



December 22, 1999

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P O Box 12668
Austin, Texas 78711-2668

OR99-3730

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130549.

The Denton State School of the Texas Department of Mental Health and Mental Retardation (the "department") received a request from a former employee for information regarding an abuse/neglect case involving the former employee. You claim that the information is excepted from required disclosure under section 552.101 of the Government Code, in conjunction with section 48.101(a)(3) of the Human Resources Code. We have considered the exception you claim and reviewed the submitted information.

Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office (1) general 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, and (3) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.¹ You did not, however, submit to this office a copy of the written request for information.

¹The Seventy-sixth Legislature amended sections 552.301- 552.303 of the Government Code. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 20, 1999 Tex. Sess. Law Serv. 4500 (Vernon). The amendment applies to a governmental body's request for an attorney general decision made on or after September 1, 1999, the effective date of the amendment. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 36, 1999 Tex. Sess. Law Serv. 4500, 4514 (Vernon).

Therefore, as provided by section 552.302 of the Government Code, the information that is the subject of this request for information is presumed to be public information. Information that is presumed public must be released unless a governmental body demonstrates a compelling interest to withhold the information to overcome this presumption. *See 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982).

Where information is made confidential by other law or where third party interests are at issue a compelling reason exists to overcome the presumption that information is open under section 552.302. *See* Open Records Decision No. 150 (1977). The submitted information contains information made confidential by law.

Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. Section 48.101 of the Human Resources Code provides in pertinent part:²

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

(d) The department by rule shall provide for the release on request to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

²The Seventy-sixth Legislature amended section 48.101, renumbered former section 48.102, and added a new section 48.102 of the Human Resources Code. Act of May 20, 1999, 76th Leg., R.S., ch. 907, §§ 10, 11, 12, 1999 Tex. Sess. Law Serv. 3607, 3610, 3611 (Vernon), effective September 1, 1999.

The submitted documents appear to be “files, reports, records, communications, and working papers used or developed in an investigation” of alleged exploitation. We therefore conclude that the confidentiality provisions of section 48.101 apply to the records at issue. As noted above, however, the requestor of the information is the former state school employee accused of the exploitation.

Section 48.101(d), above, provides special access to the report by the subject of the report, in accordance with rules promulgated by the “department or investigating state agency.” In addition, the Seventy-sixth Legislature enacted a new section 48.102 of the Human Resources Code, which specifically addresses reports of investigations in schools. *See note 2, ante.* Effective September 1, 1999, according to section 48.102(b),(c):

(b) On request, the department shall provide a copy of the report of the investigation to the person who is alleged to have suffered the abuse, neglect, or exploitation, to the legal guardian of that person, *and to the person alleged to have committed the abuse, neglect, or exploitation.*

(c) The report of the investigation shall be edited to protect the identity of the person who made the report under Section 48.051.

Section 48.102 entitles a person alleged to have committed exploitation to a copy of the report of the investigation, with the identity of the reporting person redacted. The department is directed by the legislature to adopt rules to implement section 48.102, although we have not been made aware of any rules adopted by the department relating to the new section. *See Hum. Res. Code § 48.102(d).* You refer us to provisions in the Texas Administrative Code which you assert make additional information confidential.³ However, a governmental body cannot deny access to information by agency rule. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Authority to exempt records from required disclosure must be granted expressly by statute; it cannot be implied from general rulemaking authority. *Id.* Therefore, section 48.102 now governs the release of this information to this requestor.

Finally, you claim that selected portions of the requested information are confidential pursuant to chapter 595 of the Health and Safety Code. Chapter 595 makes confidential records of the “identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation.” Health & Safety Code § 595.001. You have highlighted the client’s identifying information on the documents submitted for

³ Should the department need to refer to these sections in the future, note that the reference to Texas Administrative Code provisions cited as “25 TEX. ADMIN. CODE § 403.291 et seq.” in your request for decision now refers to 25 T.A.C. § 414.1 *et seq.*

review, and this office agrees that you must withhold the highlighted, identifying information. In addition, the department must withhold information identifying any other client(s) and the individual(s) who reported the incident. In addition, two documents, facsimile pages 7 and 19, contain the former employee's social security number. We note that the social security number may be confidential if the information is requested by anyone else, but will not further address that issue as to this request. We have marked the identifying information. The department must release the redacted documents.⁴

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).

⁴ We note that among the documents submitted for review are several which are signed by the former employee. Because we determine that the requestor is entitled to the redacted documents, we do not discuss the availability of information to a requestor who has already had access to it.

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,

A handwritten signature in cursive script, appearing to read "Patricia Michels Anderson".

Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/jc

Ref: ID# 130549

Encl. Submitted documents

cc: Ms. Felisha Avery
1009 Windsor Drive
Duncanville, Texas 75137
(w/o enclosures)