ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2006

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OR2006-13424

Dear Ms. Cordova 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# 264414.

The Texas Department of Criminal Justice (the "department") received a request for information relating to a named inmate. The Office of the General Counsel (the "OGC") has submitted information that the department seeks to withhold under section 552.101 of the Government Code. The Office of the Inspector General (the "OIG") has submitted information that the department seeks to withhold under sections 552.101, 552.108, and 552.134 of the Government Code. The OIG also states that some of the requested information will be released and that the OIG will withhold other information under section 552.117 of the Government Code on the basis of the previous determination issued

to the department in Open Records Letter No. 2005-01067 (2005).[1] We have considered your arguments and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by statute. Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions."[2] Gov't Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov't Code ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code 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. *See* Gov't Code § 411.089(b). We note that because the laws governing the dissemination of information obtained from the NCIC or TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that was obtained from the Texas Department of Public Safety or another criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* Open Records Decision No. 565 at 10-12 (1990). Thus, the department must withhold any responsive CHRI under

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[1]Open Records Letter No. 2005-01067 authorizes the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of its current or former employees under section 552.117(a)(3), regardless of whether the employee complies with section 552.1175 of the Government Code, unless the requestor has a right of access to the information or the current or former employee is deceased. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)). We note that a post office box number is not a "home address" for purposes of section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home).

[2]We note 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).

section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Section 552.101 also encompasses section 508.313 of the Government Code, which provides in part:

> (a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:
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> > (1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;
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> > (2) a releasee; or
> >
> > (3) a person directly identified in any proposed plan of release for an inmate.

Gov't Code § 508.313(a); *see also id.* § 508.001(9) ("releasee" means person released on parole or to mandatory supervision). The OIG states that some of the submitted information relates to releasees and therefore is confidential under section 508.313(a). We note that the requestor is not an entity authorized to obtain the information in question under section 508.313(c). We therefore conclude that the department must withhold the information that we have marked under section 552.101 in conjunction with section 508.313 of the Government Code.

The documents submitted by the OGC include a presentence report. Article 42.12 of the Code of Criminal Procedure is applicable to that information and provides in part:

> (j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (I) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall

> be kept separate from the defendant's community supervision file and may be released only by order of the judge.

Crim. Proc. Code art. 42.12 § 9(j). None of the circumstances described in subsections (d), (e), (f), (h), (k), or (l) of section 9 appears to be present in this instance. Therefore, the department must withhold the presentence investigation report, which we have marked, under section 552.101 in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure.

Information relating to a polygraph examination is confidential under section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

> (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:
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> > (1) the examinee or any other person specifically designated in writing by the examinee;
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> > (2) the person that requested the examination;
> >
> > (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
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> > (4) another polygraph examiner in private consultation; or
> >
> > (5) any other person required by due process of law.
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> (b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.
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> (c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The OIG has submitted information acquired from polygraph examinations. We note, however, that one of the polygraph examinees authorized the release of his polygraph results to the requestor. Therefore, the department must release that information in accordance with section 1703.306(a)(1). The remaining polygraph

information, which we have marked, must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses constitutional and common-law rights to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie,* 765 F.2d at 492).

Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation. See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

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 this instance, some of the submitted information relates to immediate family members of death-row inmates and inmates' visitors. We have marked information relating to family members of inmates that the department must withhold under section 552.101 in conjunction with common-law privacy. We also have marked inmate visitor information that the department must withhold under section 552.101 in conjunction with constitutional privacy. We note, however, that some of the submitted visitor information lists the requestor as a death-row inmate's visitor. The requestor has a special right of access to his own private information under section 552.023 of the Government Code.[3] Although the inmate concerned would ordinarily also have a privacy interest in his own visitor information, the OIG informs us that the inmate in question is deceased. Thus, because privacy is a personal right that lapses at death, the information that relates to the requestor as the deceased inmate's visitor may not be withheld on the basis of the inmate's right to privacy.[4] Therefore, the requestor's visitor information is not confidential under section 552.101 in conjunction with constitutional privacy and must be released.

Next, we address the OIG's claims under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from public disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws).

The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information would interfere with law enforcement because disclosure would hamper Texas Department of Public Safety's efforts to detect forgeries of drivers' licenses), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). The statutory predecessor

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[3]*See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

[4]*See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

to section 552.108(b)(1) was not applicable, however, to generally known policies and procedures. *See* Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

A governmental body that claims section 552.108(b)(1) must sufficiently explain how and why release of the information at issue would interfere with law enforcement and crime prevention. *See* Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). The OIG states that some of the submitted information relates to alleged crimes involving inmates, including a planned escape. The OIG contends that release of information relating to those incidents would compromise prison security and reveal law enforcement techniques. Based on the OIG's arguments, we have marked information that the department may withhold under section 552.108(b)(1).

The OIG also raises section 552.108(b)(2), which excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(b)(2). A governmental body that claims this exception must reasonably explain how and why it is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The OIG states that some of the submitted information relates to cases that have not been adjudicated. We note, however, that section 552.108(b)(2) is only applicable to information relating to a concluded investigation that did not result in conviction or deferred adjudication. We therefore conclude that the department may not withhold any of the submitted information under section 552.108(b)(2).

The OIG also raises section 552.134 of the Government Code, which relates to inmates of the department. Section 552.134 states that "[e]xcept as provided by Subsection (b) [of section 552.134] or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] 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 552.029 provides in part that notwithstanding section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the department is subject to required disclosure:

> (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). Thus, the legislature explicitly made section 552.134 subject to section 552.029.

We note that most of the information submitted by the OIG relates to death-row inmates. Section 552.134(a) is not applicable to information about an inmate sentenced to death. *See id.* § 552.134(b)(2). The OIG states, however, that some of the information at issue relates to a general-population inmate. Based on that representation, we have marked information relating to the general-population inmate that the department must withhold under section 552.134 of the Government Code. We also note, however, that some of the information at issue relates to the inmate in question as a party to an alleged crime. In that context, the inmate's name is subject to disclosure as basic information under section 552.029(8) and may not be withheld under section 552.134.

We next note that section 552.136 of the Government Code is applicable to some of the remaining information.[5] Section 552.136 provides as follows:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
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> > (1) obtain money, goods, services, or another thing of value; or
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> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
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> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked an account number that the department must withhold under section 552.136.

Lastly, we note that the remaining information includes the social security numbers that are not protected by section 552.117 of the Government Code. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.[6] Gov't Code § 552.147(a). Thus, the

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[5]Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See*Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

[6]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.

department must withhold the social security numbers of living individuals under section 552.147.

In summary: (1) the department must withhold any responsive CHRI under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (2) the marked information relating to releasees must be withheld under section 552.101 and section 508.313 of the Government Code; (3) the marked presentence investigation report must be withheld under section 552.101 and section 9(j) of article 42.12 of the Code of Criminal Procedure; (4) the marked polygraph information must be withheld under section 552.101 and section 1703.306 of the Occupations Code; (5) the marked information that is protected by common-law and constitutional privacy also must be withheld under section 552.101; (6) the department may withhold the marked information that is excepted from disclosure under section 552.108(b)(1) of the Government Code; (6) the department must withhold the marked information that is excepted from disclosure under section 552.134 of the Government Code; (7) the marked account number must be withheld under section 552.136 of the Government Code; and (8) the social security numbers of living individuals must be withheld under section 552.147 of the Government Code. The rest of the submitted information must be released.

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,

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JWM/sdk

Ref: ID# 264414

Enc: Submitted documents

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