



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2012

Mr. Byron A. Lyons
Chief Deputy
Polk County Sheriff Office
1733 North Washington
Livingston, Texas 77351

OR2012-04466

Dear Mr. Lyons:

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# 449660.

The Polk County Sheriff's Office (the "sheriff's office") received a request for five categories of information pertaining to the Polk County Adult Detention Facility and Immigrations and Customs Enforcement Detainees held at that facility. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.147, and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the requestor asks the sheriff's office to construe the request as an ongoing request. The Act does not require a governmental body to comply with a continuing request to supply information on a periodic basis as such information is prepared in the future. *See*

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 an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

²We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Instead, the Act applies only to information that a governmental body possesses or has access to at the time it is requested. Further, the sheriff's office informs us it "does not possess any documents responsive" to the request for information. We note that the Act does not require the sheriff's office to answer factual questions, conduct legal research, or create responsive information. Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds the information on behalf of the governmental body that receives the request. *See id.* § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this case, as you have submitted information responsive to the request and have raised exceptions to disclosure for this information, we will address your arguments for the submitted information.

Next, we must address the sheriff's office's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under the Act is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). Your markings on the request for information indicate the sheriff's office received the request on January 17, 2012. However, you did not submit a portion of the requested information until February 13, 2012. *See id.* § 552.308 (prescribing requirements for proof of compliance with Gov't Code § 552.301). Therefore, we find the sheriff's office failed to comply with the requirements of subsection 552.301(e) for the information submitted on February 13, 2012.

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 the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise section 552.108 of the

Government Code for a portion of the information at issue, this section is a discretionary exception that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, it does not constitute a compelling reason to withhold information. Therefore, the sheriff's office may not withhold any of the information submitted on February 13, 2012 under section 552.108 of the Government Code. Because your claims under sections 552.101 and 552.152 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of these sections to the information submitted on February 13, 2012 as well as the timely submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision[.]" Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. We understand you to contend a portion of the requested information is excepted under section 552.101 in conjunction with section 521.051(a) of the Business and Commerce Code.³ This section provides that:

[a] person may not obtain, possess, transfer, or use personal identifying information of another person without the other person's consent, and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name.

Bus. & Comm. Code § 521.051(a) (formerly Bus. & Comm. Code § 48.101(a)). "Personal identifying information" is defined as "information that alone or in conjunction with other information identifies an individual" and includes an individual's name. *Id.* § 521.002(a)(1)(A). You assert a portion of the requested information meets the definition of "personal identifying information" under section 521.002(a)(1). *See id.* However, section 521.051(a) does not prohibit the transfer of personal identifying information of another person unless the transfer is made with the intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name without that person's consent. *See id.* § 521.051(a). In this instance, the sheriff's office's release of the information at issue would be for the purpose of complying with the Act, and not "with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value[.]" *See id.* Therefore, section 521.051(a) does not prohibit the sheriff's office from transferring the requested information. *See id.* Thus, we conclude the sheriff's office may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 521.051 of the Business and Commerce Code.

³Although you cite to section 521.002 of the Texas Business and Commerce Code, that section defines terms for the purpose of chapter 521 of the Business and Commerce Code and does not make information confidential.

Section 552.101 of the Government Code also encompasses section 236.6 of title 8 of the Code of Federal Regulations,⁴ which protects information regarding detainees held on behalf of the Immigration and Naturalization Service (the "INS").⁵ This section provides as follows:

No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the [INS] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the [INS] and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

8 C.F.R. § 236.6. We note portions of the submitted information pertain to INS detainees. Upon review, we find the sheriff's office is required to abide by rules promulgated by the INS with regard to INS detainees. *See id.* § 2.1 (providing that Secretary of Homeland Security may issue regulations to administer and enforce laws relating to immigration and naturalization of aliens); *see also ACLU of N.J., Inc. v. County of Hudson*, 799 A.2d 629 (N.J. 2002) (stating that while state possesses sovereign authority over operation of its jails, it may not operate them, in respect to INS detainees, in any way that derogates federal government's exclusive and expressed interest in regulating aliens). You do not provide our office with any applicable federal law, regulation, or executive order that provides the requestor with a right of access to the information at issue. We therefore conclude the information we have marked pertains to INS detainees and is made confidential by section 236.6 of title 8 of the Code of Federal Regulations and must be withheld from the

⁴A federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

⁵We note that the functions of the INS were transferred to the Department of Homeland Security on March 1, 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). However, as section 236.6 still refers to the agency at issue as "the INS," we will also do so in this ruling.

requestor under section 552.101 of the Government Code.⁶ *See ACLU*, 799 A.2d at 655 (concluding that because INS had authority to promulgate 8 C.F.R. § 236.6, provision preempts state law requiring disclosure of requested information); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation).

Section 552.101 also encompasses section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.181 provides as follows:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181; *see generally id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact that information may pertain to public or private infrastructure does not make the information *per se* confidential under the Texas Homeland Security Act. *See Open Records Decision No. 649 at 3* (1996) (language of confidentiality provision controls scope of its protection). Moreover, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See Gov't Code § 552.301(e)(1)(A)* (governmental body must explain how claimed exception to disclosure applies).

You assert the jail is critical infrastructure for the purposes of section 418.181 of the Government Code. You explain the architectural drawings and floor plans of the jail reveal technical details of particular vulnerabilities of the jail that could be used to compromise the security of the facility and pose a risk of danger to the people of the state, as well as the law enforcement officers and persons housed in the jail. Based on your representations and our review of the information at issue, we find the architectural drawings and floor plans are confidential under section 418.181 of the Government Code. We therefore conclude the sheriff's office must withhold the architectural drawings and floor plans we have marked on that basis under section 552.101 of the Government Code.⁷

⁶As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure of this information.

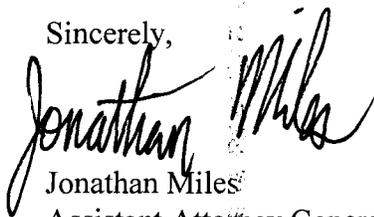
⁷As our ruling for the submitted information is dispositive, we need not address your remaining arguments against its disclosure.

In summary, the sheriff's office must withhold the information pertaining to INS detainees, which we have marked, under section 552.101 of the Government Code in conjunction with section 236.6 of title 8 of the Code of Federal Regulations. The sheriff's office must withhold the architectural drawings and floor plans we have marked under section 418.181 of the Government Code in conjunction with section 552.101 of the Government Code. As you raise no further exceptions for the remaining 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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/som

Ref: ID# 449660

Enc. Submitted documents

c: Requestor
(w/o enclosures)