



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 17, 2014

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

OR2014-04454

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# 516888.

The Office of the Inspector General of the Texas Department of Criminal Justice (the "department") received a request for information pertaining to the suicides of twelve named death row inmates. You state you do not have information pertaining to four of the named inmates.¹ You state the department will withhold information under sections 552.117 and 552.147 of the Government Code and pursuant to previous determinations issued by this office, including Open Records No. 2005-01067 (2005).² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108,

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Section 552.024 of the Government Code permits a governmental body to redact information subject to section 552.117 of the Government Code in certain situations without requesting a decision from this office. *See Gov't Code* § 552.024(c). Section 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. *See id.* § 552.147(b). Open Records Letter No. 2005-01067 serves as a previous determination permitting the department to 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 they comply with section 552.1175 of the Government Code, under section 552.117(a)(3) of the Government Code without requesting a decision from this office.

552.1085, 552.130, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the requested information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2005-04243 (2005), 2008-08204 (2008), 2008-13101 (2008), 2008-13133 (2008), 2008-13147 (2008), 2008-13809 (2008), and 2014-01234 (2014). We note some information was ordered to be released in these rulings.

You now raise sections 552.107 and 552.108 of the Government Code for some of the submitted information. Section 552.007 of the Government Code, however, provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.107 and 552.108 of the Government Code, this exception does not prohibit the release of information or make information confidential. *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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department may not now withhold the previously released information under sections 552.107 or 552.108. However, you also raise sections 552.101, 552.102, 552.1085, 552.130, and 552.134 of the Government Code for some of the submitted information. Sections 552.101, 552.102, 552.1085, 552.130, and 552.134 make information confidential. Accordingly, we will address the applicability of sections 552.101, 552.102, 552.1085, 552.130, and 552.134 to any previously released information in Open Records Letter Nos. 2005-04243, 2008-08204, 2008-13101, 2008-13133, 2008-13147, 2008-13809, and 2014-01234.

We note in Open Records Letter No. 2008-08204, the requestor had a special right of access to some of the information at issue pursuant to section 10805(a)(1)(A) of title 42 the United States Code. The current request involves a different requestor with no special right of access to the information that was released in Open Records Letter No. 2008-08204. Thus, we find the circumstances have changed and the department may no longer rely on Open Records Letter No. 2008-08204 as a previous determination for this information. *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 information is or is not excepted from disclosure). Accordingly, we will address your arguments against disclosure of this information.

However, we have no indication the laws, facts, and circumstances on which the remaining information in Open Records Letter Nos. 2005-04243, 2008-13101, 2008-13133, 2008-13147, 2008-13809, and 2014-01234 were based have changed. Accordingly, to the extent the information is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter Nos. 2005-04243, 2008-13101, 2008-13133, 2008-13147, 2008-13809, and 2014-01234 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* ORD 673. To the extent the information is not identical, we will address your arguments against disclosure.

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 made confidential by statute, such as section 418.177 of the Texas Homeland Security Act, chapter 418 of the Government Code (the “HSA”). Section 418.177 provides the following:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain 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 seek to withhold the serious incident reports in the submitted information under section 552.101 of the Government Code in conjunction with section 418.177 of the

Government Code. You state “the release of these records would enable a person to calculate times and number of correctional officers assigned to security coverage at any given period.” You further state this information would help anticipate and defeat security measures employed by the department’s Correctional Institution Division “to maintain offender and staff safety and to prevent disruption of unit activities and security protocols.” You claim release of this information would compromise department security measures and create potential danger to institutional security, staff, offenders, and the public. You further claim this information “can serve as the key to an escape, an abduction or some other criminal act which could be devastating to the legitimate penological interests of the [department], the [Office of the Inspector General,] and the State.” Upon review, we find the department has failed to establish the information at issue is maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Thus, the department has not established the applicability of section 418.177 of the Government Code to the information at issue, and the department may not withhold any of the information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which governs the public availability of mental health records and provides:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Upon review, we find the information we marked under section 611.002 consists of mental health records or information obtained from mental health records. Therefore, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.³ However, we find none of the remaining information constitutes mental health records or information obtained from mental health records for the purposes of section 611.002 of the Health and Safety Code. Thus, no portion of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which provides in relevant part:

