



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 24, 2005

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Texas Department of Criminal Justice  
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OR2005-05626

Dear Mr. Mondville 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# 226765.

The Texas Department of Criminal Justice (the "department") received a request for ten categories of information regarding a former department employee. The department and the Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG states that it has released a portion of the requested information. The OIG further states that, in accordance with its records retention schedule, some of the requested information no longer exists.<sup>1</sup> The

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<sup>1</sup> 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. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); 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).

department claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.107, and 552.122 of the Government Code. The OIG claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, and 552.134 of the Government Code.<sup>2</sup> We have considered the submitted arguments 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 section encompasses information other statutes make confidential. The information submitted by the department contains W-2 and W-4 forms. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the department must withhold these forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.

Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov’t Code §§ 560.001 (defining “biometric identifier” to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, this information, which we have marked, is confidential under section 560.003 of the Government Code, and the department must withhold it under section 552.101 of the Government Code.

Next, we consider the department’s section 552.107 assertion. 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 Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney

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<sup>2</sup>OIG also raises section 552.029 of the Government Code. Section 552.029 is not an exception under the Act but rather provides a list of information about an inmate that is expressly public. *See* Gov’t Code § 552.301(a) (Exceptions to disclosure under Act found at subchapter C of chapter 552).

acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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, no writ). 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 department states that the documents it seeks to withhold under section 552.107 are communications between department lawyers and department employees made in the furtherance of rendition of legal services. These documents consist of letters between the department’s lawyers and department employees regarding prospective engagement to provide legal representation. *See In re Auclair*, 961 F.2d 65, 69 (5<sup>th</sup> Cir. 1992) (communications made in course of preliminary discussions with view to employing attorney are protected by attorney-client privilege even though employment is not accepted). The department further explains both communications were intended to be confidential and have remained confidential. Hence, we agree the department may withhold the information it has marked pursuant to section 552.107.

We note that the information submitted by the department and OIG includes the personal information of applicants for positions with the department and department employees. In Open Records Letter No. 2005-01067 (2005), we issued a previous determination that authorizes the department to withhold the personal information of a current or former employee of the department under section 552.117(a)(3) of the Government Code without the necessity of again requesting an attorney general decision with regard to the applicability of this exception. *See Gov’t Code* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov’t Code § 552.301(a)). Accordingly, the department and OIG must withhold the personal information of current or former employees of the department in accordance with Open Records Letter No. 2005-01067.

To the extent that the submitted social security numbers are not those of current or former department employees, they are excepted from public disclosure under section 552.147 of the Government Code,<sup>3</sup> which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the department and OIG must withhold the social security numbers contained in the submitted information under section 552.147.<sup>4</sup>

The department raises section 552.122 of the Government Code for a portion of its submitted information. Section 552.122 excepts from disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. Open Records Decision No. 626 at 6 (1994). The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

The department contends that the questions and responses it has marked are excepted from disclosure under section 552.122(b). After reviewing the information, we agree that the submitted questions test an individual’s knowledge in a particular area and thus constitute “test items” as contemplated by section 552.122(b). Furthermore, we find that the answers to these questions might reveal the questions themselves. Therefore, pursuant to section 552.122 of the Government Code, the department may withhold the questions, as well as the corresponding preferred and actual answers.

The OIG raises section 552.134 of the Government Code, which relates to inmates of the department and provides in relevant 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]

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<sup>3</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

<sup>4</sup>We note that 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 under the Act.

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 552.029 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.

Gov't Code § 552.029(8). Much of the information submitted by the OIG concerns inmates who were confined in a facility operated by the department. Section 552.134 is explicitly made subject to section 552.029. 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 includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. The information at issue includes investigations of incidents involving the use of force and alleged crimes involving inmates. Accordingly, with the exception of basic information that must be released pursuant to section 552.029(8), the OIG must withhold the information it submitted pertaining to inmates who were confined in a facility operated by the department under section 552.134 of the Government Code. However, case number SC.14.3085.94.WY does not pertain to inmates and no portion of it may be withheld on this basis. Furthermore, case number UF.05.1508.88.WY pertains to a personnel issue involving interactions between department employees and a named inmate that arose following a use of force incident. Although the document mentions an inmate confined in a facility operated by the department by name, the submitted information is only in part "about an inmate who is confined in a facility operated by or under a contract with the department." We therefore find that only the portions of the record we have marked are subject to section 552.134. The remainder of the documents concern only department employees and may not be withheld under section 552.134.

In summary, (1) the department must withhold the W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with federal law; (2) the fingerprint information submitted by the department is confidential under section 560.003 of the Government Code and must be withheld under section 552.101; (3) the department may

withhold the information it has marked under section 552.107(1); (4) the department may withhold the questions, and their corresponding preferred and actual responses, pursuant to section 552.122(b) of the Government Code; (5) the department must withhold the social security numbers of current or former department employees in accordance with Open Records Letter No. 2005-01067; (6) the department must withhold the social security number of an individual who is not a current or former department employee under section 552.147 of the Government Code; (7) with the exception of basic information that must be released pursuant to section 552.029(8), the department and the OIG must withhold the submitted information pertaining to inmates who were confined in a facility operated by the department under section 552.134 of the Government Code. The remaining 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 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,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 226765

Enc. Submitted documents

c: Ms. Yolanda Torres  
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(w/o enclosures)