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ATTORNEY GENERAL OF TEXAS

May 31, 2016

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

OR2016-12348

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# 610283.

The Texas Department of Criminal Justice (the "department") received a request for all records related to a named inmate. You state the department will release some information to the requestor. You state the department will redact information pursuant to sections 552.024(c),¹ 552.1175(f),² and 552.147(b)³ of the Government Code and Open

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

²Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, dates of birth, social security number, and family member information of certain individuals who properly elect to keep this information confidential. *See* Gov't Code § 552.1175(b), (f). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.1175(h). *See id.* § 552.1175(g), (h).

³Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

Records Decision No. 670 (2001).⁴ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.130, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). Case numbers 95-1762, IF.CC.0773.2007.TO, and 2011.00039 and correspondence number CM.2011.00925 consist of completed investigations that are subject to section 552.022(a)(1). The information subject to section 552.022(a)(1) must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. *Id.* Although you assert these investigations are excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information subject to section 552.022(a)(1) under section 552.103. However, because sections 552.101, 552.102, 552.130, and 552.134 of the Government Code can make information confidential under the Act, we will consider the applicability of these exceptions to the information subject to section 552.022(a)(1) of the Government Code. Furthermore, we will consider your arguments for case number 97-1303, which is not subject to section 552.022(a)(1).

Next, we note case number 97-1303 includes a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report the Office of the Attorney General (“OAG”) determines is privileged, the OAG shall make the report public. *See* Crim. Proc. Code art. 49.18(b). Although you claim the custodial death report is excepted from disclosure under sections 552.103, 552.108, and 552.134 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the department must release the custodial death report within case number 97-1303, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

⁴Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. ORD 670 at 6.

Next, we note case number 97-1303 contains the fingerprints of the named inmate, the public availability of which is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.003 of the Government Code provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Section 560.002(1)(A) of the Government Code gives an individual or his authorized representative a right of access to his own fingerprints. The general exceptions found in the Act, such as sections 552.103, 552.108, and 552.134 of the Government Code, cannot impinge on a statutory right of access to information. *See Open Records Decision Nos. 613 at 4 (1993), 451 at 4 (1986).* In this instance, the requestor submits an authorization form signed by the named inmate. Therefore, we find the requestor is acting as the authorized representative of this individual. Thus, the requestor has a right of access to her client’s fingerprints, which we have marked, pursuant to section 560.002(1)(A) of the Government Code, and the marked fingerprints must be released to the requestor.

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.

Gov’t Code § 552.134(a), (b)(2). Section 552.134 is explicitly made subject to section 552.029, which provides, in relevant part, the following:

Notwithstanding Section . . . 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [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.

Id. § 552.029(8). Thus, the legislature explicitly made section 552.134 subject to section 552.029. You contend the remaining information falls within the scope of section 552.134. Upon review, we find case numbers 95-1762 and IF.CC.0773.2007.TO consist of information about non-death row inmates confined in facilities operated by the department for purposes of section 552.134. We note some of the information at issue pertains to the death of an inmate in custody and/or alleged crimes involving the inmate. Therefore, the department must release basic information about the incidents at issue pursuant to section 552.029(8). *See id.* For purposes of section 552.029(8), basic information includes the time and place of the incident, the names of inmates and department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. Therefore, except for the information subject to section 552.029 of the Government Code, which the department must release, the department must withhold case numbers 95-1762 and IF.CC.0773.2007.TO under section 552.134 of the Government Code.⁵ However, we find case numbers 97-1303 and 2011.00039 and correspondence number CM.2011.00925 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). Accordingly, the department may not withhold case numbers 97-1303 and 2011.00039 and correspondence number CM.2011.00925 under section 552.134 of the Government Code.

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[.]” *Id.* § 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 case number 97-1303 pertains to a murder case which is currently on appeal and is the subject of an active criminal investigation being conducted by the department. Based on these representations, 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). Thus, section 552.108(a)(1) is applicable to case number 97-1303.

However, we note, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers

⁵As our ruling is dispositive, we need not address the department’s remaining arguments against disclosure of this information.

to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the department may withhold the remaining information in case number 97-1303 under section 552.108(a)(1) of the Government Code.⁶

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center.⁷ Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI 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 laws with respect to the CHRI it generates. See *id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F or subchapter E-1 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. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F or subchapter E-1 of the Government Code. Upon review, we find the remaining information contains a Federal Bureau of Investigation (“FBI”) number, which we have marked. The marked FBI number consists of CHRI that is confidential under section 411.083. Thus, the department must withhold the marked FBI number under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. However, we find you have not demonstrated any portion of the remaining information consists of CHRI for purposes of chapter 411 of the Government Code, and the department may not withhold it under section 552.101 on that basis.

In summary, the department must release the custodial death report pursuant to article 49.18(b) of the Code of Criminal Procedure and the requestor’s client’s fingerprints within case number 97-1303 pursuant to section 560.002(1)(A) of the Government Code,

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of the information at issue, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597(1991).

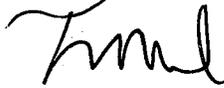
⁷Although you raise section 552.101 in conjunction with section 411.084 of the Government Code, we understand you to raise section 552.101 in conjunction with section 411.083 of the Government Code.

both of which we have marked. Except for the information subject to section 552.029(8) of the Government Code, which the department must release, the department must withhold case numbers 95-1762 and IF.CC.0773.2007.TO under section 552.134 of the Government Code. With the exception of the basic information, which the department must release, the department may withhold the remaining information in case number 97-1303 under section 552.108(a)(1) of the Government Code. The department must withhold the FBI number we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The department must release the remaining information.⁸

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bw

Ref: ID# 610283

Enc. Submitted documents

Requestor
(w/o enclosures)

⁸We note the requestor has a right of access to some of the information being released in this instance. See Gov't Code §§ 552.023(a), 560.002(1)(A); see also Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself or person for whom she is authorized representative). Thus, if the department receives another request for the same information from a different requestor, the department must again seek a decision from this office.