



ATTORNEY GENERAL OF TEXAS  
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October 12, 2010

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OR2010-09129A

Dear Ms. Fleming and Mr. West:

This office issued Open Records Letter No. 2010-09129 (2010) on June 22, 2010. In that ruling, we determined that because the Texas Department of Criminal Justice's Office of the Inspector General (the "OIG") failed to submit information responsive to items one, five, or six of the request, it must release such information to the extent it exists. Further, we found the information submitted by the OIG may be withheld under section 552.108(a)(1) of the Government Code. Since that date, the Texas Department of Criminal Justice's Office of the General Counsel (the "OGC") has provided information responsive to item five of the request and now makes arguments against its disclosure. Accordingly, we hereby withdraw the prior ruling. *See Gov't Code §§ 552.306, .352.* This decision serves as the corrected ruling and is substituted for Open Records Letter No. 2010-09129. *See generally id.* § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act). Your request was assigned ID# 398008.

The Texas Department of Criminal Justice (the "department") received a request for six categories of information pertaining to certain department policies and a specified investigation. The OGC and OIG have submitted separate briefs to this office. The OGC claims the information it has submitted is excepted from disclosure under section 552.134 of the Government Code. The OIG states it plans to release basic information from the information it has submitted.<sup>1</sup> *See id.* §§ 552.029(8) (stating basic information regarding an alleged crime involving an inmate may not be withheld under section 552.134), .108(c) (stating basic information about arrested person, arrest, or crime may not be withheld under section 552.108); Open Records Decision 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 to the department in Open Records Letter No. 2005-01067 (2005).<sup>2</sup> The OIG claims the remaining information it has submitted is excepted from disclosure under sections 552.108 and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code* § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we note neither the OGC nor the OIG have submitted information responsive to item one or item six of the request, pertaining to department policies. To the extent information responsive to these portions of the request existed on the date the OGC or OIG received this request, we assume it has been released. If the OGC or OIG have not released any such information, it must be released at this time. *See id.* §§ 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).

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<sup>1</sup>We note the requestor has a special right of access to some of the information being released in this instance. *See Gov't Code* § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because such information may be confidential with respect to the general public, if the department receives another request for this information from an individual other than this requestor, it should again seek a ruling from this office. *See Gov't Code* §§ 552.301, .302.

<sup>2</sup>Section 552.147(b) 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. 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).

Next, the OGC acknowledges the department failed to comply with section 552.301 of the Government Code with respect to the information submitted by the OGC. Gov't Code § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Because section 552.134 of the Government Code can provide a compelling reason to withhold information, we will consider the OGC's argument under this exception for the information it failed to timely submit. Furthermore, we will still address the OIG's claim under sections 552.108 and 552.134 for the information it timely submitted.

Section 552.108(a) 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov't Code § 552.108(a)(1). The OIG asserts the information it submitted as Exhibit C relates to an open criminal investigation by OIG investigators, and that the release of anything other than basic information would seriously compromise the investigation. 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.” We note the requestor contends there is no ongoing criminal investigation by the department. Whether or not the requested information relates to a pending criminal case is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Therefore, based upon this representation, we conclude the release of Exhibit C 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 department may withhold Exhibit C pursuant to section 552.108(a)(1) of the Government Code.<sup>3</sup>

The OGC raises section 552.134 of the Government Code for the information it has submitted. Section 552.134, 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 [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:

[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 OGC asserts the records it has submitted, as well as the accompanying video recordings, consist of information about inmates confined in a facility operated by the department. Upon review, we find portions of this information contain the identifying information of inmates, which are subject to section 552.134. Therefore, the department must withhold the information we have marked in the information submitted by the OGC under section 552.134(a). However, some of the information at issue concerns alleged crimes involving inmates. Under section 552.029(8) of the Government Code, basic information regarding an alleged crime involving an inmate 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. Further, we note the remaining information submitted by the OGC pertains to an investigation of a current or former department employee. Thus, the OGC has failed to demonstrate how this information is about an inmate. Accordingly, no portion of the remaining information submitted by the OGC may be withheld under section 552.134.

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<sup>3</sup>As our ruling is dispositive, we need not address the OIG's remaining argument against disclosure.

We note some of the remaining information submitted by the OGC is subject to section 552.101 of the Government Code.<sup>4</sup> 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. Section 552.101 encompasses the doctrine of 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 *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). 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 (5th Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See Open Records Decision No. 455 at 7 (1987). 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). 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. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. In Open Records Decision No. 185, 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 which 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. ORDs 430, 428. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see ORD 430 (list of inmate visitors

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

protected by constitutional privacy of both inmate and visitors). Upon review, we find that portions of the remaining information submitted by the OGC fall within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the inmate visitor and correspondent information we have marked must be withheld from the remaining information submitted by the OGC under section 552.101 in conjunction with constitutional privacy.

In summary, the department may withhold the information submitted by the OIG, Exhibit C, under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked in the information submitted by the OGC under section 552.134 of the Government Code. The department must withhold the inmate visitor and correspondent information we have marked in the remaining information submitted by the OGC under section 552.101 in conjunction with constitutional 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](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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/tp

Ref: ID# 398008

Enc. Submitted documents

c: Requestor  
(w/o enclosures)