ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2011

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

OR2011-09897

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# 423477 .

The Texas Department of Criminal Justice's Office of the Inspector General (the "department") received a request for information pertaining to the requestor, a former department employee. You state the department will redact social security numbers pursuant to section 552.147 of the Government Code.[1] You state the department will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, and 552.134 of the

[1]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). We note, however, the requestor has a right of access to her own social security number and it may not be withheld under section 552.147. *See generally id.* § 552.023(b) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests).

Government Code.[2] We have considered the exceptions you claim and reviewed the submitted information.

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 or 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. Generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* ORD 393, 339; *see also* ORD 440 (detailed descriptions of serious sexual offenses must be withheld). You claim case file 2005-1449, which pertains to a sexual assault investigation, is confidential in its entirety pursuant to common-law privacy.[3] In this instance, case file 2005-1449 indicates that the requestor knows the identity of the alleged sexual assault victim. Thus, withholding only the victim's identifying information from the requestor would not preserve the victim's common-law right to privacy. Accordingly, to protect the victim's privacy, the information we have marked pertaining to case file 2005-1449 must be withheld in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy.[4]

Section 552.101 of the Government Code also encompasses information that other statutes make confidential, such as article 20.02(a) of the Code of Criminal Procedure, which provides that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define "proceedings" for purposes of

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[2]Although, you raised section 552.114 of the Government Code as an exception to disclosure of the requested information, you have provided no arguments regarding the applicability of this section. Since you have not submitted arguments concerning this exception, we assume that you no longer urge it. *See* Gov't Code §§ 552.301(b), (e), .302

[3]Although you list the case number as 2005-1447 in your brief, we note the documents reveal the case number is actually 2005-1449.

[4]As our ruling is dispositive, we need not address your remaining argument against the disclosure of the information we marked under common-law privacy.

subsection (a). Therefore, we have reviewed case law for guidance and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes "proceedings" for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding). The court further stated that the term "proceedings" could "reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations." *Id.* at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See Id.* at 276; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02(h); FED. R. CRIM. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."). Article 20.02(h) states that "[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute "necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.* Because subsection (h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute "necessary to prevent the unauthorized disclosure of a matter before the grand jury" for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee's note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret "for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.*

Upon review of the information pertaining to case number 2006-2430, it appears the investigation has been closed with no criminal charges. Additionally, you have not submitted any arguments explaining how the matter upon which the submitted subpoenas were based is still "before the grand jury" to warrant keeping the subpoena and documents gathered in response to the subpoena secret. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes the submitted documents gathered in response to a grand jury subpoena confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, none of the remaining information may be withheld under article 20.02 of the Criminal Code of Procedure.

You claim the remaining information is excepted under section 552.134 of the Government Code, which relates to inmates of the department. This exception provides in relevant part:

> (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.

Gov't Code § 552.134(a). You assert that the remaining records consist of information about inmates confined in a facility operated by the department. Upon review, we agree that some of the remaining information pertains to inmates confined in a facility operated by the department. Accordingly, the department must withhold the information we have marked under section 552.134 of the Government Code.[5] The remaining information, however, pertains to investigations into alleged misconduct by a department employee and not information pertaining to an inmate. Thus, section 552.134 is not applicable to the remaining information, and the department may not withhold it on that basis.

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

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[5]As our ruling is dispositive for the information we marked under section 552.134 of the Government Code, we need not address your remaining arguments against the disclosure of that information.

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 department 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 department may not withhold any of the remaining information under section 552.108(b)(1).

The department 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 department may not withhold any of the remaining information at issue under section 552.108(b)(2) of the Government Code.

You assert some of the remaining information is subject to section 552.117(a)(3) of the Government Code, which excepts from disclosure the home address, home telephone number, family member information, and emergency contact information of a current or former employee 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. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(3)). In Open Records Letter No. 2005-01067 (2005), this office issued a previous determination that authorizes the department to withhold social security numbers and other personal information relating to its current or former employees under section 552.117(a)(3) without requesting an attorney general decision. We note, however, that the only remaining personal information pertaining to a current or former department employee is information pertaining to the requestor. Because this exception protects personal privacy, the requestor has a right of access to her own personal information under section 552.023 of the Government Code. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987). Therefore, the requestor's personal information may not be withheld under section 552.117(a)(3) of the Government Code and must be released.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.134 of the Government Code. The department may withhold the information we

marked under section 552.108(b)(1) of the Government Code. The remaining information must be released to this requestor.[6]

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,

Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/em

Ref: ID# 423477

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[6]We note that the requestor has a special right of access to some of the information being released in this instance, such as her personal information and her date of birth. Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.