



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2009

Mr. James Mu
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2009-00921

Dear Mr. Mu:

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# 332855.

The Texas Department of Criminal Justice (the "department") received a request for information regarding a named inmate. You state that you will release some of the responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department has not complied with the requirements of section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 by law. Open Records Decision No. 150 (1977). Because your claims under sections 552.101

and 552.134 of the Government Code can provide compelling reasons for non-disclosure, we will address these exceptions.

While you have not submitted arguments under section 552.134 of the Government Code as required by section 552.301(e)(1)(A), you have marked the submitted records as being excepted under this exception. Accordingly, because this section is compelling we will address the applicability of section 552.134 to the documents. Section 552.134, which relates to inmates of the department, provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, 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.

(b) Subsection (a) does not apply to:

(2) information about an inmate sentenced to death.

Gov't Code § 552.134(a), (b)(2). The submitted information pertains to an inmate who was executed. Section 552.134(a) is not applicable to "information about an inmate sentenced to death." *Id.* § 552.134(b)(2). Thus, the department may not withhold this information under section 552.134.

You claim that the family member information in the submitted records is protected by constitutional privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the constitutional right 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 Fado 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).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *See id.* You seek to withhold information relating to the inmate's family members when those family members are not listed as visitors or correspondents, but only as relatives of the inmate. However, you have failed to demonstrate how this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Furthermore, you acknowledge that some, if not all, of the listed family members are deceased. Because privacy is a personal right that lapses at death, the constitutional right to privacy does not encompass information that relates only to a deceased individual. *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.); Attorney General Opinions JM-229 (1984), H-917 (1976); Open Records Decision No. 272 (1981). Accordingly, the inmate's family member information may not be withheld under section 552.101 in conjunction with constitutional privacy. As you have raised no further exceptions to the disclosure of the submitted information, it must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 332855

Enc. Submitted documents

c: Requestor
(w/o enclosures)