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Id. § 773.091(a)-(b), (g). Except for the information specified in section 773.091(g), emergency medical services (“EMS”) records are deemed confidential under section 773.091. Upon review, we find the information we marked under section 773.091 constitutes EMS records or information obtained from EMS records that are subject to chapter 773 of the Health and Safety Code. Thus, with the exception of the information subject to section 773.091(g), the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office

has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We note the MPA does not apply to optometrists. *See* Occ. Code § 151.052(a)(2). Section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See id.* § 159.001(3). Under this definition, a deceased person cannot be a patient under section 159.002 of the MPA. *See* ORDs 487, 370, 343. Thus, the MPA is applicable only to records related to a person who was alive at the time of diagnosis, evaluation, or treatment to which the records pertain. Upon review, we find the information we marked under the MPA consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created by a physician or someone under the supervision of a physician or information obtained from a medical record. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. However, we find you have not demonstrated how any of the remaining information you seek to withhold constitutes medical records for purposes of the MPA, and the department may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses section 258.102 of the Occupations Code. Section 258.102 provides in pertinent part as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Id. § 258.102(a). A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Upon review, we find the information we marked constitutes dental records the department must withhold under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code. However, we find you have not demonstrated how any of the remaining information constitutes dental records for purposes of section 258.102 of the Occupations Code, and the department may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential under federal and state law. *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.* 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) 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. Similarly, 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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). However, because the laws that govern 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. Accordingly, the department must withhold the Federal Bureau of Investigation numbers and the information we marked in the submitted information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law. However, we find none of the remaining information constitutes confidential CHRI for the purposes of chapter 411. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see also id.* §§ 560.001(1) (defining “biometric identifier” to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure). We note laws making this type of information confidential are intended to protect an individual’s privacy. *See id.* § 560.003. Because the right of privacy is purely personal and lapses at death, the fingerprints of a deceased individual may not be withheld on the basis of sections 560.001, 560.002, and 560.003. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.) (right of privacy is purely personal and lapses upon death); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-67 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). The fingerprints in the submitted information belong to deceased individuals. Therefore, the department may not withhold the fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code.

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 of the Government Code also encompasses 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 Fadlo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). 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;” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found “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.” ORD 185. 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 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. The right of those individuals to anonymity was found to outweigh the public's interest in this information. ORD 185; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Although some of the inmates at issue are deceased and their privacy rights lapsed at death, the separate privacy interests of the inmates' visitors and correspondents in their association with these individuals are protected by constitutional privacy. Accordingly, the department must withhold the visitor and correspondence information we marked under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. Upon review, we find the information we marked under common-law privacy satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing information of no legitimate public interest, and it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the department must withhold the dates of birth of department employees in the submitted information under section 552.102(a) of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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).

You state the information at issue consists of communications between a department employee and attorney. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the department. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold the information we marked under section 552.107(1) of the Government Code.

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 (Tex. App.—Austin 2002, no pet.) (Gov’t Code 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).

You seek to withhold the unit photographs, unit diagrams, and correctional officer shift rosters in the remaining information. You contend this information could be used in the planning and execution of a crime and compromise department and unit security or facilitate an escape plan. You also seek to withhold offender activity logs. You contend these logs detail the movement of offenders throughout the day, indicate where an offender is located at any given time, and “paint a picture of the activities of the correctional facility.” You state release of the offender activity logs would demonstrate the pattern of activities in the unit and would “alert any person intent on defeating the unity security measures a significant advantage” because “they could predict when certain activities would occur and thus be able to facilitate a planned escape or other crime, or by disrupting of the unit’s regular activities.”

You also seek to withhold the serious incident reports in the remaining information under section 552.108(b)(1) of the Government Code. You state “the release of these records would enable a person to calculate times and number of correctional officers assigned to security coverage at any given period.” You further state this information would help anticipate and defeat security measures employed by the department’s Correctional Institution Division “to maintain offender and staff safety and to prevent disruption of unit activities and security protocols.” You claim release of this information would compromise department security measures and create potential danger to institutional security, staff, offenders, and the public. You further claim this information “can serve as the key to an escape, an abduction or some other criminal act which could be devastating to the legitimate peneological interests of the [department], the [Office of the Inspector General,] and the State.” Upon review, with the exception of the information we marked for release, the department may withhold the submitted unit photographs, unit diagrams, shift rosters, and

offender activity logs under section 552.108(b)(1) of the Government Code.⁴ However, we find you have failed to demonstrate release of the remaining information at issue would interfere with law enforcement. Thus, no portion of the remaining information may be withheld under section 552.108(b)(1).

