



June 8, 2001

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-2408

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148144.

The Texas Department of Criminal Justice (the “department”) received a written request for the following information:

All Texas Department of Criminal Justice records, including any case documents, video or audio recordings compiled by any agency including Internal Affairs or the Inspector General’s Office pertaining to actual incidents or allegations of sexual or intimate contact between Texas prison inmates and any of the following personnel; Texas prison guards, prison medical staff, teachers or educators, clergy, volunteers or any other prison personnel from 1997 to present.

Any records of resignations or terminations or disciplinary action of prison guards, prison medical staff, teachers or educators, clergy, volunteers or any other prison personnel relating to intimate or sexual contact between inmates and the preceding prison personnel from 1997 to present.¹ [Footnote added.]

¹You state that for purposes of this ruling, the department interprets “intimacy” as “including some degree of sexual or genital physical contact” and not merely instances where “the officer and the inmate were excessively friendly.”

You indicate that the department believes that some of the requested information is subject to required public disclosure:

We believe that some of the information requested is likely public. Basic allegations against employees are likely public. Criminal allegations are likely public. Disciplinary documents that reflect the disciplinary charge, the punishments imposed, and the short narratives of what was found to have occurred are mostly public. However, we believe that the identities of the alleged victims are not public, because the alleged victims are either victims of sexual offenses and/or because the alleged conduct usually constitutes sexual harassment. We do [not]² believe that the identities of witnesses and the contents and substance of their statements are public. And we do not believe that the details of the investigations (the allegations, witness statements, and physical evidence) are available to the public. [Footnote added.]

You contend that the information you seek to withhold is excepted from required public disclosure pursuant to sections 552.101, 552.107(2), 552.108, 552.117(3), and 552.131 of the Government Code.³

We first address the applicability of section 552.117(3) of the Government Code to all of the records at issue. Section 552.117(3) requires the department to withhold "information that relates to the home address, home telephone number, or social security number, or that reveals whether" a department employee "has family members." Accordingly, the department must withhold these types of information regarding current employees from all of the documents at issue pursuant to section 552.117(3). On the other hand, because section 552.117(3) applies only to current department employees, any such information pertaining to a former department employees is excepted from public disclosure only if the former employee elected to have this information withheld from the public pursuant to section 552.024 of the Government Code. *See* Gov't Code § 552.117(1) (protecting employees' and former employees' personal information).

We also note that the employees' social security numbers are made confidential under 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), but only

²Because your last two statements here appear to be, at least in part, contradictory, we assume that you in fact seek to withhold the identities of witnesses and the contents of their individual statements.

³In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

if the department obtained or maintained the social security numbers pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain the social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the department should ensure that these numbers were not obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

We next address the applicability of section 552.131 of the Government Code to Exhibits 1 and 3. Section 552.131 relates to inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice 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 § 552.131(a).⁴ Section 552.131 is specifically made subject to section 552.029 of the Government Code, which provides in relevant part:

Notwithstanding . . . Section 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure[:]

...

(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) (emphasis added). Thus, the legislature explicitly made section 552.131 subject to section 552.029. Pursuant to section 552.029(8), "basic

⁴As of the date of this letter ruling, four different sections of the Act were denominated as section 552.131. Sections 552.131 and 552.029, relating to inmates of the department, were added to chapter 552 of the Government Code by the Act of May 26, 1999, 76th Leg., R.S., ch.783, §§ 1, 2, 1999 Tex. Gen. Laws 3407-08.

information” regarding an alleged crime involving an inmate is subject to required disclosure. The basic information that is subject to disclosure under section 552.029(8) includes the time and place of the incident, the names of inmates and of 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.

As you note in your brief to this office, an instance of sexual activity between a prison employee and an inmate or an individual who is “under the supervision of the department but not in the custody of the department” constitutes a criminal offense. *See* Penal Code § 39.04(a)(2), (f), (eff. Sept. 1, 1999); *see also* Penal Code § 21.01 (defining “sexual contact,” “sexual intercourse,” and “deviate sexual intercourse”). You additionally note that

[e]ven before [the effective date of section 39.04], such [sexual] conduct was potentially criminal either under a theory of rape (the sexual conduct was under duress and therefore not voluntary) or under a theory of bribery (the employee engaged in that or other improper conduct under some inducement or for some reward, e.g., for sex, the officer brought drugs to the inmate).

We therefore conclude that although the department must withhold pursuant to section 552.131 most of the information contained in Exhibits 1 and 3, which was gathered during investigations of employee/inmate sexual activity, the department nevertheless must release all “basic information” contained in these files, with the following exception.

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We conclude that in those instances where the department determined that the sexual activity was not voluntary by one of the parties, the identity of the “victim” of the sexual activity must be withheld from the public pursuant to section 552.101 of the Government Code in conjunction with the common law right of privacy. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (identity of victim of sexual harassment protected by common law privacy); Open Records Decision No. 339 (1982) (identity of sexual assault victim protected by common law privacy).

Finally, we address the extent to which the records of “resignations or terminations or disciplinary action” of department employees accused of improper sexual activity are subject to public disclosure. As noted above, you do not contend that these types of records, which you designated Exhibits 2, 4, 5, 6, 7, 8, and 9, are excepted from public disclosure. Accordingly, in those instances where both parties’ sexual activity was consensual, we

conclude that the records of the employee's resignation, termination, or disciplinary action must be released in their entirety, including the identity of the inmate or the individual under the supervision of the department. Otherwise, the department must release these records with the name of the "victim" of the sexual activity redacted, as discussed above.⁵

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

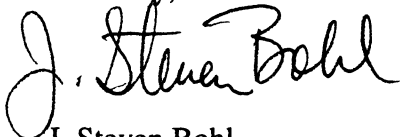
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

⁵Because we are able to resolve your request under sections 552.101, 552.117(3), and 552.131, we need not address the applicability of section 552.108 except to note that the information that is subject to release under section 552.029 is not protected by this exception. *See* Gov't Code § 552.108(c) (section 552.108 does not protect basic information).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/RWP/seg

Ref: ID# 148144

Encl. Submitted documents

cc: Ms. Mary Ann Razzuk
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(w/o enclosures)