



ATTORNEY GENERAL OF TEXAS
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April 9, 2012

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OR2012-05079

Dear Ms. Towe 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# 450029.

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 has been released to the requestor. The OIG further states it does not maintain some of the requested information.¹ The OIG also states it will release some of the requested information to the requestor with certain addresses, telephone

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time 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).

numbers, social security numbers, and personal family information redacted 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).² The OGC claims its submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.134 of the Government Code. The OIG claims its submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.134 of the Government Code. We have considered the claimed exceptions 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. This exception encompasses federal and state laws that make criminal history record information (“CHRI”) confidential. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. Upon review, we find the information we have marked constitutes CHRI. Thus, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

²Open Records Letter No. 2005-01067 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.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA is applicable to medical records. *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). Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies: (1) the information to be covered by the release; (2) reasons or purposes for the release; and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). This office has determined 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 some of the OIG’s submitted information constitutes medical records for the purposes of the MPA. Thus, the department may only release these documents in accordance with the MPA.

Next, the OGC and the OIG claim some of the submitted information is excepted under section 552.134(a) of the Government Code, which relates to inmates of the department and provides:

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 relevant part:

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 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). The submitted information consists of records involving a use of force, an alleged crime involving an inmate, and employees' conduct on the job. We find these records pertain to investigations of the named employee's conduct, and, therefore, are not "about an inmate" for purposes of section 552.134, and thus may not be withheld in their entirety under section 552.134. The submitted records, however, include inmate-identifying information. This information is generally subject to section 552.134. However, basic information regarding incidents involving the use of force and an alleged crime involving an inmate are subject to required disclosure pursuant to section 552.029. Basic information includes the time and place of the incident, the names of inmates and 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. Therefore, we conclude the identity of the inmates at issue in the use of force and alleged crime records must be released pursuant to section 552.029, and no portion of these documents may be withheld under section 552.134. We find section 552.029 is not applicable to the remaining inmate-identifying information. Consequently, the department must withhold the information we have marked in the OIG and OGC's information under section 552.134 of the Government Code.³

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

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

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. In this instance, the requestor's client is one of the polygraph examinees. Thus, the department has the discretion to release the polygraph information of the requestor's client pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). Otherwise, the department must withhold the polygraph information in the OIG's submitted information, which we have marked, under section 552.101 in conjunction with section 1703.306(a) of the Occupations Code.

Section 552.102(a) of the Government Code exempts 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 held section 552.102(a) exempts 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.*, 354 S.W.3d 336 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we find no portion of the OIG's submitted information is subject to section 552.102(a) of the Government Code, and the department may not withhold any of the OIG's submitted information on that basis.

Next, 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, orig. proceeding). 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).

The OGC states the information it has marked under section 552.107(1) 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 information the OGC has marked under section 552.107(1) of the Government Code.

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 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 OGC states the submitted records contain information that, if released would undermine the security of correctional facilities and “jeopardize the safety of inmates, correctional officers and the general public[.]” The OGC contends the information in question could be used in the planning and execution of a crime or in facilitating an escape. We have marked information the department may withhold under section 552.108(b)(1). We find the OGC has 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 at issue under section 552.108(b)(1) of the Government Code.

The OGC 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[.]” Gov’t Code § 552.108(b)(2). However, the OGC provides 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.

We note portions of the remaining information are subject to section 552.117(a)(3) of the Government Code.⁴ Section 552.117(a)(3) excepts from disclosure the home address, home 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 further note that some of the information at issue consists of the requestor’s client’s personal information. Thus, because section 552.117 protects personal privacy, as noted above, the requestor has a right of access to his client’s information. Gov’t Code § 552.023(a); ORD No. 481 at 4. However, the remaining information at issue is the personal information of other department employees. Therefore, the department must withhold this information, which we have marked, under section 552.117(a)(3) of the Government Code.

In summary, the OGC and the OIG must withhold the portions of the information we have marked under section 552.134 of the Government Code. The department must withhold the marked information under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. The marked medical records may only be released in accordance with the MPA. The department has the discretion to release the polygraph information of the requestor’s client pursuant to section 1703.306(a)(1). Otherwise, the department must withhold the polygraph information we have marked in the OIG’s information under section 552.101 in conjunction with section 1703.306(a) of the Occupations Code. The department may withhold the information the OGC has marked under section 552.107(1) of the Government Code. The department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

department must withhold the information we have marked under section 552.117(a)(3) of the Government Code. The remaining information must be released.⁵

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# 450390

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note that the requestor has a special right of access to some of the information being released in this instance. Because such information is 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.