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ATTORNEY GENERAL OF TEXAS

January 31, 2017

Mr. Sharbel Sfeir
Assistant General Counsel
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Texas Department of Criminal Justice
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Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
4616 West Howard Lane, Suite 250
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OR2017-02180

Dear Mr. Sfeir and 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# 643657.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to a specified incident and department policies regarding a specified unit. The department's Office of the General Counsel (the "OGC") and Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG states it does not possess information responsive to some portions of the request.¹ The OIG states it will withhold information

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);

pursuant to section 552.147 of the Government Code.² The OIG claims the information it submitted is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, and 552.134 of the Government Code. The OGC states it will release some information. The OGC claims the information it submitted is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to subsection 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). Further, pursuant to subsection 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The department received the request for information on October 25, 2016. We note the department was closed on November 11, 2016. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, you were required to provide the information required by subsection 552.301(b) by November 8, 2016. Moreover, you were required to provide the information required by subsection 552.301(e) by November 16, 2016. However, the department did not request a ruling from this office until November 16, 2016. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Furthermore, the OIG did not submit written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld and a copy of the specific information requested or representative samples until December 1, 2016. Consequently, we find the department failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166

Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Section 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).

S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although the OGC and the OIG raise section 552.108 of the Government Code for the submitted information, this section is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the department has waived its claim under section 552.108 for the submitted information. The OGC also raises sections 552.101 and 552.134. The OIG also raises sections 552.101, 552.102, 552.117, 552.1175, and 552.134. As these sections can make information confidential under the Act, and therefore provide compelling reasons to withhold information, we will consider the applicability of these sections to the submitted information.

Next, we note the submitted information 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). The format of the report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined the report and the summary of how the death occurred must be released to the public, but any other documents submitted with the report are confidential under article 49.18(b). Although the OIG and OGC claim the submitted custodial death report is excepted from disclosure under sections 552.101 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 submitted custodial death report, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

Section 552.134 of the Government Code is applicable to information related to inmates of the department. Section 552.134 states, 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). However, section 552.029 of the Government Code provides:

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. Although the inmate to whom the information at issue pertains is deceased, section 552.134 is applicable to the information that relates to the decedent as an inmate. We note some of the submitted information pertains to the conduct of department employees and is administrative information. Such information does not constitute “information about an inmate” for purposes of section 552.134 and may not be withheld on that basis. Upon review, we find the information we have marked consists of information about a non-death row inmate confined in a facility operated by the department. Thus, the department must withhold the information we have marked under section 552.134 of the Government Code.

We note, however, the information we have marked is related to the death of an inmate in custody. Therefore, basic information about this inmate’s death is subject to disclosure under section 552.029(8). *See id.* Basic information under section 552.029(8) 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. As the department does not raise further exceptions to disclosure of the basic information, those types of information must be released pursuant to section 552.029(8). Accordingly, except for basic information under section 552.029(8) of the Government Code, which must be released, the department must withhold the information we have marked under section 552.134 of the Government Code.³

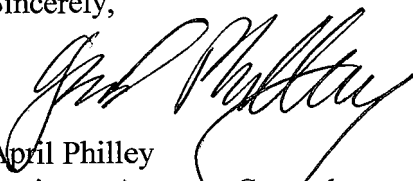
In summary, the department must release the custodial death report, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure. With the exception of basic information under section 552.029(8) of the Government Code, which must be released, the department must withhold the information we have marked under section 552.134 of the Government Code. The remaining information must be released.

³As we are able to make these determinations, we need not address your other arguments against disclosure of this information.

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,



April Philley
Assistant Attorney General
Open Records Division

AP/sdk

Ref: ID# 643657

Enc. Submitted documents

c: Requestor
(w/o enclosures)