



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2009

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OR2009-15515

Dear Mr. West and Mr. Brown:

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# 360121.

The Texas Department of Criminal Justice (the "department") received a request for (1) documents pertaining to investigations which resulted in convictions of department employees for smuggling contraband into the prison system during a specified time period; (2) documents regarding disciplinary reports against any inmate for possession of contraband; (3) documents pertaining to a named individual; (4) copies of the named individual's answers to specified questions in an employment application; and (5) the answer to a specified question given by the named individual. The department's Office of the General Counsel (the "OGC") and its Office of the Inspector General (the "OIG") have submitted separate briefs as well as separate documents that each seeks to withhold from disclosure. The OGC has released some of the requested information. The OGC claims the

information it has submitted is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. The OIG states it has released some of the requested information to the requestor with redactions pursuant to section 552.147 of the Government Code and the previous determination issued to the department in Open Records Letter No. 2005-01067 (2005).¹ The OIG also states it has no information responsive to portions of the request.² The OIG claims the information it has submitted is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304.

Initially, we note the OIG submitted information that was created after the date of the request. We have marked this information, which is not responsive to the instant request. This decision does not address the public availability of this non-responsive information, and this information need not be released in response to this request.

Next, we must address the OGC's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *Id.* § 552.301(b). The OGC states the requestor made a request for information on August 13, 2009, and the OGC requested clarification on the same date. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). When a governmental body requests a clarification under section 552.222, the deadlines of section 552.301(b) are tolled until the governmental body receives a response to its clarification request. *See* Open Records Decision No. 663 at 5 (1999) (clarification does not trigger a new ten business day time interval, but merely tolls the ten day deadline during the clarification or narrowing process, which resumes upon receipt of the clarification or narrowing response). We note the OGC received the requestor's clarification on August 24, 2009, resuming the ten day deadline. The OGC sought further clarification on September 2, 2009, and received the requestor's response on September 18, 2009. The OGC informs us it was closed for business on

¹Section 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. 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) of the Government Code, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, and Texas motor vehicle record information without the necessity of requesting a decision under the Act. *See* Open Records Decision No. 673 (2001) (listing elements of first type of previous determination under section 552.301(a) of the Government Code).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

August 27, 2009. Accordingly, the ten-business-day deadline with regard to the OGC was September 24, 2009. The OGC did not request a ruling until September 25, 2009. Consequently, we find the OGC failed to comply with the procedural requirements of section 552.301 of the Government Code.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because the OGC's claims under sections 552.101 and 552.134 of the Government Code can provide compelling reasons for non-disclosure, we will address their applicability to the information submitted by the OGC.

Next, we address the OIG's claim under section 552.108 of the Government Code, as it is potentially the most encompassing of its claimed exceptions. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The OGC states case number 2008-3687 pertains to a concluded criminal investigation that did not result in conviction or deferred adjudication. Based on the OIG's representations and our review, we conclude section 552.108(a)(2) is generally applicable to case number 2008-3687.

However, section 552.108 of the Government Code does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, which you state the OIG has released, the OIG may withhold case number 2008-3687 under section 552.108(a)(2) of the Government Code.³

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Next, we address the OIG's claims against disclosure of the remaining information. Section 552.101 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, such as chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). The OIG does not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information at issue. Therefore, the OIG must withhold the submitted fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code.

We next address the OIG's claim under section 552.130 of the Government Code for the remaining information. Section 552.130(a)(1) excepts from disclosure information that relates to a driver's license issued by a Texas agency. *Id.* § 552.130(a)(1). Accordingly, the OIG must withhold the submitted Texas driver's license under section 552.130 of the Government Code.

We now address the OGC's claim under section 552.134 of the Government Code for the information submitted by the OGC. Section 552.134(a) relates to inmates of the department and provides:

(a) Except as provided by Subsection (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.

Id. § 552.134(a). The OGC asserts the records submitted by it consist of information about inmates confined in facilities operated by the department. Based on the OGC's representations and our review, we agree the information submitted by the OGC pertains to inmates confined in facilities operated by the department. Further, the exceptions in section 552.029 of the Government Code are not applicable to the information at issue. Therefore, the OGC must withhold the information it has submitted pursuant to section 552.134 of the Government Code.⁴

In summary, the OIG may withhold case number 2008-3687, with the exception of basic information, which the OIG states has been released, under section 552.108(a)(2) of the

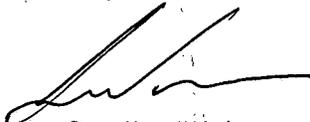
⁴As our ruling is dispositive, we need not address the OGC's remaining argument against disclosure.

Government Code. The OIG must withhold the submitted fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The driver's license submitted by the OIG must be withheld under section 552.130 of the Government Code. The OGC must withhold the information it has submitted under section 552.134 of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 360121

Enc. Submitted documents

c: Requestor
(w/o enclosures)