



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2011

Mr. James Mu
Assistant General Counsel
Texas Department of Criminal Justice
Office of General Counsel
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2011-06996

Dear Mr. Mu:

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# 417983.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to an investigation of a fire that occurred at a specified location. You state some of the requested information has been or will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2008-06594 (2008). In that ruling, we determined the department must withhold the information we marked under sections 552.134 and 552.117(a)(3) of the Government Code and must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent

the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department must rely on Open Records Letter No. 2008-06594 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You assert portions of the submitted information are subject to section 552.134 of the Government Code. Section 552.134 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). You state the information at issue consists of information about inmates who are confined in a facility operated by the department. You state the information at issue is not made public by section 552.029 of the Government Code. Thus, we agree portions of the information at issue, which we have marked, are subject to section 552.134 of the Government Code. Therefore, the department must withhold the information we have marked under section 552.134 of the Government Code.¹ However, we find the remaining information at issue consists of general investigative materials and an investigative report pertaining to the fire or concerns department employees, and thus does not constitute information about an inmate confined in a facility operated by the department for the purposes of section 552.134. Accordingly, the remaining information may not be withheld under section 552.134.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses constitutional privacy, which 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 No. 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

¹As our ruling is dispositive with respect to some of the information at issue, we need not address your remaining argument under section 552.101 against disclosure of this 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 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 those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure." This office ruled this right would be violated by the release of information that identifies those correspondents because such a release would discourage correspondence. See ORD 185. The information at issue in this ruling 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 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. Further, we recognized inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See also 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 protected by constitutional privacy of both inmate and visitors). Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy.

Next, you claim a portion of the remaining information is excepted from disclosure under section 552.108(b) of the Government Code. Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency 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." Gov't Code § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. See *id.* § 552.301(e)(1)(A); see also *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 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).

This office has on numerous occasions concluded 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 that predecessor to section 552.108 excepts detailed guidelines regarding police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution).

In this instance, you argue release of a portion of the submitted information, which you have marked, would cause "an undermining of security on the unit that will jeopardize the safety of inmates, guards and the general public[.]" You state the information at issue reveals information regarding how to escape and conduct illegal activities during a fire evacuation. You argue "making the requested plan available would ultimately interfere with [y]our ability to operate safe and secure facilities, and thereby interfere with [y]our ability to perform [y]our law enforcement duty to provide secure and safe facilities[.]" Based on your arguments and our review, we conclude release of most of the information at issue, which we have marked, would interfere with law enforcement and crime prevention. Therefore, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated how release of the remaining information at issue would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). Thus, the department may not withhold the remaining information at issue under section 552.108(b)(1) of the Government Code.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department must rely on Open Records Letter No. 2008-06594 as a previous determination and withhold or release the identical information in accordance with that ruling. The department must withhold the information we have marked under section 552.134 of the Government Code and the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy. The department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. 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,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 417983

Enc. Submitted documents

c: Requestor
(w/o enclosures)