



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2013

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

OR2013-06582

Dear 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# 485139 (TDCJ ORR# 2013-00022).

The Office of the Inspector General of the Texas Department of Criminal Justice (the "department") received a request for information pertaining to four specified incidents.¹ You state the department has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, 552.130, 552.134, 552.136, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

¹You note the department 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).

²Although you raise section 552.101 in conjunction with section 411.084 of the Government Code, we understand you to raise section 552.101 in conjunction with section 411.083 of the Government Code, as this is the proper section for the substance of your argument.

Section 552.134 of the Government Code relates to inmates of the department and provides in relevant part as follows:

(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.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029, which provides in relevant part:

[n]otwithstanding Section . . . 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] is subject to required disclosure under Section 552.021:

. . .

(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.

Gov't Code § 552.029(8). You contend a portion of the submitted information, identified as Case Number 2010.00463, contains information about non-death row offenders. We note, however, Case Number 2010.00463 pertains to an alleged crime and a use of force incident involving inmates. Basic information regarding the incident is subject to required disclosure under section 552.029(8) of the Government Code. Basic information includes, among other things, names of inmates directly involved in the incident. Thus, other than basic information which must be released under section 552.029(8), the department must withhold the information in Case Number 2010.00463 under section 552.134 of the Government Code.³

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 of the Government Code encompasses information that other statutes make confidential, such as article 20.02(a) of the Code of Criminal Procedure, which provides that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define "proceedings" for purposes of subsection (a). Therefore, we have reviewed case law for guidance and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes

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

“proceedings” for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding). The court further stated that the term “proceedings” could “reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations.” *Id.* at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See Id.* at 276; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02(h); FED. R. CRIM. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20.02(h) states that “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.* Because subsection (h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury” for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee’s note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

You have not submitted any arguments explaining how the matter upon which the submitted subpoenas were based is still “before the grand jury” to warrant keeping the subpoena and documents gathered in response to the subpoena secret. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes the information gathered in response to a grand jury subpoena confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with article 20.02 of the Criminal Code of Procedure.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center (the “NCIC”) or by the Texas Crime Information Center (the “TCIC”). *See* Gov’t Code § 411.083(a). 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 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10–12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except 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) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). We note because the laws governing the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10–12. Upon review, we find the information we have marked in the remaining information constitutes confidential CHRI that the department must withhold under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses section 58.005 of the Family Code, which provides that “[r]ecords and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to [certain listed individuals].” Fam. Code § 58.005(a). You contend a portion of the submitted information is confidential under section 58.005. You do not inform us, however, nor does the information at issue reflect that it was “obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court.” *Id.* We therefore conclude the department may not withhold the information at issue under section 552.101 of the Government Code on the basis of section 58.005 of the Family Code.

Section 552.101 also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

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 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 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 inmate visitor and mail logs that 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. ORDs 430, 428. Further, we recognized inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See also ORD 185. The rights of those individuals to anonymity were 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). Although the privacy rights of an inmate lapse at death, the separate privacy interests of the inmate's visitors and correspondents in their association with the inmate are protected by constitutional privacy. Accordingly, the department must withhold the visitor and correspondence information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy. However, we find none of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, the remaining information is not confidential under constitutional privacy and the department may not withhold it from release under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not

relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). In addition, in Open Records Decision No. 396 (1983) we considered whether certain types of information pertaining to inmate trust accounts were protected by common-law privacy. ORD 396. We found information regarding balances held in inmate accounts is highly intimate or embarrassing. *Id.* at 1. Furthermore, we concluded there is not a legitimate public interest in inmate account balances because “the total amount an inmate has on deposit at any particular time[] does not . . . relate to the receipt or expenditure of public funds.” *Id.* Accordingly, we determined that information regarding inmate account balances is protected under common-law privacy. *Id.*

You claim that portions of the remaining information, including the identities of the inmates’ family members are excepted under section 552.101 in conjunction with common-law privacy. Upon review, we find some of the remaining information is highly intimate or embarrassing and is not of legitimate concern to the public. Therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

You raise section 552.108 and state that release of some of the remaining information would interfere with law enforcement.⁴ Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.,* Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See e.g.* Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

⁴We note that although you cite to both section 552.108(b)(1) and section 552.108(b)(2) of the Government Code, section 552.108(b)(1) is the proper exception for your arguments.

You state Case Number 08-3015 contains information on security threat group activities inside the correctional facility. You argue that the release of this information would compromise security measures and investigative techniques and undermine the department's efforts in preventing gang violence and controlling illegal gang activity inside and outside the correctional facility. Having considered your argument, we conclude that a portion of Case Number 08-3015, which we have marked, is excepted from disclosure under section 552.108(b)(1).

You further argue that the use of force records and officer statements in Case Number 00-1010 contain unit security information. You contend that this information could be used in the planning and execution of a crime, as well as facilitate an escape plan or serious assault. However, we find that you have not adequately explained how or why release of the information at issue would interfere with law enforcement or crime prevention. We therefore conclude that the department may not withhold any of the remaining information under section 552.108(b)(1).

Section 552.102(a) of the Government Code 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 has 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the department must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(3) excepts from public disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. Gov't Code § 552.117(a)(3). We note that section 552.117(a)(3) protects an employee's personal cellular telephone or pager number if the employee pays for the cellular telephone or pager service with his or her personal funds. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Therefore, the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code, but may only withhold the marked cellular telephone number if the service for the number is paid for with the employee's personal funds. To the extent the service is paid for by the department, the number may not be withheld under section 552.117(a)(3) of the Government Code.

Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department[.]

...

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (3), (b). Although, you raise section 552.1175, upon review we find that none of the remaining information consists of a home address, home telephone number, emergency contact information, social security number, or family member information for the purposes of section 552.1175 of the Government Code. Therefore, none of the remaining information may be withheld on this basis.

You raise section 552.136 of the Government Code for portions of the remaining information. Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Thus, the department must withhold the information we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail

address is of a type specifically excluded by subsection (c).⁵ *Id.* § 552.137(a)-(c). Accordingly, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).⁶

You raise section 552.147 of the Government Code, which provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act.⁷ Gov’t Code § 552.147. Accordingly, the department may withhold the social security numbers we have marked under section 552.147 of the Government Code.

Lastly, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department: (1) except for basic information which must be released under section 552.029(8), must withhold the information in Case Number 2010.00463 under section 552.134 of the Government Code; (2) must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code; (3) must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy; (4) must withhold the information we have marked under common-law privacy; (5) may withhold the information we have marked under section 552.108; (6) must withhold the information we have marked under section 552.102 of the Government Code; (7) must withhold the information we have marked under section 552.117(a)(3) of the Government Code, but may only withhold the cellular telephone number we marked if the service is not paid for by the department; (8) must withhold the information we have marked under section 552.136 of the Government Code; (9) must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release; and (10) may

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481, 480 (1987), 470 (1987).

⁶Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁷Section 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 under the Act.

withhold the information we have marked under section 552.147 of the Government Code. The department must release the remaining information, but may only release copyrighted information in accordance with copyright law.

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,



Eamon D. Briggs
Assistant Attorney General
Open Records Division

EDB/som

Ref: ID# 485139

Enc. Submitted documents

c: Requestor
(w/o enclosures)