



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2010

Ms. Patricia Fleming
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
2616 West Howard Lane, Suite 250
Austin, Texas 78728

OR2011-12546

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# 428404.

The Texas Department of Criminal Justice (the "department") received a request for information contained in the personnel file of a named individual and for information in which the named individual is listed as a suspect, person of interest, or accomplice, including the nature of the incident and any conclusive findings.¹ The department's Office of General

¹We note both the OGC and OIG sought and received clarification of the requests. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). *See also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when

Counsel (the “OGC”) and Office of Inspector General (the “OIG”) have submitted separate correspondence to this office, as well as separate responsive records each seeks to withhold from disclosure. The OIG states some of the requested information has been destroyed pursuant to the department’s records retention schedule.² The OGC and the OIG state some of the requested information has been or will be released 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, 552.1175, 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). The OGC claims its submitted information is excepted from disclosure under section 552.134 of the Government Code. The OIG claims its submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

We will first address the arguments submitted under section 552.134 of the Government Code, as this exception is potentially the most encompassing. Section 552.134 of the Government Code encompasses information relating to inmates of the department and provides:

(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). However, section 552.029 of the Government Code provides:

Notwithstanding 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:

...

(8) basic information regarding . . . an incident involving the use of force, or an alleged crime involving the inmate.

a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-business-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The 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).

Id. § 552.029(8). Thus, the legislature explicitly made section 552.134 subject to section 552.029.

Both the OGC and the OIG claim section 552.134 for the information each has submitted. Upon review of the submitted information, we agree the information we have marked relates to inmates confined in a facility operated by the department. Accordingly, the OGC and the OIG generally must withhold the information we have marked under section 552.134 of the Government Code. However, we note some of the information we have marked pertains to incidents of alleged crimes involving inmates. The OGC and the OIG must release basic information concerning these incidents under 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. As for the remaining information, we find it pertains to investigations into misconduct by department employees. Thus, the remaining information does not pertain to an inmate, and section 552.134 is not applicable. Therefore, neither the OGC nor the OIG may withhold the remaining information under section 552.134 of the Government Code.

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 exception encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(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.

Occ. Code § 159.002(b)–(c). This office has concluded 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). This office also has concluded when a file is created as the result of a hospital stay, all of the documents in the file relating to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released on receipt of the

patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004–.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review of the submitted information, we find the medical records we have marked in the submitted information may be released only in accordance with the provisions of the MPA. *See* Occ. Code § 159.005.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which states, “[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 [.]” Occ. Code § 1703.306. Upon review, we find the information we have marked was acquired from a polygraph examination and is within the scope of section 1703.306. Accordingly, the OIG 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 doctrine of common-law 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 established. *Id.* at 681–82. This office has found certain medical information and information indicating disabilities or specific illnesses are protected from disclosure by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review of the submitted information, we find the OIG must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate and embarrassing and of no legitimate public interest. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

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 (section 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 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 contends the submitted shift rosters and employee logs, which are internal documents maintained by the department, could be used in the planning and execution of a crime or in facilitating an escape from a department facility. Upon review, we find the OIG has demonstrated release of this information, which we have marked, would interfere with law enforcement or crime prevention. We therefore conclude the OIG may withhold the shift roster and employee logs we have marked under section 552.108(b)(1) of the Government Code.

In summary, the OGC and the OIG must withhold the information we have marked under section 552.134 of the Government Code. However, basic information concerning the incidents we have marked must be released under section 552.029 of the Government Code. The medical records we have marked may be released only in accordance with the provisions of the MPA. The OIG 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 and common-law privacy. The OIG may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The remaining information must be released.³ As our ruling is dispositive, we do not address the OIG's remaining arguments against disclosure.

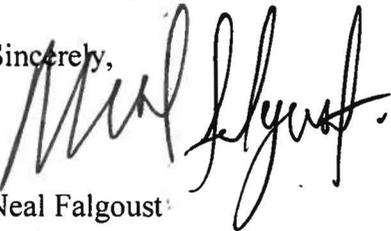
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

³In 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.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 428404

Enc. Submitted documents

c: Requestor
(w/o enclosures)