



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 18, 2015

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

OR2015-24298

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# 587903.

The Office of the Inspector General of the Texas Department of Criminal Justice (the "department") received a request for four categories of information pertaining to the requestor. You state the department does not possess or have access to some of the requested information.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.134 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the 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 the doctrine of common-law privacy, which

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<sup>1</sup>The 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).

<sup>2</sup>Although you initially raise sections 552.103, 552.107, 552.1175, 552.130, and 552.147 of the Government Code, you have not submitted arguments in support of these exceptions; therefore, we assume you have withdrawn them. *See* Gov't Code §§ 552.301, 302.

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. Texas 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. In Open Records Decision No. 393 (1983), this office concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d at 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

You inform us the submitted information pertains to an investigation of alleged sexual assault. However, we note the requestor is the alleged victim depicted in the submitted information. Section 552.023 of the Government Code provides that “[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.” *See* Gov’t Code § 552.023(a); *see also id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person’s representative, solely on the grounds that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or individual’s authorized representative requests information concerning the individual). Accordingly, this requestor has a right of access to information pertaining to her that would ordinarily be confidential under section 552.101 in conjunction with common-law privacy. Therefore, the department may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(a)(2) 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 . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” *Id.* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You inform us the remaining information pertains to a closed investigation that did not result in conviction or deferred adjudication. However, you also state this information relates to an “unresolved” criminal investigation that is “subject to subsequent action.” We note section 552.108(a)(2) is applicable only if the information at issue is related to a concluded criminal case that did not result in conviction or deferred adjudication. Thus, because of these contradictory representations, we find you have failed to demonstrate the applicability of

section 552.108(a)(2) of the Government Code to the information at issue. Therefore, the department may not withhold any of the submitted information on that basis.

Section 552.134 of the Government Code relates to information about inmates of the department. This exception provides, in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] is excepted from the requirements of Section 552.021 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). You assert some of the submitted information consists of records pertaining to an inmate confined in a facility operated by the department. Upon review, we find portions of the submitted information are about an inmate for section 552.134 purposes. Accordingly, the department must withhold the information we have marked under section 552.134. However, the remaining information at issue pertains to the conduct of department employees and, therefore, is not "about an inmate" for purposes of section 552.134. Therefore, the department may not withhold any of the remaining information on that basis.

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[.]" *Id.* § 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 we have marked under section 552.102(a) of the Government Code.<sup>3</sup> However, we find you have failed to demonstrate the applicability of section 552.102(a) to any of the remaining information. Therefore, the department may not withhold any of the remaining information on that basis.

Section 552.108(b) 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 (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). This section is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records

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

Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department's use of force policy), 456 (198) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You assert some of the remaining information, which we have marked, consists of shift rosters that are excepted from disclosure pursuant to a previous determination issued by this office to the department in Open Records Letter No. 2004-6370 (2004). In that ruling, this office ruled the department may generally withhold shift rosters for its prison units from public disclosure for security reasons under section 552.108(b)(1) of the Government Code. Therefore, the department may withhold the information at issue under section 552.108(b)(1) pursuant to the previous determination issued in Open Records Letter No. 2004-6370. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

In addition, you state some of the remaining information contains diagrams of the department's unit layout. You state this information could be used in the planning and execution of a crime, compromise department security, or be used to facilitate an escape plan. Upon review, we find the release of the information at issue, which we have marked, would interfere with law enforcement. Therefore, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.108(b)(1) to any of the remaining information, and it may not be withheld on that basis.

Section 552.117(a)(3) of the Government Code 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). Upon review, we find the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code.

In summary, the department must withhold the information we have marked under section 552.134 of the Government Code. The department must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. The department may withhold the submitted shift rosters we marked under section 552.108(b)(1) of the Government Code pursuant to the previous determination issued in Open Records Letter No. 2004-6370. The department may withhold the additional information we have marked under section 552.108(b)(1) of the Government Code. The department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code. The department must release the remaining information.<sup>4</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Joseph Keeney  
Assistant Attorney General  
Open Records Division

JDK/akg

Ref: ID# 587903

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>We note the requestor has a special right of access to some of the information being released. *See* Gov't Code § 552.023(a). Therefore, the department must again seek a decision from this office if it receives another request for this information from another requestor.