



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2011

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

OR2011-18750

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# 439763 (OR-2011-00223).

The Texas Department of Criminal Justice (the "department") received a request for (1) information related to a specified use of force, including the requestor's polygraph records, and a specified case number; (2) disciplinary reports regarding three named correctional officers; and (3) medical records related to the use of force and case number. You state some of the requested information either has been or will be released, with redactions pursuant to sections 552.117 and 552.147 of the Government Code.¹ You claim other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.130, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a

¹Open Records Letter No. 2005-01067 (2005) authorizes the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of its current or former employees under section 552.117(a)(3) of the Government Code, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, without the necessity of requesting a decision under the Act. See Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person from public release without the necessity of requesting a decision under the Act.

completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See* Gov’t Code § 552.022(a)(1). In this instance, the submitted information is a completed investigation made by or for the department. Thus, the information at issue is subject to disclosure under section 552.022(a)(1). Although you assert the submitted information is excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *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 Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not a confidentiality provision for purposes of section 552.022(a)(1) of the Government Code. Therefore, the department may not withhold any of the submitted information under section 552.103 of the Government Code. However, we will consider your claims under section 552.108 of the Government Code and under sections 552.101, 552.102, 552.130, and 552.134 of the Government Code, which are confidentiality provisions for purposes of section 552.022(a)(1).

As section 552.134 is the most inclusive exception you claim, we begin with that section. Section 552.134(a) is applicable to information relating to inmates and former inmates of the department and provides as follows:

(a) 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 552.134 is explicitly made subject to section 552.029, which provides in part:

Notwithstanding Section 508.313 or 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 the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(8). We note the submitted information consists of an investigation of a use of force. The department must release basic information about a use of force pursuant to section 552.029(8). *See id.* For purposes of section 552.029(8), basic information includes the time and place of the incident, the names of inmates and of department employees who

were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. Thus, those types of information must be released pursuant to section 552.029(8) and may not be withheld under section 552.134. We also note much of the remaining information at issue pertains to employees of the department and the propriety of their conduct. Such information does not constitute “information about an inmate” for purposes of section 552.134 and may not be withheld on that basis. We have marked the submitted information related to inmates the department must generally withhold under section 552.134 of the Government Code.²

We note one of the documents encompassed by section 552.134 includes information acquired from a polygraph examination in which the requestor was the examinee. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses information other statutes make confidential. Section 1703.306 of the Occupations Code provides in part:

(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[.]

Occ. Code § 1703.306; *see* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). Thus, although the information we have marked under section 552.134 of the Government Code must generally be withheld from the requestor, the department has the discretion to release the polygraph information we have marked to this requestor pursuant to section 1703.306(a)(1) of the Occupations Code. *See* Open Records Decision No. 451 at 3 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act).

We also note the submitted information includes medical records, some of which pertain to the requestor. Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which is applicable to medical records. Section 159.002 of the MPA provides in part:

²As we are able to make this determination, we need not address your claim under section 552.108(a)(1) of the Government Code.

(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 determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that 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). The medical records we have marked must be withheld under section 159.002 of the MPA unless the department receives written consent for release of the records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 of the Government Code also encompasses constitutional privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); 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 relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); 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); 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 id.* 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). In Open Records Decision No. 430 (1985), this office determined a list of inmate visitors is protected by constitutional privacy because people have a First Amendment right to correspond with inmates, which would be threatened if their names were released. *See also* Open Records Decision Nos. 428 (1985) (logs of certain mail sent or received by inmates protected by constitutional privacy), 185 (1978) (public's right to obtain inmate's correspondence list not sufficient to overcome First Amendment right of inmate's correspondents to maintain communication with inmate free of threat of public exposure). Thus, although the requestor is a party to the inmate correspondence we have marked, the department must withhold the marked correspondence under section 552.101 of the Government Code in conjunction with constitutional privacy to protect the privacy of the other party to the correspondence.

Next, we address your claims under section 552.102 and 552.108(b)(1) 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 has 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). We have marked employees’ birth dates the department must withhold under section 552.102(a) of the Government Code.

Section 552.108(b)(1) 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 but was not applicable to generally known policies and procedures. *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); *compare* 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). You state the submitted records contain information that, if released, “could negatively impact [u]nit security should it fall into the wrong hands[.]” You contend the information in question could be used in the planning and execution of a crime or in facilitating an escape. Based on your representations, we have marked information the department may withhold under section 552.108(b)(1) of the Government Code. We find you have not demonstrated release of any of the remaining information at issue would interfere with law enforcement or crime prevention. We therefore conclude the department may not withhold any of the remaining information under section 552.108(b)(1).

Lastly, section 552.117(a)(3) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member 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* Gov’t Code § 552.117(a)(3). We have marked employees’ social security numbers the department must withhold under section 552.117(a)(3) of the Government Code.

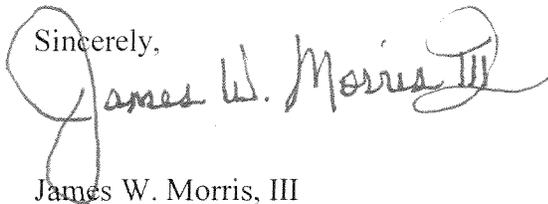
In summary, the department (1) must generally withhold the marked inmate information under section 552.134 of the Government Code, but has the discretion to release the marked polygraph information to this requestor pursuant to section 1703.306(a)(1) of the

Government Code; (2) must withhold the marked medical records under section 159.002 of the MPA unless the department receives written consent for release of the records that complies with sections 159.004 and 159.005 of the MPA; (3) must withhold the marked inmate correspondence under section 552.101 of the Government Code in conjunction with constitutional privacy; (4) must withhold the marked birth dates under section 552.102(a) of the Government Code; (5) may withhold the information we have marked under section 552.108(b)(1) of the Government Code; and (6) must withhold the marked employees' social security numbers under section 552.117(a)(3) of the Government Code.³ The rest of the submitted 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bs

Ref: ID# 439763

Enc: Submitted documents

c: Requestor
(w/o enclosures)

³As we are able to make these determinations, we need not address the other exception you claim.