



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2011

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OR2011-11549

Dear Ms. Fleming and 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# 426504.

The Texas Department of Criminal Justice (the "department") received a request for any complaints, grievances, reports, and investigations pertaining to a named former employee. The department's Office of General Counsel (the "OGC") and Office of the Inspector General (the "OIG") have submitted separate correspondence to this office, as well as separate responsive records each seeks to withhold from disclosure. The OGC states some of the requested information will be made available to the requestor. The OIG states it will withhold certain addresses, telephone numbers, social security numbers, and personal family information pursuant to sections 552.117 and 552.147(b) of the Government Code, as well as the previous determination issued by this office in Open Records Letter No. 2005-01067

(2005).¹ The OIG further states it will withhold the submitted employee shift rosters pursuant to the previous determination in Open Records Letter No. 2004-6370 (2004). The OGC claims its submitted information is excepted from disclosure under section 552.107 of the Government Code. The OIG claims its submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.130, 552.134, and 552.137 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we address the OGC's claims under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

¹The OIG states that it is withholding the addresses, telephone numbers, social security numbers, and family member information of department employees that are excepted under section 552.117(a)(3) and the previous determination set forth in Open Records Letter No. 2005-01067 (2005).

The OGC states its submitted information consists of a communication between an OGC attorney and department employees. The OGC states this communication was made for the purpose of facilitating the rendition of legal services to the department. The OGC states this communication was made in confidence and has remained confidential. Based on these representations and our review, we find the information at issue consists of an attorney-client privileged communication. Accordingly, the department may withhold the OGC's submitted information under section 552.107(1) of the Government Code.

Next, we turn to the OIG's assertion its submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-03398 (2011). In that ruling, we determined OIG report number 2009-02376 must be withheld in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy because the information pertained to a sexual assault, and the requestor knew the identity of the victim. However, in this instance the OIG has not demonstrated, nor does the submitted information reflect, the present requestor knows the identity of the alleged sexual assault victim. Thus, we find that the circumstances have changed with regard to the information at issue, and the department may not continue to rely on Open Records Letter No. 2011-03398 as a previous determination in this instance. *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). Accordingly, we will consider the OIG's claimed exceptions against disclosure of OIG report number 2009-02376.

We next note OIG report number 2009-2376 consists of a completed investigation. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Although the OIG asserts this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the OIG may not withhold OIG report number 2009-2376 under section 552.103 of the Government Code. However, sections 552.101, 552.102, 552.130, 552.134, and 552.137 of the Government Code constitute "other law" for purposes of section 552.022. Therefore, we will consider whether these sections require the OIG to withhold any of the information subject to section 552.022(a)(1).

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 section 1324a of title 8 of the United States

Code, which governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Accordingly, we conclude the submitted I-9 form and its attachments, which we have marked, are confidential for purposes of section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. *See* 8 U.S.C. § 1324a(b)(1)(B)-(D); 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C).

Section 552.101 also encompasses section 411.153 of the Government Code, which provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov’t Code § 411.153. A “DNA record” means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6)-(7). “Forensic analysis” is defined as “a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action.” *See* Crim. Proc. Code art. 38.35(4); *see also* Gov’t Code § 411.141(10) (providing that “forensic analysis” has meaning assigned by Crim. Proc. Code art. 38.35). A “DNA database” means “one or more databases that contain forensic DNA records maintained by the director [of the Texas Department of Public Safety (the “DPS”).]” Gov’t Code § 411.141(5); *see id.* § 411.001(3).

The director of the DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), .142(h) (requiring director to establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C. § 28.82(a). The DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov’t Code § 411.147(b).

In this instance, the OIG’s remaining information contains DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code.

The documents in question are contained in records of a criminal investigation. The documents appear to be the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. Therefore, the department must withhold the DNA records we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.²

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). The remaining information contains fingerprints. There is no indication the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Therefore, the department must withhold the fingerprints we have marked in the OIG’s submitted information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See Occ. Code* §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision* Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find none of OIG’s remaining information constitutes a medical

²As our ruling is dispositive, we need not address the OIG’s remaining arguments against disclosure of this information.

record for purposes of the MPA. Therefore, none of OIG's remaining information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners] Board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The OIG has submitted information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the common-law right to privacy, which protects information if it (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 met.

