



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2005

Mr. John C. West
General Counsel
Texas Department of Criminal Justice
Office of the Inspector General
P. O. Box 13084
Austin, Texas 78711

OR2005-04913

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# 225414.

The Texas Department of Criminal Justice, Office of the Inspector General (the "OIG") received a request for information related to a use of force incident involving a named inmate. You state that the OIG is releasing some requested information to the requestor but claim that the remainder of the requested information is excepted from disclosure under section 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

We must consider the requestor's assertion that the OIG did not comply with section 552.301(d)(2) of the Government Code. Section 552.301(d)(2) requires a governmental body that requests an attorney general decision to provide the requestor with a copy of its written communication to the attorney general not later than the tenth business day after receiving the requestor's written request for information. Gov't Code § 552.301(d)(2). Pursuant to section 552.303(c) of the Government Code, this office notified you via facsimile on May 20, 2005, that additional information was needed in order to

¹Although you also cite section 552.101 of the Government Code, we note that this section does not encompass other exceptions listed in the Act. Because you do not address any other law outside of the Act in your comments to this office, we assume that you do not raise section 552.101 in this instance.

determine whether the OIG complied with section 552.301(d)(2). We requested that the additional information be provided to our office within seven calendar days of the date the notice was received. *See* Gov't Code § 552.303(d). The notice further stated that failure to submit the requisite information would result in the legal presumption that the information at issue is public. *See* Gov't Code § 552.303(e).

As of the date of this letter, we have not received your response. Therefore, as provided by section 552.303(e), the information at issue is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information. This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third-party interests. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Although you claim that the information at issue is excepted from disclosure under section 552.108 of the Government Code, we note that this provision is a discretionary exception to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally); 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). In this instance, your claim under section 552.108 is not compelling reasons for non-disclosure under section 552.302, and none of the submitted information may be withheld under that exception. *See* Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions); *but see* Open Records Decision No. 586 at 3 (1991) (need of another governmental body to withhold information under predecessor to section 552.108 provided compelling reason to withhold information).

We note, however, that some of the submitted information is subject to mandatory exceptions under sections 552.101 and 552.117 of the Government Code.² Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it: (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental

²The Office of the Attorney General will raise mandatory exceptions like sections 552.101 and 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

body, *see* Open Records Decision No. 565 (*citing United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information in the submitted documents that must be withheld under common-law privacy in conjunction with section 552.101.

Section 552.117(a)(3) excepts from public disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current and former employees of the Texas Department of Criminal Justice, regardless of whether the employees complied with section 552.1175.³ Thus, the OIG must withhold the social security numbers of current or former employees contained in the submitted records pursuant to section 552.117(a)(3). We have marked the information that must be withheld under this exception.

In summary, the OIG must withhold the information we have marked under section 552.101 of the Government Code and common-law privacy. The social security numbers of current and former employees of the Texas Department of Criminal Justice must also be withheld in accordance with section 552.117(a)(3) of the Government Code. The remaining submitted information 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

³We note that Open Records Letter No. 2005-1067(2005) was recently issued and serves as a previous determination for this type of information maintained by the Texas Department of Criminal Justice.

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID#

Enc. Submitted documents

c: Ms. Yolanda M. Torres
American Civil Liberties Union of Texas
P. O. Box 515
Huntsville, Texas 77342-0515
(w/o enclosures)