



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2006

Ms. Carla Cordova
Assistant General Counsel
Texas Department of Criminal Justice,
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2006-03881

Dear Ms. Cordova:

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# 246533.

The Texas Department of Criminal Justice (the "TDCJ") received a request for information regarding a named inmate. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidential criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. We note, however, that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2) (defining "criminal history record information"). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1).

Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, we have marked the CHRI that must be withheld under section 552.101.¹

We note that some of the submitted documents are subject to section 552.101 in conjunction with 81.103 of the Health and Safety Code. Section 81.103(a) makes certain test result information confidential and provides:

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

Health & Safety Code § 81.103(a). “Test results” are defined as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Health & Safety Code § 81.101(5). A test result may be released to the person tested or a person legally authorized to consent to the test on the person’s behalf. *See id.* § 81.103(b)(6). Furthermore, a person tested or a person legally authorized to consent to the test on the person’s behalf may authorize the release or disclosure of the test result. *See id.* § 81.103(d). Such authorization must be in writing and signed by the person tested or the person legally authorized to consent to the test on the person’s behalf. The authorization must state the person or class of persons to whom the test results may be released or disclosed. *See id.* § 81.103(d). We have marked the test results that are confidential under section 81.103(a) and may be released only in accordance with section 81.103.

Finally, we consider your claim that portions of the submitted information are excepted from public disclosure under common law and constitutional privacy. Section 552.101 encompasses the doctrines of common law and constitutional privacy. The common law right to 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.*

¹We note that DPS has the authority to release an individual’s own CHRI to that individual. Gov’t Code § 411.083(b)(3).

v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). 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. Open Records Decision No. 600 at 4 (1992). 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 the interest in 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; 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 490, 492 (5th Cir. 1985)).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), as authority, this office held that those individuals who correspond with inmates possess a “first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. Open Records Decision No. 185 (1978). Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. The rights of those individuals to anonymity was found to outweigh the public’s interest in this information. *Id.*; *see* Open Records Decision No. 430 (1985) (list of inmate visitors protected by constitutional privacy of both inmate and visitors). In the present case, the information at issue is the inmate visitor list and identities of the immediate family members of an inmate on death row. The family information is found on the inmate’s consolidated record form, as well as on his correspondence and visitors list. We conclude that the identities of the family members found in the consolidated record, which you have marked, must be withheld under section 552.101 in conjunction with common law privacy. The inmate visitor list, which you have also marked, is confidential under constitutional privacy and must be withheld under section 552.101 of the Government Code.

In summary, the TDCJ must withhold (1) CHRI we have marked pursuant to section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F and (2) information you have marked pursuant to section 552.101 of the Government Code

in conjunction with common law and constitutional privacy. The marked test results may be released only in accordance with section 81.103 of the Health & Safety Code. The remaining information must be released to the requestor.²

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).

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.

²As this ruling is dispositive, we need not address your remaining argument.

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,

A handwritten signature in black ink, appearing to read "Michael A. Lehmann". The signature is fluid and cursive, with the first name being the most prominent.

Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/sdk

Ref: ID# 246533

Enc. Submitted documents

c: Mr. Anthony S. Haughton
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(w/o enclosures)