



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 11, 2011

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Mr. John C. West
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Texas Department of Criminal Justice
P.O. Box 13084
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OR2011-03398

Dear Mr. Mu 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# 411522 (OIG Open Records # OR2011-00003 and OR2011-00266).

The Office of General Counsel (the "OGC") of the Texas Department of Criminal Justice (the "department") received a request for eighty-eight specified categories of information that relate to the termination of a named former employee, including personnel information of various department employees and a specified investigation involving a named prisoner. The department's Office of Inspector General (the "OIG") received two requests from the same requestor for the same information. The OGC states it has released or will release some of the requested information, but asserts the information it submitted is excepted from disclosure under sections 552.101, 552.107, and 552.134 of the Government Code. The OIG states it will release some of the requested information, but informs us it will withhold certain employee-related information and shift rosters pursuant to the previous determinations in Open Records Letter Nos. OR2005-01067 (2005) and OR2004-6370 (2004), as well as social security numbers pursuant to section 552.147(b) of the Government

Code.¹ The OIG claims some of the information it submitted is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, 552.122, 552.130, 552.134, 552.136, 552.137, and 552.147 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.²

Initially, as noted in part above, the OIG informs us it will withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067. Thus, we do not address the OIG's arguments under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.117, 552.1175, and 552.147 of the Government Code to withhold the requested information submitted by the OIG that is subject to the previous determination in Open Records Letter No. 2005-01067.

Next, the OIG informs us agency case report number 2009-02376 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-07905 (2010). The OIG seeks to withhold the report pursuant to that previous determination ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). In Open Records Letter No. 2010-07905, we determined the requestor, a former employee of the department, had a right of access to his fingerprint information pursuant to section 560.002(1)(A) of the Government Code, but the OIG must withhold the remaining information from him under section 552.101 of the Government Code in conjunction with common-law privacy. The requestor here is not the former employee, and the OIG does not inform us, nor is it otherwise apparent, she is the former employee's authorized representative. *See* Gov't Code § 552.023. Accordingly, because the law, facts, and

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.

²The OGC and OIG each sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). We also note that if the information responsive to a request for information under the Act is voluminous, section 552.301(e)(1)(D) allows a governmental body to submit in its request for a ruling a representative samples of the information requested, rather than the specific information requested in its entirety. *See* Gov't Code § 552.301(e)(1)(D).

circumstances on which Open Records Letter No. 2010-07905 was based have changed, the OIG may not rely on Open Records Letter No. 2010-07905 as a previous determination and, thus, may not withhold or release the information in agency case report 2009-02376 in accordance with that ruling.

We next note agency case report number 2009-2376 and the OIG report number IF.CC.0690.2006.JD, which were submitted by the OIG, consist of completed investigations. The personnel records submitted by the OIG also contain completed performance evaluations. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Although the OIG asserts this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the OIG may not withhold the completed reports and evaluations, which we have marked, under section 552.103. However, sections 552.101, 552.102, 552.130, 552.134, 552.136, and 552.137 of the Government Code constitute other law for purposes of section 552.022. Therefore, we will consider whether these sections require the OIG to withhold any of the information subject to section 552.022(a)(1). In addition, section 552.022(a)(1) does not make public information that is excepted from disclosure under section 552.108 of the Government Code. *See Gov't Code § 552.022(a)(1)*.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy, which protects information that is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Generally, only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also* Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld).

Agency case report number 2009-02376 is an investigation of alleged sexual assault. The requestor knows the identity of the victim of the alleged sexual assault. The OIG also informs us report number IF.CC.0690.2006.JD is linked to the investigation and involves the same victim. Thus, withholding only the victim's identifying information in these reports from the requestor would not preserve the victim's common-law right to privacy. Therefore, the OIG must withhold agency case report number 2009-2376 and OIG report number IF.CC.0690.2006.JD in their entirety pursuant to the common-law privacy principles incorporated by section 552.101 of the Government Code.³ The OGC has also submitted information related to this investigation. Accordingly, the OGC must withhold the information related to this sexual-assault investigation, which we have marked, under section 552.101 in conjunction with common-law privacy.

The OIG seeks to withhold pursuant to section 552.103 of the Government Code the information it submitted that is not subject to section 552.022. Section 552.103 provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

³As our ruling is dispositive, we do not address the OIG's other arguments to withhold this information.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). This office considers the totality of the circumstances presented in deciding whether a governmental body has established litigation is reasonably anticipated. Open Records Decision No. 677 at 3 (2003).

