



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 20, 2007

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

OR2007-02026

Dear Ms. Fleming:

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# 271653.

The Texas Department of Criminal Justice (the "department") received a request for information relating to a former inmate. You state that some of the requested information either has been or will be released. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We note that some of the submitted information does not relate to the named inmate and thus is not responsive to this request. This decision does not address the public availability of that information, which we have marked, and it need not be released.

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 exception encompasses information that other statutes make confidential. You contend that the submitted information includes records pertaining to

substance abuse treatment that are confidential under federal law.¹ Section 290dd-2 of title 42 of the United States Code provides in part as follows:

(a) Requirement

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see also* 42 C.F.R. § 2.1. We understand that the department operates a federally funded substance abuse treatment program. You have not demonstrated, however, that the records that you seek to withhold under the federal law are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research. We therefore conclude that the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 290dd-2 of title 42 of the United States Code. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

You also raise section 552.101 in conjunction with 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:

- (1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

¹We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

Gov't Code § 508.313(a); *see also id.* § 508.001(9) (“releasee” means person released on parole or to mandatory supervision). You state that some of the submitted information consists of records from the former inmate’s parole file. You do not indicate that the requestor represents an eligible entity that is authorized to obtain the information in question under section 508.313(c). *See id.* § 508.313(c)-(d).² Furthermore, none of the information appears to be subject to chapter 62 of the Code of Criminal Procedure or section 552.029 of the Government Code. *See id.* § 508.313(e)-(f).³ 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.

Section 552.101 also encompasses the common-law right to privacy. Common-law privacy protects information that 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). The common-law right to 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). You seek to withhold information relating to the former inmate’s family members under section 552.101 in conjunction with common-law privacy. Having considered your arguments, we conclude that the inmate’s family member information is not protected by common-law privacy and thus may not be withheld under section 552.101.

Lastly, we address your claim under section 552.134 of the Government Code, which encompasses information that relates to inmates of the department. Section 552.134 states that “[e]xcept as provided by [section 552.134(b)] 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 that notwithstanding section 552.134, eight specified categories of information

²Section 508.313(c) provides for the release of information that is confidential under section 508.313(a) to the governor, a member of the board of pardons and paroles or a parole commissioner, the criminal justice policy council, or an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose. Section 508.313(d) provides that “eligible entity” means a government agency, an organization with which the Department of Criminal Justice contracts or an organization to which the department provides a grant, or an organization to which inmates are referred for services by the department.

³Section 508.313(e) provides that section 508.313 does not apply to information relating to a sex offender that is authorized for release under chapter 62 of the Code of Criminal Procedure. Section 508.313(f) provides that section 508.313 does not apply to information that is subject to required public disclosure under section 552.029 of the Government Code.

about an inmate who is confined in a facility operated by or under a contract with the department are subject to required disclosure under the Act. *See id.* § 552.029. We have reviewed the information that you seek to withhold under section 552.134 and agree that the information falls within the scope of the exception. Furthermore, we find that none of the information in question is subject to section 552.029. We therefore conclude that the department may withhold the information that we have marked under section 552.134.

In summary: (1) the department must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code; and (2) the department must withhold the information that we have marked under section 552.134 of the Government Code. The rest of the submitted information must be released.⁴ As we are able to make these determinations, we need not address your other arguments against disclosure.

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

⁴We note that some of the information to be released would be excepted from public disclosure to protect the former inmate's privacy interests. In this instance, however, the requestor has a special right of access to that information under section 552.023 of the Government Code as the former inmate's authorized representative. *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). Should the department receive another request for these same records from a person who would not have a right of access to the former inmate's private information, the department should resubmit these records and request another ruling. *See* Gov't Code §§ 552.301(a), .302.

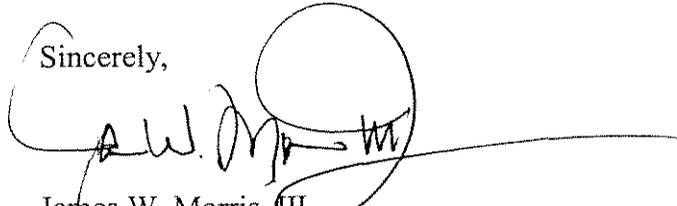
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jww

Ref: ID# 271653

Enc: Submitted documents

c: Ms. Mehala A. Smith
Office of the Georgia Capital Defender
225 Peachtree Street NE Suite 900
Atlanta, Georgia 30303
(w/o enclosures)