



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2011

Mr. John C. West
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Office of the Inspector General
Texas Department of Criminal Justice
4616 Howard Lane, Suite 250
Austin, Texas 78728

OR2011-01929

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# 408516 (OIG Open Records 2010-00258).

The Texas Department of Criminal Justice's (the "department") Office of the Inspector General (the "OIG") received a request for investigative file number SC.14.00085.2010.HQ. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.1175, 552.134, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information consists of a completed investigation that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you claim portions of this investigation are subject to section 552.107(1) of the Government Code, that section protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107(1) is not "other law" that makes information confidential for purposes of section 552.022. Accordingly, no submitted

information may be withheld under section 552.107(1) of the Government Code. However, the attorney-client privilege in Texas Rule of Evidence 503 is "other law" for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (addressing applicability of rule 503 to information encompassed by section 552.022). Therefore, we will consider your attorney-client privilege argument under Texas Rule of Evidence 503. Because sections 552.101, 552.117, 552.1175, and 552.134 of the Government Code are "other law" for purposes of section 552.022, we will also consider your claims under those exceptions. We also note some information is subject to sections 552.102, 552.130, 552.136, and 552.137, which are "other law" for purposes of section 552.022.¹ Additionally, we will consider your argument under section 552.108 because information subject to section 552.022(a)(1) may be withheld under that exception.

Rule 503(b)(1) of the Texas Rules of Evidence provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). When asserting the attorney-client privilege, a

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. *See* ORD 676 at 6-7.

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, you have marked a legal opinion under the attorney-client privilege. You state this document was communicated between OIG's general counsel and an OIG supervisor who was reviewing the investigation. You state the purpose of this communication was to render legal advice to OIG's management. You also state the communication was only intended to be used by OIG personnel and has only been shared among such personnel and OIG counsel. Therefore, based on your representations and our review, we conclude the OIG may withhold the document we marked under rule 503.

Section 552.134 of the Government Code relates to inmates of the department and provides in relevant part as follows:

(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.

(b) Subsection (a) does not apply to:

....

(2) information about an inmate sentenced to death.

Gov't Code § 552.134(a), (b)(2). In this instance, most of the submitted information pertains to the conduct of current or former department employees. As such, most of the submitted information may not be withheld under section 552.134. However, upon review, we marked the information that pertains to individuals confined as non-death row inmates in a facility operated by the department. We find this information is subject to section 552.134. We also

find the exceptions in section 552.029 are not applicable in this instance. Therefore, the OIG must withhold the marked information under section 552.134(a) of the Government Code. We note a portion of the remaining information relates to an inmate who is on death row. Section 552.134 is not applicable to information about such an inmate, and this individual's information may not be withheld on that basis. *See id.* § 552.134(b)(2).

You raise section 552.108(b)(1) of the Government Code for portions of the remaining information. This section excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution[.]" *Id.* § 552.108(b)(1); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information which, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement and crime prevention. *See Gov't Code* §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding predecessor to section 552.108 excepts detailed guidelines regarding police department's use of force policy), 508 (1988) (holding the release of dates of prison transfer could impair security), 413 (1984) (holding predecessor to section 552.108 excepts sketch showing security measures for execution). However, this section is not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). You contend that the submitted records include information relating to security threat groups, investigative techniques, and unit security and operations. Based on your arguments, we have marked information relating to security threat groups, the release of which you have established would interfere with law enforcement. The OIG may withhold this marked information under section 552.108(b)(1). However, you have not provided any arguments demonstrating how the release of any specific portions of the remaining information would interfere with law enforcement or crime prevention. *See Gov't Code* § 552.301(e)(1)(A). We therefore conclude that the OIG may not withhold any of the remaining information under section 552.108(b)(1).

The OIG also raises section 552.108(b)(2) of the Government Code for the remaining information. Section 552.108(b)(2) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates

to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” *Id.* § 552.108(b)(2). However, you provide no arguments explaining how the information at issue relates to a criminal investigation that concluded in a result other than conviction or deferred adjudication. We therefore conclude the OIG may not withhold any of the remaining information at issue under section 552.108(b)(2) of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

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 common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type 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. Upon review, we have marked the portions of the submitted information that reveal information we find to be highly intimate or embarrassing and of no legitimate public interest. The OIG must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy. You do not explain, however, how the remaining information at issue is highly intimate or embarrassing such that it is confidential under common-law privacy. Thus, none of the remaining information may be withheld under section 552.101 on that basis.

Some of the remaining information falls within the scope of section 552.117 of the Government Code. 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. Gov’t Code § 552.117(a)(3). We note that section 552.117(a)(3) protects an employee’s personal cellular

telephone or pager number if the employee pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Therefore, the OIG must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code, but may only withhold the marked cellular telephone numbers if the service for those numbers is paid for with the employees' personal funds. To the extent any of the cellular telephone numbers are paid for by the department, they must be released.

Section 552.1175 of the Government Code provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(7), (b). The remaining information includes the cellular telephone number of an individual identified as an employee of the Federal Bureau of Investigation. If this individual is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure who elects to restrict access to his personal cellular telephone number in accordance with section 552.1175(b), and cellular service for the number at issue is paid for with the individual's own funds, then the OIG must withhold the marked number under section 552.1175 of the Government Code. However, if this individual is not a criminal investigator, does not properly elect to restrict access to this number, or does not pay for the cellular telephone service with his own funds, the cellular telephone number we marked under section 552.1175 must be released.

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130(a). The OIG must withhold the Texas motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides in part that “[n]otwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we have marked cellular telephone account numbers in the submitted information. The OIG must withhold these numbers under section 552.136 of the Government Code.

The remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 provides “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We marked private e-mail addresses in the remaining information. These e-mail addresses are not specifically excluded by section 552.137(c). Accordingly, the OIG must withhold the marked e-mail addresses under section 552.137, unless the owners of the e-mail addresses consent to their disclosure.

In summary, the OIG may withhold the information we marked under Texas Rule of Evidence 503. The OIG must withhold the information we marked under section 552.134 of the Government Code. The OIG may withhold the information we marked under section 552.108(b)(1) of the Government Code. The OIG must withhold the information we marked under section 552.102(a) of the Government Code and under section 552.101 of the Government Code in conjunction with common-law privacy. The OIG must also withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code, but may only withhold the marked cellular telephone numbers if the service for those numbers is paid for with the employees’ personal funds. The OIG must withhold the cellular telephone number we marked under section 552.1175(a)(7) of the Government Code if the individual to whom the number pertains is a criminal investigator as described by article 2.122(a) of the Code of Criminal Procedure, elects to restrict access to his personal cellular telephone number in accordance with section 552.1175(b) of the Government Code, and pays for the cellular service with his own funds. Finally, the OIG must withhold the information we marked under sections 552.130 and 552.136 of the Government Code, as well as the e-mail addresses we marked under section 552.137 of the Government Code

unless the owners of the e-mail addresses consent to their release.² The remaining information must be released.³

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/em

Ref: ID# 408516

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including Texas driver's license and Texas license plate numbers under section 552.130 of the Government Code, and e-mail addresses of members of the public under section 552.137 of the Government Code.

³The remaining information includes the social security number of a volunteer. 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. Gov't Code § 552.147(b).