The OIG received the first request for information on November 29, 2010, and received a clarification of that request on December 27, 2010. *See* Gov't Code § 552.222. The OIG received the second request for information on December 28, 2010. The OIG does not inform us litigation was pending against the department when the OIG received either of the requests for information. However, the OIG asserts it anticipated litigation on the dates it received the requests because

the letter from the requestor, an attorney[,] is clearly calculated to lead to the acquisition of information upon which a claim may be based. The detailed nature of the request-all 83 of them; the nature of the case itself; the request for information about State personnel that seeks information to identify potential defendants and identify any facts which could enhance the claim; the broad scope of the request; the portions identified by requestor; and the basic facts involved in the criminal cases all lead a reasonable person to believe and expect that litigation is imminent.

After reviewing the submitted documentation and the OIG's arguments, we conclude, based on the totality of the circumstances, the OIG has established the department reasonably anticipated litigation when it received the requests for information and that the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore,

⁴In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

we conclude the OIG may withhold the remaining information it submitted under section 552.103.⁵

We note, however, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

The OGC claims some of the information it submitted is excepted from disclosure under section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides the following:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice 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 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

(1) the inmate's name, identification number, age, birthplace, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;

...

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(1), (8). The OGC asserts some of the information it submitted consists of information about inmates confined in a facility operated by the department. Upon review, we agree this information, which the OGC has marked, is subject to section 552.134. However, these records contain information that concerns incidents involving the use of

⁵As our ruling is dispositive, we do not address the OIG's other arguments to withhold this information.

force and alleged crime involving inmates. Thus, the OGC must release basic information concerning the use of force and crimes. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. *See id.* The OGC must withhold the remaining information it marked pursuant to section 552.134.⁶

Section 552.101 of the Government Code also encompasses information protected by other statutes, including chapter 411 of the Government Code, which pertains to criminal history record information ("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 - 411.127. 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 the OGC must withhold the CHRI it has marked under section 552.101 in conjunction with chapter 411 of the Government Code.

The OGC asserts some of the information it submitted consists of private financial information that is excepted from release under section 552.101 of the Government Code in conjunction with common-law privacy. Prior decisions of this office have found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos.* 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See Open Records Decision Nos.* 545, 523 (1989); *see also* ORD 600 (personal financial information includes choice of particular insurance carrier). Upon review, we agree most of the information the OGC seeks to withhold under common-law privacy consists of personal financial information that is not of legitimate

⁶As our ruling is dispositive, we do not address the OGC's other arguments to withhold this information.

concern to the public. *See* Open Records Decision Nos. 620 (1993), 600. Thus, the OGC must withhold the personal financial information we have marked under section 552.101 in conjunction with common-law privacy. However, we find the remaining information at issue does not contain personal financial information that is confidential under common-law privacy; thus, the OGC may not withhold the remaining information under section 552.101 on that ground.

We note the remaining documents submitted by the OGC include information that is excepted from disclosure under section 552.102(a) of the Government Code.⁷ Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information in the remaining documents that the OGC must withhold under section 552.102(a) of the Government Code.

The OGC asserts some of the remaining information it submitted is excepted under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than

⁷The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The OGC explains the information it has marked under section 552.107 constitutes confidential communications between OGC attorneys and employees that were made in furtherance of the rendition of professional legal services. The OGC also asserts the communications were intended to be confidential and their confidentiality has been maintained. After reviewing the OGC’s arguments and the information at issue, we agree this information constitutes privileged attorney-client communications; therefore, the OGC may withhold the information it has marked under section 552.107.

Section 552.117 of the Government Code is applicable to some of the remaining information submitted by the OGC. Section 552.117(a)(3) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former department employees “regardless of whether the current or former employee complies with Section 552.1175.” Gov’t Code § 552.117(a)(3). Accordingly, the OGC must withhold under section 552.117(a)(3) the information we have marked in the remaining documents submitted by the OGC.

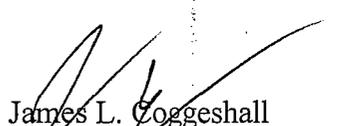
For the information submitted by the OIG, we summarize as follows: (1) the OIG must withhold agency case report 2009-2376 and OIG report number IF.CC.0690.2006.JD in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the OIG must release the performance evaluations we have marked pursuant to section 552.022(a)(1) of the Government Code; and (3) the OIG may withhold the remaining information it submitted under section 552.103 of the Government Code. For the information submitted by the OGC, we summarize as follows: (1) with the exception of basic information about the use of force and crimes involving inmates that must be released pursuant to section 552.029 of the Government Code, the OGC must withhold the information it has marked under section 552.134; (2) the OGC must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.102 and 552.117(a)(3) of the Government Code; (3) the OGC must withhold the information it has marked under section 552.101 in

conjunction with chapter 411 of the Government Code; (4) the OGC may withhold the information it has marked under section 552.107 of the Government Code; and (5) the OGC must release the remaining information it submitted.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tf

Ref: ID# 411522

Enc. Submitted documents

c: Requestor
(w/o enclosures)