



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2009

Mr. James Mu
Assistant General Counsel
TDCJ- Office of the General Counsel
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2009-12233

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# 352822.

The Texas Department of Criminal Justice (the "department") received a request for the department's Unit Classification Procedure Manual. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code* § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

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 id.* § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released unless a governmental body demonstrates a compelling reason to overcome this presumption. *See City of Dallas v. Abbott*, 279 S.W.3d 806 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *see also* 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

claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will address this exception.

You claim portions of the submitted information are confidential pursuant to common-law privacy and "special circumstances." You argue that release of the information at issue would create an inherent risk of physical danger for the general prison population, corrections officers, and the general public, and therefore, a special circumstance exists under common-law privacy to withhold the submitted information. However, the Third Court of Appeals recently ruled that the "special circumstances" exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, No. 03-08-00516-CV, 2009 WL 1491880 (Tex. App.—Austin May 29, 2009, no pet. h.). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can be withheld under common-law privacy. *Id.*; see also *Indus. Found.*, 540 S.W.2d at 686. In this instance, the information at issue consists of department procedures and blank forms. We therefore find that none of this information is intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find that none of the submitted information may be withheld under section 552.101 on this basis.

The 81st Legislature recently enacted section 552.151 of the Government Code which relates to a public employee or officer's safety. This section provides:

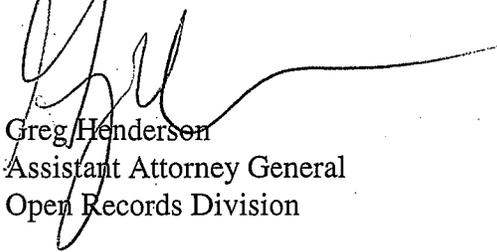
Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Added by Act of June 3, 2009, 81st. Leg., R.S., S.B. 1068, § 4 (to be codified at Tex. Gov't Code § 552.151). In this instance, you explain that release of the submitted information at issue would create an inherent risk of physical danger for the general prison population, corrections officers, and the general public. Upon review, we find the department has failed to demonstrate that any of the submitted information at issue relates to an employee or officer of the department for purposes of section 552.151. Accordingly, the department may not withhold any of the submitted information at issue under section 552.151 of the Government Code. As no further exceptions to disclosure are raised, the submitted information 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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID# 352822

Enc. Submitted documents

c: Requestor
(w/o enclosures)