Id. at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). The submitted report relates to an alleged sexual assault. You argue the report should be withheld in its entirety. 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 all of the information at issue when the requestor knows the identity of the alleged sexual assault victim. *See* ORD 393. As previously noted, although the OIG seeks to withhold the submitted report in its entirety, the OIG has not demonstrated, nor does the information reflect, the requestor in this instance knows the identity of the alleged sexual assault victim. Thus, the department may not withhold the submitted report in its entirety under common-law privacy. However, we find the alleged victim's identifying information, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the OIG must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.³

The OIG claims portions of its submitted information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 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). 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. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.108(b)(1) of the Government Code 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Gov't Code § 552.108(b)(1) protects information that, 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). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.,* Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch

³As our ruling is dispositive, we need not address the OIG's remaining arguments against disclosure of this information.

showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See e.g.* Open Records Decision Nos. 531 at 2-3 (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).

The OIG states the submitted employee logs relate to the day-to-day management of incarcerated felons. The OIG contends this information could be used in the planning and execution of a crime or in facilitating an escape. Upon review, we find the OIG has demonstrated release of the submitted employee logs would interfere with law enforcement or crime prevention. We therefore conclude the OIG may withhold the submitted employee logs under section 552.108(b)(1) of the Government Code.⁴

The OIG asserts its remaining information is subject to section 552.134 of the Government Code. Section 552.134 of the Government Code is applicable to information relating to current or former inmates of the department. Section 552.134(a) provides as follows:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], 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 552.029 of the Government Code provides in part:

Notwithstanding Section 508.313 [of the Government Code] or [section] 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 [of the Government Code]:

...

(8) basic information regarding . . . an alleged crime involving the inmate.

Id. § 552.029(8). Thus, section 552.134 is explicitly made subject to section 552.029. In this instance, the submitted records contain information regarding an alleged crime involving the inmate. Thus, the department must release basic information regarding the alleged crime

⁴Although the OIG raises section 552.108 for specified photographs and "Security Threat Group" identifying information, we note the OIG has not submitted information that falls within these two categories of information. Accordingly, we do not address the OIG's arguments for this information under section 552.108 of the Government Code.

involving the inmate pursuant to section 552.029 of the Government Code. Basic information includes the time and place of the incident, the names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. Upon review, 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 in the OIG's submitted information under section 552.134 of the Government Code.⁵ However, we find the remaining information at issue consists of general investigative materials and investigative reports pertaining to the incident at issue and the named former officer, 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 OIG's remaining information, including the basic information which must be released under section 552.029, may not be withheld under section 552.134 of the Government Code.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The department must withhold the motor vehicle record information we have marked in the OIG's submitted information under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The department must withhold the personal e-mail addresses we have marked in the OIG's submitted information under section 552.137, unless the owners of the addresses have affirmatively consented to their release.

In summary, the department may withhold the OGC's submitted information under section 552.107(1) of the Government Code. The department may only release the submitted I-9 form and its attachments, which we have marked, in compliance with the federal laws and regulations governing the employment verification system. The department must withhold the submitted DNA records we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code. The department must withhold the information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. The department must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Government Code. The department must withhold the information we have marked

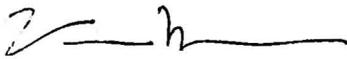
⁵As our ruling is dispositive for this information, we need not address the OIG's remaining argument against disclosure of this information.

under section 552.101 in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.102(a) of the Government Code. The department may withhold the submitted employee logs under section 552.108(b)(1) of the Government Code. The department must withhold the information we have marked under section 552.134 of the Government Code. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The remaining information must be released.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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 426504

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including I-9 forms under section 1342a of title 8 of the United States Code; a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; Texas driver's license numbers under section 552.130 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.