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(a)(1) 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). You state the information at issue contains photographs of offenders that are not department photographs listed in section 552.029 of the Government Code. *See Gov’t Code* § 552.029 (providing that certain categories of information about inmate confined in facility operated by or under contact with department are subject to required disclosure). You state these photographs pertain to unresolved criminal cases. Thus, we understand you to represent the photographs at issue pertain to cases that are ongoing. Based on your representation, we conclude the release of the information at issue 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. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the department may withhold the offender photographs you seek to withhold under section 552.108(a)(1) of the Government Code, to the extent they were not previously released.

Next, we address your argument under section 552.1085 of the Government Code for any information that was previously released. Section 552.1085 of the Government Code provides, in pertinent part, the following:

(c) A sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section. This section applies to any sensitive crime scene image regardless of the date that the image was taken or recorded.

Gov’t Code § 552.1085(c). For purposes of section 552.1085, “sensitive crime scene image” means “a photograph or video recording taken at a crime scene, contained in or part of a closed criminal case, that depicts a deceased person in a state of dismemberment, decapitation, or similar mutilation or that depicts the deceased person’s genitalia.” *See id.*

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

§ 552.1085(a)(6). As previously noted, you state the submitted information pertains to unresolved criminal cases. Thus, we understand you to represent the submitted information pertains to cases that are ongoing. We note a sensitive crime scene image is a photo contained in a "closed criminal case." Because you represent the information at issue pertains to ongoing criminal cases, we find you have failed to sufficiently demonstrate the applicability of section 552.1085 to the information at issue. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply). Therefore, we conclude the department may not withhold the information at issue under section 552.1085 of the Government Code.

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.

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

...

(2) information about an inmate sentenced to death.

Id. § 552.134(a), (b)(2). You contend portions of the remaining information contain information about non-death row offenders. Upon review, we find the information we marked consists of information about non-death row inmates confined in facilities operated by the department for purposes of section 552.134. We also find the exceptions in section 552.029 are not applicable to this information. Therefore, the department must withhold the information we marked under section 552.134 of the Government Code. However, we find portions of the remaining information pertain to death row inmates. Section 552.134 is not applicable to an inmate who has been sentenced to death. *See id.* § 552.134(b)(2). Further, we find you have not established section 552.134 is applicable to the remaining information. Accordingly, the department may not withhold any of the remaining information under section 552.134 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Accordingly, the department must withhold the motor vehicle record information we marked under section 552.130 of the Government

Code.⁵ However, find you have not demonstrated how any of the remaining information consists of motor vehicle record information. Accordingly, the department may not withhold any of the remaining information under section 552.130 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).⁶ *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

We note some of the remaining information 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, to the extent the information is identical to the information previously requested and ruled upon by this office, the department must continue to rely on Open Records Letter Nos. 2005-04243, 2008-13101, 2008-13133, 2008-13147, 2008-13809, and 2014-01234 as previous determinations and withhold or release the identical information in accordance with those rulings. The department must withhold (1) the mental health records and mental health record information we marked under section 611.002 of the Health and Safety Code; (2) with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the information we marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code; (3) the information we marked under section 552.101 of the Government Code in conjunction with the MPA; (4) the dental records we marked under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code; (5) the Federal Bureau of Investigation numbers in the submitted information and the information we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal

⁵Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

⁶The 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 (1987), 480 (1987), 470 (1987).

law; (6) the information we marked under section 552.101 of the Government Code in conjunction with constitutional privacy; (7) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (8) the dates of birth of state employees in the submitted information under section 552.102(a) of the Government Code. The department may withhold the information we marked under section 552.107 of the Government Code. With the exception of the information we marked for release, the department may withhold the submitted unit photographs, unit diagrams, shift rosters, and offender activity logs under section 552.108(b)(1) of the Government Code. To the extent they were not previously released, the department may withhold the offender photographs you seek to withhold under section 552.108(a)(1) of the Government Code. The department must withhold the information we marked under section 552.134 of the Government Code and the information we marked under section 552.130 of the Government Code. The department must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining information must be released; however, any information protected by copyright may only be released 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 516888

Enc. Submitted documents

c: Requestor
(w/o enclosures)

