



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2006

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

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

OR2006-06751

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# 252286.

The Texas Department of Criminal Justice (the "department") received a request for (1) offense and investigative reports regarding alleged sexual assault for fiscal year 2005, and (2) the annual report of offense investigative reports regarding alleged sexual assault for fiscal year 2005. 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 indicates that it is releasing some of the requested information to the requestor with redactions pursuant to the previous determination issued by this office in

Open Records Letter No. 2005-01067 (2005).¹ The OIG also states that it is withholding social security numbers under section 552.147 of the Government Code.² The OIG claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, and 552.134 of the Government Code.³ The department claims that the information it has submitted is excepted from disclosure under sections 552.101 and 552.134 of the Government Code.⁴ We have considered the submitted arguments and reviewed the submitted representative samples of information.⁵

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov’t Code § 552.022(a)(1). Section 552.103 of the Government Code is a discretionary exception to public disclosure that protects a governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (section 552.103 may be waived by governmental body); Open Records Decision Nos. 665 at 2 n.5) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the information contained in the completed investigations that the OIG has submitted may not be withheld under section 552.103 of the Government Code. Because information that is subject to section

¹Open 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.

²We 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).

³Although the OIG also raises section 552.029 of the Government Code, we note that this section is not an exception to disclosure but is instead a list of eight categories of information that must be released when the information concerns an inmate who is confined in a facility operated by or under contract with the department. *See* Gov’t Code § 552.029.

⁴We note that in its brief dated April 26, 2006, the department withdrew its assertions of sections 552.103, 552.107, 552.108, and 552.111 of the Government Code for the information it submitted.

⁵We assume that the “representative sample” of records submitted to this office by the OIG is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 409 (1988), 496 (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.

552.022(a)(1) may be withheld under mandatory exceptions, we will consider the department's and the OIG's claims under sections 552.101, 552.108, 552.117, 552.1175, and 552.134 of the Government Code for all of the submitted information.

Both the department and the OIG raise section 552.134 of the Government Code, which 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). The information submitted by both the department and the OIG concerns inmates confined in a facility operated by or under contract with the department. Thus, section 552.134 is applicable to the submitted information, and it must generally be withheld on that basis. However, the submitted documents contain information regarding incidents involving alleged criminal conduct involving inmates. Under section 552.029(8), basic information regarding these incidents is subject to required disclosure. *Id.*

Although not excepted from disclosure under section 552.134, some of the basic information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy.⁶ The doctrine of common law 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

⁶ 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 the common law right of privacy. Gov't Code § 552.101.

information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Information that tends to identify a victim of sexual assault is protected under common law privacy. See Open Records Decision No. 339 (1982); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Thus, the department and the OIG must withhold the identifying information of an inmate who is an alleged victim of sexual assault pursuant to section 552.101 of the Government Code in conjunction with common law privacy. The remaining basic information must be released. 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.

In summary, the identifying information of the inmates who are the alleged victims of sexual assault must be withheld under section 552.101 of the Government Code, but all other basic information regarding alleged crimes involving inmates must be released pursuant to section 552.029(8) of the Government Code. The remainder of the submitted information must be withheld under section 552.134 of the Government Code. As our ruling is dispositive, we need not consider the remaining arguments.

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.

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,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 252286

Enc. Submitted documents

c: Ms. Nicole Porter
Director, Prison and Jail Accountability Project
ACLU of Texas
P.O. Box 12905
Austin, Texas 78711
(w/o enclosures)