



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 2, 2009

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

Mr. John C. West  
General Counsel  
Texas Department of Criminal Justice  
Office of the Inspector General  
4616 Howard Lane, Suite 250  
Austin, Texas 78728

OR2009-15541

Dear Mr. Brown 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# 360094 (OIG ORR File # OR-2009-00238).

The Texas Department of Criminal Justice (the "department") received a request for all records pertaining to a specified death row inmate's incarceration. The department's Office of the General Counsel (the "OGC") and the department's Office of the Inspector General (the "OIG") have submitted separate briefs and documents to this office. The OGC indicates that it will release any responsive information not subject to this ruling to the requestor. The OGC claims that portions of its submitted information are excepted from disclosure under sections 552.101 and 552.134 of the Government Code.<sup>1</sup> The OIG states that some

---

<sup>1</sup>We note that the OGC initially raised several other exceptions under the Act but has since withdrawn its claims under those sections. Accordingly, we only address sections 552.101 and 552.134 for the information submitted by the OGC.

responsive information has been destroyed pursuant to the department's record retention schedule.<sup>2</sup> We understand the OIG will release one OIG file and basic information pertaining to another OIG file with redactions pursuant to the previous determination issued to the department in Open Records Letter No. 2005-01067 (2005) and 552.147 of the Government Code.<sup>3</sup> The OIG claims that its submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.<sup>4</sup> We have considered the claimed exceptions and reviewed the submitted information.

We first address the OIG's argument that its submitted information is excepted under section 552.108 of the Government Code. Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The OIG states that its submitted information relates to a pending criminal investigation. Based on this representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

As the OIG acknowledges, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic, "front-page" information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-87; *see also* Open Records Decision No. 127 (1976)

---

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, *writ dism'd*); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>Open Records Letter No. 2005-1067 authorizes the department to withhold the present and former addresses and telephone numbers, social security numbers, and family member information of its current and 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, 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 Gov't Code § 552.301(a)). Section 552.147 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. Gov't Code § 552.147.

<sup>4</sup>Although the OIG also raised sections 552.117, 552.1175, and 552.134 of the Government Code as exceptions to disclosure of its submitted information, the OIG has provided no arguments regarding the applicability of these sections. Since the OIG has not submitted arguments concerning these exceptions, we assume that the OIG no longer urges them. *See* Gov't Code §§ 552.301(b), (e), .302

(summarizing types of information considered to be basic information). Thus, with the exception of basic information, which the OIG states will be released, the department may withhold the OIG's submitted information under section 552.108(a)(1) of the Government Code.<sup>5</sup>

Next, the OGC claims section 552.101 of the Government Code for a portion of its submitted 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 is made confidential under 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 *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. 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); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. 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). 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." This office ruled that this right would be violated by the release of information that identifies those correspondents because such a release would discourage correspondence. See ORD 185. The information at issue in this ruling was the identities of individuals who had corresponded with inmates. In Open Records Decision No. 185, our office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. 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. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were

---

<sup>5</sup>As our ruling is dispositive for the information submitted by the OIG, we need not address the OIG's remaining argument against disclosure of this information.

released. *See also* ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Upon review, we find that the department must withhold most of the information that the OGC has marked as "visitor information" under section 552.101 in conjunction with constitutional privacy. However, two of the documents the OGC has marked as "visitor information" do not reveal any visitors of the inmate and may not be withheld under section 552.101 based on constitutional privacy. As the OGC raises no further exceptions to disclosure of these documents, we have marked them for release.

Next, the OGC claims that the information it has highlighted in yellow consists of confidential criminal history record information ("CHRI"). Section 552.101 also encompasses CHRI generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) 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. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we agree that a portion of the highlighted information, which we have marked, consists of CHRI which must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. However, we find that none of the remaining highlighted information constitutes CHRI for the purposes of chapter 411. Therefore, the department may not withhold any portion of the remaining highlighted information in the OGC's submitted information on that basis.

Finally, the OGC claims that a page "apparently pertaining to disciplinary hearings" is excepted under section 552.134 of the Government Code, which relates to inmates of the department and provides in relevant part:

(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.

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

...

(2) information about an inmate sentenced to death.

*Id.* § 552.134(a)-(b). Upon review, we agree that the page the OGC has marked constitutes information about inmates for purposes of section 552.134. However, we note that a portion of the submitted information relates to the named death-row inmate. Section 552.134(a) is not applicable to information about an inmate sentenced to death. *See id.* § 552.134(b)(2). We have marked the information pertaining to the named death-row inmate that may not be withheld under section 552.134. However, the department must withhold the remaining information in that document under section 552.134 of the Government Code, to the extent it does not pertain to other death-row inmates.

In summary, with the exception of basic information, which the OIG states will be released, the department may withhold the OIG's submitted information under section 552.108(a)(1) of the Government Code. With the exception of the documents we have marked for release, the department must withhold the information the OGC has marked "visitor information" under section 552.101 of the Government Code in conjunction with constitutional privacy. The department must withhold the CHRI we have marked in the OGC's submitted information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. With the exception of the information we have marked for release and any information pertaining to other death-row inmates, the department may withhold the page the OGC has marked under section 552.134 of the Government Code. The remaining information in the OGC's submitted information must be released to the requestor.<sup>6</sup>

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](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

---

<sup>6</sup>We note that the requestor has a special right of access to some of the information being released from the OGC's submitted information in this instance. Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.

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,

A handwritten signature in cursive script that reads "Laura Ream Lemus".

Laura Ream Lemus  
Assistant Attorney General  
Open Records Division

LRL/eb

Ref: ID# 360094

Enc. Submitted documents

c: Requestor  
(w/o enclosures)