



September 25, 2002

Mr. James L. Hall  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR2002-5411

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168446.

The Texas Department of Criminal Justice (the "department") received a request for information relating to use of force reports and videotapes, and requests for video recordings maintained by the department. You sought clarification of the request from the requestor, and you have submitted a copy of the requestor's written response. *See Gov't Code § 552.222* (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that the requestor has asked for "all requests and correspondences for surveillance videos" in addition to the other requested information. You state that the department does not have information responsive to this part of the request. Furthermore,

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

with respect to the request for use of force reports and videotapes, you state that the department only retains responsive information dating from 1995 to the present. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

Next, we address the use of force reports and videotapes at issue that pertain to incidents involving the use of force against non-death row inmates. Section 552.134 of the Government Code provides in pertinent part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice 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.

(b) Subsection (a) does not apply to:

...

(2) information about an inmate sentenced to death.

Section 552.029 of the Government Code provides:

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 Texas Department of Criminal Justice 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.

Section 552.134 is explicitly made subject to section 552.029. The use of force reports and videotapes pertaining to non-death row inmates in the submitted sample relate to incidents involving the use of force against department inmates. Under section 552.029, basic information regarding the death of an inmate in custody, an alleged crime involving an

inmate, and an incident involving the use of force is subject to required disclosure. Basic information that is subject to disclosure under section 552.029(8) includes the time and place of the incident, 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 filed as a result of the incident. Accordingly, the department must withhold the information in the use of force reports pertaining to non-death row inmates, and the corresponding videotapes, under section 552.134 of the Government Code. We further determine, however, that the department must release all basic information in the use of force reports pursuant to section 552.029(8) of the Government Code.

We next address the use of force reports and videotapes that pertain to incidents involving the use of force against death row inmates. You acknowledge that section 552.134 does not apply to information regarding inmates sentenced to death. *See Gov't Code § 552.134.* You contend, however, that the use of force reports and videotapes relating to death row inmates at issue here are protected from disclosure under section 552.108(b)(1) of the Government Code. Section 552.108(b) of the Government Code provides in pertinent part:

(b) An 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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

You state that use of force reports and videotapes pertaining to death row inmates contain sensitive information about such inmates that, if disclosed, could be acquired by other inmates and used to the detriment of prison security. Upon review of the information in the submitted sample, however, we find that you have not demonstrated how the release of this information would interfere with law enforcement. Accordingly, we determine that the department may not withhold the submitted information relating to death row inmates pursuant to section 552.108(b)(1) of the Government Code.

You state that the use of force videotapes pertaining to death-row inmates are protected under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Upon review of the videotapes in the submitted sample, we find that these videotapes do not contain highly intimate or embarrassing information. Moreover, this office has determined

that the public has a legitimate interest in certain information regarding inmates of the department. *See, e.g.*, Open Records Decision No. 508 (public has legitimate interest in certain information regarding transfers of prisoners). We determine that the department may not withhold any portion of the information in the submitted sample pursuant to section 552.101 and common-law privacy.

Finally, you state that the use of force reports regarding death row inmates contain the social security numbers of department employees. Section 552.117(3) of the Government Code exempts from required public disclosure the home address, home telephone number, social security number, and the family member information of an employee of the department. We agree that the social security numbers, which we have marked, must be withheld under section 552.117.

In summary, the department must release basic information about use of force incidents contained in use of force reports pertaining to non-death row inmates pursuant to section 552.029(8) of the Government Code. The department must withhold the remainder of the use of force reports, and the corresponding videotapes, pertaining to non-death row inmates under section 552.134 of the Government Code. The social security numbers of department employees in the use of force reports regarding death row inmates must be withheld under section 552.117. The use of force reports and corresponding videotapes pertaining to death row inmates must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 168446

Enc: Submitted documents

c: Mr. Brian Collister  
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(w/o enclosures)