



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2004

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P. O. Box 4004
Huntsville, Texas 77342

OR2004-7107

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208063.

The Texas Department of Criminal Justice (the "department") received a request for all records relating to a named death row inmate. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses laws that make criminal history record information ("CHRI") confidential. *See* Gov't Code § 552.101. CHRI obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is made confidential under federal and state law. 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" but does not include "driving record information maintained by [the Department of Public Safety

¹We 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.

(“DPS”)] under “Subchapter C, Chapter 521, Transportation Code.” Gov’t Code § 411.082(2).

Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. Gov’t Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. Gov’t Code § 411.084; *see also* Gov’t Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). After reviewing the submitted records, however, we conclude that the responsive information does not contain any CHRI obtained from the NCIC or TCIC networks. Consequently, none of the responsive information may be withheld from disclosure on this basis.

Next, we address your argument for the submitted fingerprint. Sections 560.001, 560.002, and 560.003 provide in pertinent part as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

....

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose[.]

....

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. The submitted fingerprint may be released only as provided under section 560.002. As the requestor in this instance is the attorney for the person to whom this fingerprint information pertains, the requestor has a right of access to his client's fingerprint information. *See id.* § 560.002(1).

Section 552.101 also encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

In Open Records Decision No. 430 (1985), our office determined that the list of inmate visitors is 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. *See also* Open Records Decision No. 185 (1978). Most of the documents you seek to withhold are the visitation records and mail logs of an inmate. We find that the constitutional right to privacy overrides section 552.134(b) of the Government Code, which makes information about an inmate sentenced to death available to the public. *See* Gov't Code § 552.134(b). We note that although the requestor is the inmate's authorized representative, the requestor does not have a right of access to this information under section 552.023 of the Government Code because the constitutional rights of the visitors listed in the visitation records are also implicated.² *See* Open Records Decision No. 185

²Government Code section 552.023(a) states that a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect that person's privacy interests.

(1978). Thus, you must withhold the visitation records and mail logs in their entirety under section 552.101 of the Government Code.³

Section 552.101 also encompasses the doctrine of common-law privacy, which protects from disclosure information that is (1) highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Foundation v. Tex. Indus. Accident Board*, 540 S.W.2d 668 at 685 (Tex. 1976). Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, we believe that a portion of the submitted information implicates the inmate's right to privacy. We note, however, that the requestor has a special right of access pursuant to section 552.023 of the Government Code to some of the information that is otherwise private because the inmate about whom the information concerns has consented in writing to the release of this information to the requestor. Gov't Code § 552.023; *see id.* § 552.229 (consent to release information under special right of access). Thus, in this case, the department must release this particular information to the requestor.

You contend that portions of the submitted information are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure an internal record of a law enforcement agency 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). Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision Nos. 531 (1989) (holding that predecessor to section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution). You state that the submitted shift rosters indicate the name and placement of certain officers within the unit or whether a particular post was manned on certain days. You also contend that this information, if released, could "help inmates in their future attempts to circumvent the security of the prison unit." You also state that release of other portions of the submitted information would result in a compromise of the security and safety of certain aspects of the prison system. Having reviewed your arguments and the submitted information, we agree that the release of these portions of the submitted information would interfere with law

³Because our ruling on this issue is dispositive, we need not address your argument under section 552.130 of the Government Code.

enforcement or crime prevention. Accordingly, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code.

Section 552.134 of the Government Code relates to information about inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, 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.

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

....

(2) information about an inmate sentenced to death.

Gov't Code § 552.134(a), (b)(2). A portion of the submitted information consists of information about non-death row inmates confined in a facility operated by the department. We find that the exceptions in section 552.029 are not applicable. Therefore, you must withhold the information we have marked under section 552.134(a) of the Government Code.

In summary, we conclude: (1) the submitted fingerprint must be released to this requestor as provided by section 560.002 of the Government Code; (2) the inmate visitation records and mail logs must be withheld under section 552.101 of the Government Code; (3) the department may withhold the information we have marked under section 552.108(b)(1); and (5) the department must withhold the information we have marked pursuant to section 552.134 of the Government Code.⁴ The remaining information must be released.⁵

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.

⁴Because our ruling on these issues is dispositive, we need not address your remaining arguments.

⁵Because the remaining information is confidential with respect to the general public, if the department receives a further request for this information from an individual other than the requestor or the named inmate whose information is at issue, the department should again seek our decision.

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 Dep't of Pub. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 208063

Enc. Submitted documents

c: Ms. Caroline Meyer
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(w/o enclosures)