosure and the information at issue were submitted to this office on January 7. *See Gov't Code* § 552.308 (stating requirements for submissions to attorney general by common contract carrier). Thus, the department did not comply with section 552.301(e) in requesting this decision, and the submitted information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because your claims under sections 552.101 and 552.134 of the Government Code can provide compelling reasons for non-disclosure, we will address those exceptions.

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 exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 508.313 of the Government Code, which provides in part:

- (a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

*Id.* § 508.313(a). You state that some of the submitted information, which you have marked, is contained in the parole division files of two of the named inmates. You explain that the marked information was generated while those inmates were “subject to release on parole, release to mandatory supervision, or executive clemency[.]” *Id.* § 508.313(a)(1). You do not indicate that any of the information in question is subject to release under section 508.313(c). *See id.* § 508.313(c)-(d).<sup>2</sup> Likewise, you do not indicate that any of the information in question is subject to chapter 62 of the Code of Criminal Procedure or section 552.029 of the Government Code. *See id.* § 508.313(e)-(f).<sup>3</sup> Based on your representations and our review of the information at issue, we conclude that the department must withhold the marked parole division records under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.

Section 552.101 of the Government Code also encompasses constitutional privacy, which 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 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

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<sup>2</sup>Section 503.313(c) provides for the release of information that is confidential under section 508.313(a) to the governor, a member of the board of pardons and paroles or a parole commissioner, the criminal justice policy council, or an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose. Section 508.313(d) provides that “eligible entity” means a government agency, an organization with which the Department of Criminal Justice contracts or an organization to which the department provides a grant, or an organization to which inmates are referred for services by the department.

<sup>3</sup>Section 508.313(e) provides that section 508.313 does not apply to information relating to a sex offender that is authorized for release under chapter 62 of the Code of Criminal Procedure. Section 508.313(f) provides that section 508.313 does not apply to information that is subject to required public disclosure under section 552.029 of the Government Code.

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). In Open Records Decision No. 185, citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), we held that 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. *See* ORD 185 at 2. The information at issue in that decision was the identities of individuals who had corresponded with inmates. 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, we determined that 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. *See* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors), 428 (inmate mail logs protected by constitutional privacy). We also recognized that inmates have 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 (release of visitors lists could compromise rights of inmates to visit with outsiders), 428 (inmates' interests in corresponding with outsiders free from threat of harassment by other inmates outweighed inmate/requestor's interests in obtaining inmate mail logs). In this instance, the remaining information at issue includes an inmate's personal correspondence. We conclude that the department must withhold that information, which you have marked, under section 552.101 of the Government Code in conjunction with constitutional privacy.

You also claim section 552.134 of the Government Code, which is applicable to information relating to inmates of the department. Section 552.134(a) states that

[e]xcept as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] 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). You state that the rest of the submitted information is related to inmates of the department. We note that none of the remaining information appears to be

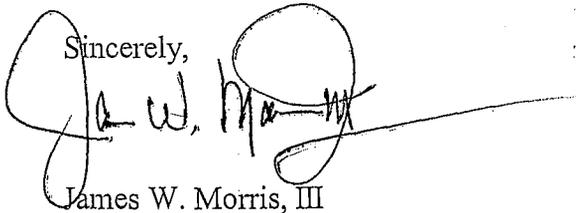
subject to section 552.029 of the Government Code. *See id.* § 552.029 (providing that eight specified categories of information about inmate confined in facility operated by or under contract with department are subject to required disclosure, notwithstanding Gov't Code §§ 508.313 and 552.134). Based on your representation and our review of the information at issue, we conclude that the department must withhold the rest of the submitted information under section 552.134 of the Government Code.

In summary: (1) the parole division records you have marked must be withheld under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code; (2) the inmate's correspondence you have marked must be withheld under section 552.101 in conjunction with constitutional privacy; and (3) the rest of the submitted information must be withheld under section 552.134 of the Government Code. As we are able to make these determinations, we do not address your other arguments against disclosure.

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](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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 372384

Enc: Submitted documents

c: Requestor  
(w/o enclosures)