



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 14, 2017

Mr. Eric K. Miller  
Assistant General Counsel  
Office of the General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR2017-28447

Dear Mr. Miller:

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# 689484 (TDCJ#AL0089).

The Texas Department of Criminal Justice (the "department") received a request for all legislative inquiries submitted by legislators or their representatives. You claim some of the submitted information is not subject to the Act. You claim the remaining submitted information is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you assert some of the submitted information is not responsive to the instant request for information because it does not consist of the legislative inquiries submitted to the

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<sup>1</sup>We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 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 those records contain substantially different types of information than that submitted to this office.

department by legislators or their representatives. Upon review, we agree the information at issue, which we marked, is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request.<sup>2</sup>

Next, you claim portions of the responsive information are not subject to the Act, but are instead governed by section 306.003 of the Government Code. Section 306.003 provides, in part, as follows:

(a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

(b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

Gov't Code § 306.003(a)-(b). Section 306.003 pertains to only records of a member of the legislature or the lieutenant governor. *See id.*; Open Records Decision No. 648 (1996). The responsive information at issue, which you marked, consists of records of the department rather than those of a member of the legislature or the lieutenant governor. Therefore, we conclude that section 306.003 does not apply to the information you marked.

Section 552.134 of the Government Code relates to inmates of the department and provides:

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.

Gov't Code § 552.134(a). You seek to withhold certain documents in their entirety under section 552.134. In this instance, the information at issue consists of communications between legislators and the department. As such, this information does not constitute "information about an inmate" for purposes of section 552.134. Therefore, the department may not withhold the entirety of the documents at issue under section 552.134. However, we agree some of the information at issue pertains to inmates confined in a facility operated

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

by the department and must be withheld under section 552.134. Accordingly, the department must withhold the information we marked under section 552.134 of the Government Code.<sup>3</sup> However, we find you have failed to establish any of the remaining information relates to department inmates for purposes of section 552.134, and the department may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses section 290dd-2 of title 42 of the United States Code, which provides, in part:

(a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see* 42 C.F.R. §§ 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential), 2.12(b) (discussing when an alcohol abuse or drug program is considered to be federally assisted). Thus, section 290dd-2 makes confidential the records of substance abuse patients that are created and maintained as part of their participation and treatment in a federally assisted substance abuse program. *See* 42 U.S.C. § 290dd-2(a). We understand you to assert some of the remaining information is confidential under section 290dd-2 of title 42 of the United States Code. However, upon review, we find none of the information at issue consists of records of the identity, diagnosis, prognosis, or treatment of a patient maintained in connection with the performance of a program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code under section 290dd-2 of title 42 of the United States Code.

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,

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

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). Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, the information at issue relates to an individual who has been de-identified, and whose privacy interests are, thus, protected. Further, we find the department has not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the department may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, the department must withhold the information we marked under section 552.134 of the Government Code. The department must release the remaining responsive 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](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,



Kieran Hillis  
Assistant Attorney General  
Open Records Division

KH/sb

Ref: ID# 689484

Enc. Submitted documents

c: Requestor  
(w/o enclosures)