



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

March 20, 2006

Mr. James M. Frazier, III  
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Texas Department of Criminal Justice  
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Huntsville, Texas 77342-4004

Mr. John C. West  
OIG General Counsel  
Texas Department of Criminal Justice  
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OR2006-02724

Dear Mr. Frazier 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# 244328.

The Texas Department of Criminal Justice (the "department") received a request for "any files, notes, forms, statements, memorandums, reports, documents, e-mails or photos prepared or processed by investigators or staff of the Investigations Department of the Office of the Inspector General (the "OIG")" regarding a named inmate. The department and the OIG have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG indicates that it is releasing basic information to the requestor with redactions pursuant to the previous determination issued by this office in

Open Records Letter No. 2005-01067 (2005).<sup>1</sup> The OIG also states that it is withholding social security numbers under section 552.147 of the Government Code.<sup>2</sup> The OIG claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, and 552.134 of the Government Code. The department claims that the information it has submitted is excepted from disclosure under section 552.134 of the Government Code.<sup>3</sup> We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted to this office by the requestor. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released).

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). The requestor contends that the department received the request on December 23, 2005. The department represents to this office that it received the request on December 28, 2005. The department's request for a decision from this office asserting exceptions to the requested information was received on January 11, 2006, the tenth business day after December 28, 2005. However, the requestor has submitted to this office a copy of his request for information with a copy of the return receipt for certified mail, signed and dated, and indicating a date of delivery of December 23, 2005. The information submitted by the requestor indicates his request was received by the department on December 23, 2005, not December 28, 2005. Therefore, we conclude that the department has failed to comply with the procedural requirements of section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body

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<sup>1</sup>Open Records Letter No. 2005-01067 (2005) serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

<sup>2</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. Gov't Code § 552.147(b).

<sup>3</sup>The department withdrew its assertions of sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code for the information it submitted.

demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.108 is a discretionary exception to disclosure that protects 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). *But see* Open Record Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for non-disclosure under section 552.108 in certain circumstances). Therefore, none of the submitted information is excepted from disclosure under section 552.108. However, sections 552.101, 552.117, 552.1175, and 552.134 can provide compelling reasons to withhold 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 protected by other statutes. The OIG claims that some of the submitted information consists of medical records, access to which is governed by the Medical Practices Act ("MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the

person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Upon review, we conclude that none of the information at issue was created by a physician or by someone under the supervision of a physician. *See* Occ. Code § 159.002(b). Thus, we conclude that the OIG may not withhold any of submitted information under the MPA.

We turn now to the department's and OIG's claims regarding section 552.134 of the Government Code for the remaining information submitted by the department and the OIG. Section 552.134(a) relates to inmates of the department and provides in relevant part the following:

(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.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . Section 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.

*Id.* § 552.029(8). Upon review, we agree that the submitted records constitute information about an inmate for purposes of section 552.134. However, the records concern an incident involving the use of force and injury to the inmate. Thus, the department and the OIG must release basic information concerning this incident. *Id.* 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

department and the OIG must withhold the remaining submitted information pursuant to section 552.134.<sup>4</sup>

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); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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<sup>4</sup> Because we reach this conclusion, we need not address the OIG's remaining arguments against disclosure, except to note that the information that is subject to section 552.029(8) corresponds to the basic front-page information that is made public under section 552.108(c). See Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-188 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (per curiam); Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public in *Houston Chronicle*).

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 Office of the Attorney General 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. 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,



Lisa V. Cubriel  
Assistant Attorney General  
Open Records Division

LVC/jh

Ref: ID# 244328

Enc: Submitted documents

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