



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

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

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

OR2010-04306

Dear Ms. Fleming and 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# 373775 (OIG ORR File No. 2010-00001).

The Texas Department of Criminal Justice (the "department") received two requests from the same requestor for information pertaining to the escape of a named department inmate. The department's Office of the General Counsel (the "OGC") and Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OGC states that it will release a portion of the requested information and claims that the information it has submitted to this office for review is excepted from disclosure under sections 552.107, 552.108, 552.111, and 552.134 of the Government Code. The OIG states that it will release basic information to the requestor. *See Gov't Code* §§ 552.029(8) (stating basic information regarding an alleged crime involving an inmate may not be withheld under section 552.134), 552.108(c) (stating basic information about arrested person, arrest, or crime may not be withheld under section 552.108); Open Records No. 127 (1976) (summarizing types of information considered to be basic information). In releasing basic information, the OIG states it will

make redactions pursuant to section 552.147 of the Government Code and the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).¹ The OIG claims the representative sample of information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, 552.130, 552.134, 552.137, and 552.147 of the Government Code.² We have considered the exceptions claimed and reviewed the submitted information.

Initially, we note a portion of the OGC's information, which we have marked, is not responsive to the instant request for information because it was created after the date the department received the request. This ruling does not address such non-responsive information, and it need not be released in response to this request.

Next, we note the OIG's information includes court-filed documents that are subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). Although the OIG seeks to withhold these court-filed documents under sections 552.103 and 552.108 of the Government Code, sections 552.103 and 552.108 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103), Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, sections 552.103 and 552.108 are not other law that makes information expressly confidential for the purposes of section 552.022(a)(17), and the court-filed documents at issue may not be withheld under those sections. However, we will consider the OIG's claims under sections 552.103 and 552.108 for the portions of the OIG's information that do not constitute court-filed documents. Additionally, because the court-filed documents at issue may be withheld under sections 552.101, 552.117, 552.1175, 552.130, 552.134, 552.137, and 552.147 of the Government Code, we will address the OIG's arguments for that information under those sections.

¹ Section 552.147(b) 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. Open Records Letter No. 2005-01067 serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former members of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

² We assume 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 those records contain substantially different types of information than that submitted to this office.

We first address the OIG's claim that the portions of its information not subject to section 552.022 may be withheld under section 552.108 of the Government Code. Section 552.108(a)(1) 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.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The OIG states the information at issue pertains to an investigation being conducted by an OIG investigator. We note that section 552.108 is generally not applicable to records of an internal investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). The OIG explains, however, that release of the information at issue "would seriously undermine [the department's] continuing criminal investigation." Further, the OIG states that file numbers SC.14.00243.2009.E2, SC.15.00248.2009.E2, SC.14.00249.2009.E2, IF.IS.00999.09.IS, 2009.03903, and 2009.03840 all pertain to the same escape incident and indicates that the nature and scope of the investigation, the evidence that has been collected to support the filing of charges, the witnesses, and the investigative techniques used by the OIG to pursue the investigation overlap in all of these files. Based on these representations, we conclude release of the information at issue 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 curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, the OIG may withhold the portions of its information not subject to section 552.022(a)(17), which we have marked, under section 552.108(a)(1) of the Government Code.

We next address the OIG's and OCG's claims under section 552.134 of the Government Code for portions of their respective information. Section 552.134(a) of the Government Code relates to inmates and former inmates of the department and provides in relevant part the following:

- (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 the following:

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:

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- (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). The OIG claims the entirety of its remaining information, and the OGC claims the information it has marked, consists of information about a department inmate for purposes of section 552.134. Based upon these representations and our review, we agree the OIG must withhold its remaining information under section 552.134. We also conclude that portions of the OGC's information, which we have marked, are subject to 552.134. However, we note that much of the OGC's information relates to an alleged crime involving an inmate in custody. Thus, basic information about this incident must be released pursuant to section 552.029. *Id.* For purposes of section 552.029(8), basic information includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. Furthermore, some of the OGC's information pertains to alleged misconduct by current or former department officers and employees. This disciplinary information does not constitute "information about an inmate" for purposes of section 552.134 and may not be withheld on that basis. Consequently, no part of the OGC's remaining information may be withheld under section 552.134 of the Government Code. Accordingly, with the exception of basic information, the OGC must withhold only the information we have marked under section 552.134.

The OGC claims a portion of its remaining information is subject to section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client

representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was “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). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The OGC states that the information it has marked under section 552.107 consists of communications between department attorneys and employees. The OGC states that these communications were made in furtherance of the rendition of legal services to the department, and informs this office that these communications have remained confidential. Based on the OGC’s representations and our review, we agree the information the OGC has marked under section 552.107 constitutes privileged attorney-client communications. Accordingly, the OGC may withhold this information under section 552.107(1) of the Government Code.

We note some of the OGC’s remaining information falls within the scope of section 552.117 of the Government Code.³ 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 of the Government Code. *Id.* § 552.117(a)(3). We note section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Therefore, the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code.

In summary, except for the court-filed documents that are subject to section 552.022(a)(17) of the Government Code, the OIG may withhold its information under section 552.108(a)(1)

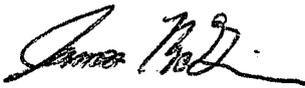
³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of the Government Code. The OIG must withhold its remaining information under section 552.134 of the Government Code. With the exception of basic information, the OGC must withhold the portions of its information we have marked under section 552.134 of the Government Code.⁴ The OGC may withhold the information it has marked under section 552.107(1) of the Government Code. The OGC must withhold the portions of its information we have marked under section 552.117(a)(3) of the Government Code. The OGC's remaining information must be released to the requestor.⁵

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

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 373775

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴ As our ruling is dispositive, we do not address any remaining claims for this information.

⁵We note the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023 (person has special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect person's privacy interests). Thus, if the department receives another request for this particular information from a different requestor, then the department should again seek a decision from this office.