



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2011

Ms. Laura Garza Jimenez
Nueces County Attorney
Nueces County Courthouse
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2011-07173

Dear Ms. Jimenez:

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# 418168.

The Nueces County Sheriff (the "sheriff") received a request for telephone call recordings, written telephone call logs, the visitor log, and the mail log regarding a named Nueces County Jail inmate during a specified time period; any records regarding a second named inmate; and the name and employee number of the jailer who would have taken a specified letter. You state the sheriff does not have a visitor log regarding the named inmate.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted any records regarding the second named inmate. To the extent information responsive to this portion of the request existed on the date the sheriff received the 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 no exceptions apply to requested information, it must release information as soon as possible).

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Next, we note the submitted documents contain information regarding inmates other than those specified by the requestor and information regarding the jailer other than the jailer's name and employee number. This information is therefore not responsive to the request. This ruling does not address the public availability of non-responsive information, and the sheriff is not required to release non-responsive information in response to this request.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses section 261.201 of the Family Code, which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You have marked a portion of the submitted information as confidential under section 261.201. However, the information at issue relates to the incarceration of an individual and is unrelated to any child abuse or neglect. *See id.* § 261.001(1), (4) (definition of "abuse" and "neglect" for purposes of chapter 261 of the Family Code), *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). We find you have failed to adequately demonstrate how the information at issue involves a report of alleged or suspected child abuse or neglect made under chapter 261, or how this information was used or developed in an investigation under chapter 261. Accordingly, we conclude the sheriff may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

Section 552.101 also encompasses the constitutional right to privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S.589, 599-600 (1977); *see also* 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 Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); *see also* ORD 455 at 3-7. 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); see also ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. 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 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 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 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 Open Records Decision No. 185, our office found "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 that could also be threatened if their names were released. ORD 428 at 4; *see generally* ORD 185. 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). Upon review, we find the telephone numbers of recipients of the inmate's telephone calls, recordings of those telephone calls, and the names of correspondents with the inmate fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy. Accordingly, the sheriff must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with constitutional privacy.² However, none of the remaining information falls within the zones of privacy or implicates an individual's privacy interests, and the sheriff may not withhold it on that basis.

You raise section 552.103 of the Government Code for the remaining information. Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation. Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of governmental body claiming exception). You contend the remaining information at issue pertains to a currently pending criminal case. We note the sheriff is not a party to the criminal proceeding and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You inform us a charge of "Sex Offenders Failure to Comply/Register Life/90 Day" has been presented to the Nueces County District Attorney (the "district attorney") for prosecution. However, you do not explain, nor do you provide a representation from the district attorney explaining, how the remaining information relates to this pending criminal litigation. See Gov't Code § 552.301(e)(1) (requiring governmental body to explain why raised exceptions apply); Open Records Decision No. 638 at 3 (1996) (requiring governmental body "to explain or describe how the requested information relates to" litigation). Therefore, we conclude you have failed to establish section 552.103 is applicable to the remaining information. Accordingly, the sheriff may not withhold the remaining information under section 552.103 of the Government Code.

You also raise section 552.108 of the Government Code for the remaining information. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime ... if ... release of the information would interfere with the detection, investigation, or

prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The remaining information consists of administrative records. We note section 552.108 is generally not applicable to purely administrative records that do 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.). You provide an affidavit from a sheriff’s deputy stating “[t]he alleged incident . . . is currently under investigation,” and the case has been presented to the district attorney for prosecution against the named inmate. However, the remaining information pertains to the named inmate’s confinement in the Nueces County Jail. You do not explain how this administrative information relates to the charge of “Sex Offenders Failure to Comply/Register Life/90 Day,” nor do you explain how release of this information would interfere with the detection, investigation, or prosecution of crime. Thus, we find you have failed to establish the applicability of section 552.108(a)(1) of the Government Code to the remaining information. Accordingly, we find the remaining information is not subject to section 552.108, and the sheriff may not withhold it on that basis.

In summary, the sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy. The sheriff must release the remaining responsive information.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 418168

Enc. Submitted documents

c: Requestor
(w/o enclosures)