



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2010

Mr. Larry Roberson
Assistant Criminal District Attorney
Bexar County Criminal District Attorney's Office
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2010-05389

Dear Mr. Roberson:

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# 376003.

The Bexar County Jail (the "jail") received a request for all paperwork related to a named inmate who died in custody on January 27, 2010 as well as another named inmate's jail file, including medical and disciplinary history, documented grievances, gang association contact sheets, gang classification sheets, and other information gathered pursuant to Chapter 61 of the Texas Code of Criminal Procedure. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the request for the named inmate's disciplinary history and documented grievances. To the extent information responsive to this portion of the request existed on the date the jail received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

You raise section 552.101 of the Government Code in conjunction with article 49.18(b) of the Code of Criminal Procedure for Exhibit B. 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 information protected by other statutes, such as article 49.18(b), which provides the attorney general shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Code Crim. Proc. art. 49.18(b). In May 2006, the attorney general revised the format of a custodial death report. The report now consists of four pages and an attached summary of how the death occurred. The attorney general has determined the four-page report and summary must be released to the public but that any other documents submitted with the revised report are confidential under article 49.18(b). You indicate the jail will release the four-page report and summary to the requestor. You state, however, all paperwork maintained by the jail on the deceased inmate, which you have submitted as Exhibit B, is part of the custodial death report and is therefore confidential under article 49.18(b). We note that article 49.18(b) does not make confidential all information held by the facility where the individual was incarcerated simply because the information is also attached to a custodial death report submitted to the attorney general. Open Records Decision No. 521 at 7 (1989) (stating facility may not engraft confidentiality afforded to records under article 49.18(b) to records that exist independently of custodial death report). If a governmental body receives a request for information otherwise generated or maintained as part of its ordinary responsibilities, those documents may be withheld only if one of the Act's exceptions or another specific law protects them. *Id.* In this instance, the requestor does not seek a copy of the custodial death report, but rather, seeks all paperwork pertaining to the named inmate. The documents you have submitted as Exhibit B are administrative and law enforcement records that are maintained separate and apart from the custodial death report. Accordingly, the documents in Exhibit B may not be withheld pursuant to article 49.18(b).

We note Exhibit B contains information about the deceased inmate's visitors. Section 552.101 of the Government Code also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has applied constitutional privacy to protect certain information related to 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 at 2. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. In that decision, 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 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. ORD 430. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. ORD 185; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Although the inmate at issue is deceased and his privacy rights lapsed at death, his visitors' separate privacy interests in their association with him are protected by constitutional privacy. Accordingly, the jail must withhold the inmate visitor information we marked in Exhibit B under section 552.101 of the Government Code in conjunction with constitutional privacy.

Exhibit B also contains criminal history record information that is confidential by statute. Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that 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. *See* Gov't Code § 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* Gov't Code §§ 411.090-.127. Furthermore, any CHRI obtained from the 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. Upon review, we find the inmate's Federal Bureau of Investigation ("FBI") number constitutes CHRI generated by the FBI which must be withheld pursuant to section 552.101 in conjunction with section 411.083 of the Government Code. We note because the laws that govern the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12.

You claim the document in Exhibit C is excepted from disclosure under section 552.101 in conjunction with article 61.03 of the Code of Criminal Procedure. Chapter 61 of the Code of Criminal Procedure deals with intelligence information pertaining to street gangs. Article 61.02 provides in part that "a criminal justice agency shall compile criminal information into an intelligence database for the purpose of investigating or prosecuting the criminal activities of criminal combinations or criminal street gangs." Crim. Proc. Code art. 61.02(a). Article 61.03 provides in relevant part:

(a) A criminal justice agency may release on request information maintained under [Chapter 61 of the Code of Criminal Procedure] to:

- (1) another criminal justice agency;
- (2) a court; or
- (3) a defendant in a criminal proceeding who is entitled to the discovery of the information under Chapter 39.

Id. art. 61.03(a). Further, article 61.05 of the Code of Criminal Procedure provides that release of the information to a person who is not entitled to the information is a Class A misdemeanor. You state the document in Exhibit C, which is an acknowledgment of gang affiliation form, is criminal gang information maintained and compiled by the jail in accordance with chapter 61. *See id.* art. 61.02(c)(2)(C) (stating submission criteria for criminal gang information). You assert the requestor is not entitled to the information under article 61.03. Based on your representations and our review of the information at issue, we conclude the jail must withhold the document in Exhibit C under section 552.101 of the Government Code in conjunction with article 61.03 of the Code of Criminal Procedure.

Next, you raise section 241.152 of the Health and Safety Code for documents in Exhibit D. Section 552.101 of the Government Code also encompasses section 241.152 of the Health and Safety Code, which states in relevant part:

(a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a

patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Health & Safety Code § 241.152(a). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." *Id.* § 241.151(2). Although you assert jail inmates receive medical treatment from the Bexar County Hospital District, you do not explain, nor does the information at issue reflect, how the documents in Exhibit D are the inmate's hospital medical records. Rather, these documents, which contain, among other things, references to the inmate's religious affiliation, educational background, and vocational skills, are routine booking records created and maintained by the jail for law enforcement purposes. Thus, we find you have failed to establish Exhibit D is confidential under section 241.152 of the Health and Safety Code, and Exhibit D may not be withheld under section 552.101 of the Government Code on that basis.

We note, however, some of the information in Exhibit D is protected from disclosure under the doctrine of common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. The types of information considered intimate or 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. *See id.* at 683. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps).* We find the information in Exhibit D that reflects whether the named inmate has certain medical or mental health issues is not of legitimate public concern. Therefore, the jail must withhold the information we marked in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the jail must withhold the inmate visitor information we marked in Exhibit B under section 552.101 of the Government Code in conjunction with constitutional privacy. The jail must withhold the FBI numbers we marked in Exhibit B under section 552.101 in conjunction with chapter 411 of the Government Code. The jail must withhold Exhibit C under section 552.101 in conjunction with article 61.03 of the Code of Criminal Procedure. The jail must withhold the marked portions of Exhibit D under section 552.101 in conjunction with common-law privacy. The remaining information must be released.

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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 376003

Enc. Submitted documents

c: Requestor
(w/o enclosures)