



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 10, 2013

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

OR2013-21426

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# 507955 (OIG PIR No. 2013-00220).

The Texas Department of Criminal Justice (the "department") received a request for specified information pertaining to the requestor's client, a death-row inmate. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.130, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we will address your arguments under section 552.108 of the Government Code because that section is potentially the most encompassing. Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental

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<sup>1</sup>Although you also raise section 552.134 of the Government Code, you have not submitted any arguments in support of this exception; therefore, we assume you have withdrawn it. *See* Gov't Code §§ 552.301, .302.

body must provide comments explaining why exceptions raised should apply to information requested). You state the submitted information relates to “potential criminal allegations that did not result in a conviction or deferred adjudication.” However, you also state the information at issue pertains to “unresolved criminal cases” and the investigations are “subject to subsequent action.” Because you state the information at issue relates to unresolved criminal cases subject to subsequent action, you have failed to explain how the submitted case files pertain to closed cases that did not result in conviction or deferred adjudication. Therefore, we find section 552.108(a)(2) is not applicable to the submitted information, and it may not be withheld on that basis.

You also raise section 552.108(b)(1) of the Government Code for a portion of the submitted information and state release of that information would interfere with law enforcement.<sup>2</sup> 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[.]” *Id.* § 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).

You state case numbers 08-0706 and 08-0999 contain information on security threat group activities inside the correctional facility. You argue the release of this information would compromise security measures and investigative techniques and undermine the department’s efforts in preventing gang violence and controlling illegal gang activity inside and outside the correctional facility. Having considered your arguments, we conclude some of the information at issue, which we have marked, is excepted from disclosure under section 552.108(b)(1) and may be withheld on that basis. However, we find you have not adequately explained how or why release of the remaining information at issue would interfere with law enforcement or crime prevention. Therefore, we conclude the department may not withhold any of the remaining information at issue under section 552.108(b)(1).

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<sup>2</sup>Although you cite both section 552.108(b)(1) and section 552.108(b)(2) of the Government Code, we understand you to assert section 552.108(b)(1) as this is the proper section based on the substance of your arguments.

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 of the Government Code 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 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 80<sup>th</sup> 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.*

You have not submitted any arguments explaining how the matter upon which the submitted subpoena was 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 information 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, the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center.<sup>3</sup> *See* Gov't Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI the 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) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). Upon review, we find the information we have marked in the remaining information constitutes confidential CHRI that the department must withhold under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), as authority, this office held those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication

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<sup>3</sup>Although you raise section 552.101 in conjunction with section 411.084 of the Government Code, we understand you to raise section 552.101 in conjunction with section 411.083 of the Government Code, as this is the proper section based on the substance of your arguments.

with [the inmate] free of the threat of public exposure.” This office ruled this right would be violated by the release of information that identifies those correspondents because such a release would discourage correspondence. *See* ORD 185. The information at issue in this ruling was the identities of individuals who had corresponded with inmates. In Open Records Decision No. 185, our office found that “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” *Id.* Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 430, 428. Further, we recognized inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The rights of those individuals to anonymity were found to outweigh the public’s interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Thus, although the requestor is the attorney for the inmate at issue, the requestor does not have a right of access to the visitation information under section 552.023 of the Government Code because the constitutional rights of the other parties are also implicated. *See* ORD 430. Accordingly, the department must withhold the visitor information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy.<sup>4</sup>

Section 552.101 of the Government Code also 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 types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find the department has failed to demonstrate any of the remaining information at issue is highly intimate or embarrassing and a matter of no legitimate public interest. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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.*

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<sup>4</sup>As our ruling is dispositive for this information, we do not address your argument against its disclosure.

*Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the department must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(3) of the Government Code excepts from public disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees 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. Gov't Code § 552.117(a)(3). We note section 552.117(a)(3) protects an employee's personal cellular telephone provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Therefore, the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code, but may only withhold the marked cellular telephone number if the cellular telephone service is not paid by a governmental body. If the cellular telephone service is paid for by a governmental body, the number may not be withheld under section 552.117(a)(3) of the Government Code.

Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

...

(3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department[.]

...

(b) Information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(3), (b). We have marked the personal information of a corrections officer that is not held in an employment capacity and that may be subject to section 552.1175. If the individual elects to restrict access to the information pertaining to him in accordance with section 552.1175(b), the department must withhold the marked information under section 552.1175 of the Government Code. If the individual does not elect to restrict access to the information we have marked, then the department may not withhold this information under section 552.1175. Upon review, we find none of the remaining information consists of personal information for the purposes of section 552.1175 of the Government Code. Therefore, none of the remaining information may be withheld on this basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130(a). Upon review, we find none of the remaining information consists of motor vehicle record information subject to section 552.130. Thus, none of the remaining information may be withheld on that basis.

We note some of the remaining information is subject to section 552.136 of the Government Code.<sup>5</sup> Section 552.136 provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Thus, the department must withhold the information we have marked under section 552.136 of the Government Code.

Section 552.147 of the Government Code provides, "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. We note, however, the requestor has a right to her client's social security number. *See generally id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Accordingly, other than the requestor's client's social security number, the department may withhold any social security numbers in the remaining information under section 552.147 of the Government Code.<sup>6</sup>

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<sup>5</sup>The 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).

<sup>6</sup>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. *See* Gov't Code § 552.147(b).

In summary, the department (1) may withhold the information we have marked under section 552.108(b)(1) of the Government Code; (2) must withhold the visitor information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy; (3) must withhold the dates of birth we have marked under section 552.102(a) of the Government Code; (4) must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code, but may only withhold the marked cellular telephone number if the cellular telephone service is not paid by a governmental body; (5) must withhold the information we have marked under section 552.1175 of the Government Code, if the individual elects to restrict access to the information in accordance with section 552.1175(b) of the Government Code; (6) must withhold the information we have marked under section 552.136 of the Government Code; (7) other than the requestor's client's social security number, the department may withhold the social security numbers in the remaining information under section 552.147 of the Government Code; and (8) must release the remaining information.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 507955

Enc. Submitted documents

c: Requestor  
(w/o enclosures)