ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 17, 2010

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

OR2010-07061

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# 379525 (OIG Open Records No. 2010-00041).

The Texas Department of Criminal Justice's (the "department") Office of the Inspector General (the "OIG") received a request for all files involving the requestor. You state the OIG will release basic information to the requestor. *See* Gov't Code § 552.029(8) (stating that, notwithstanding provisions of Gov't Code § 552.134, basic information regarding death of inmate in custody, incident involving use of force, or alleged crime involving inmate is subject to required public disclosure).[1] In releasing basic information, you state the OIG will make redactions pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).[2] You also state that six responsive records have been

[1]Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident.

[2]Open 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 section 552.301(a) of the Government Code).

destroyed pursuant to the department's record retention schedule.[3] You state the OIG will release destruction information on these six records. You claim the submitted records are excepted from disclosure under sections 552.101, 552.108, 552.117, 552.134, 552.147, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 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. We note a portion of the submitted information is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs the public availability of medical records. Section 159.002 of the MPA provides in part:

> (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(b)-(c). This office has concluded that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002,.004; Open Records Decision No. 598 (1991). This office has concluded 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). This office has also determined when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. We have marked the

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[3]We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

information that constitutes medical records subject to the MPA. In this instance, the requestor is one of the individuals whose medical information is at issue. Thus, the medical records we have marked must be withheld, unless the OIG receives written consent for release of those records that complies with the MPA.

Section 552.134 of the Government Code, which relates to inmates and former inmates of the department, provides, in relevant part:

> (a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] is excepted from the requirements of Section 552.021 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:

> [n]otwithstanding [s]ection . . . 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] 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). The submitted information consists of investigations of allegations of the alleged mistreatment of inmates confined in a facility operated by or under contract with the department. Thus, we agree portions of the remaining information, which we have marked, are subject to section 552.134. We note, however, portions of the remaining information concern alleged use of force incidents involving inmates. Under section 552.029(8) of the Government Code, basic information regarding a use of force may not be withheld under section 552.134. Basic information includes, among other things, names of inmates directly involved in the incident. Therefore, the inmates' identifying information is subject to release under section 552.029(8) and may not be withheld under section 552.134. A portion of the submitted documents, however, are pages from the inmates' institutional files. These pages are information about individuals confined as inmates in a facility operated by the department and are, therefore, subject to section 552.134. We find the exceptions in section 552.029 are not applicable to these pages. Therefore, these pages, which we have marked, must be withheld under section 552.134.[4] The remaining information concerns the

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

requestor's employment with the department. Such information does not constitute "information about an inmate" for purposes of section 552.134. Thus, no portion of the remaining information may be withheld on that basis.

Section 552.108(b)(1) 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*, 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 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 generally assert the submitted documents contain investigative techniques employed by the OIG. You have not, however, identified these techniques or explained how release of any specific procedures or techniques contained in the submitted documents will interfere with law enforcement. You also assert gang information is protected under section 552.108(b)(1). You explain this sort of information could "serve as the key to an escape, an abduction[,] or some other criminal act." Based on these representations and our review of the information at issue, we agree the release of the information we marked would interfere with law enforcement. Accordingly, the OIG may withhold the information we marked under section 552.108(b)(1). However, we find that the OIG has failed to demonstrate the applicability of section 552.108(b)(1) to the remaining information. Accordingly, no portion of the remaining information may be withheld under section 552.108(b)(1).

Section 552.101 of the Government Code also encompasses the common-law right of 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668

(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 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 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we conclude the OIG has failed to demonstrate how any of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the OIG may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

We note a portion of the remaining information is subject to section 552.136 of the Government Code.[5] Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to...obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we conclude the bank account number we have marked must be withheld under section 552.136.[6]

In summary, the OIG must withhold (1) the marked medical records , unless the department receives written consent for release of those records that complies with the MPA; (2) the information we have marked under section 552.134 of the Government Code; and (3) the bank account number we have marked under section 552.136 of the Government Code. The OIG may withhold the information we have marked under section 552.108(b)(1). The remaining information must be released.

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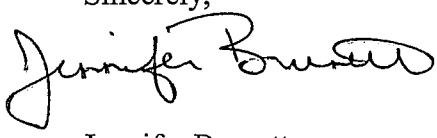
[5]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[6]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 379525

Enc. Submitted documents

c: Requestor
(w/o enclosures)