



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2004

Mr. Lance Beversdorff
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2004-1239

Dear Mr. Beversdorff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195586.

The Texas Youth Commission (the "commission") received a request for sixteen categories of information related to allegations against a commission employee concerning a use of force incident occurring September 12, 2003 at the Victory Field Correctional Academy. You contend that information responsive to the request for the "audio and video record of the videoconference" referenced in item 1, as well as portions of the information requested in item 8, the information requested in item 9, and portions of the information requested in item 11, are excepted from disclosure under section 552.101 of the Government Code.¹ You also claim that additional portions of the information requested in item 11 are excepted from disclosure under section 552.132 of the Government Code. With respect to the remainder of the requested information, you advise that the commission either has no responsive information, has provided responsive information to the requestor, or will make responsive information available to the requestor. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request

¹ We note you have submitted representative samples of the information requested in item 9, relating to disciplinary records of youths in the custody of the commission. We assume that the submitted "representative sample" of these records is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This ruling 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.

was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). As you have not provided any information responsive to the remainder of item 1, or information responsive to items 2 through 7, item 10, or items 12 through 16 for review by this office, nor raised any exceptions to disclosure for such information, we assume that the commission has released this information to the requestor, to the extent it exists. If not, you must release it immediately. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). We have considered the exceptions you claim with respect to the submitted information, and we have considered your response to our letter of February 5, 2004, seeking additional information required for our decision. See Gov't Code § 552.303 (providing for attorney general request for submission of additional information attorney general determines is necessary to render decision). We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. You contend that the submitted representative sample of youth disciplinary records is confidential under section 61.073 of the Human Resources Code. Section 61.073 provides:

The commission shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control. Except as provided by Section 61.093(c), these records and all other information concerning a child, including personally identifiable information, are not public and are available only according to the provisions of Section 58.005, Family Code, Section 61.0731, Human Resources Code, and Chapter 61, Code of Criminal Procedure.

Hum. Res. Code § 61.073. Section 58.005(a) of the Family Code provides that “[i]nformation obtained for the purpose of diagnosis, examination, evaluation, or treatment . . . of a child by [an agency] providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court” may only be disclosed to certain individuals under certain circumstances. Section 61.0731 of the Human Resources Code provides that certain information concerning a child may be released to the child and the child's parent or guardian, or to a person having a legitimate need for the information, only under certain conditions. Based on your representations and our review of the information, we determine that the submitted disciplinary records are confidential under section 61.073 of the Human Resources Code and must be withheld pursuant to section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. You contend that the names of youths appearing in the remaining documents at issue are excepted under section 552.101 in conjunction with common-law privacy. We agree that the names at issue are protected by privacy. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. Thus, we have marked the information that the commission must withhold in the remaining submitted documents pursuant to section 552.101 in conjunction with common-law privacy.

Next, you contend that the submitted audio tape recording also contains the names of youths in the custody of the commission. As you contend that the commission is unable to redact these names from the audio tape at issue, you seek to withhold the audio tape in its entirety under section 552.101 in conjunction with common-law privacy. Based on our review of the submitted audio tape and your representations, we determine that the commission must withhold the audio tape recording in its entirety pursuant to section 552.101 in conjunction with common-law privacy.

Finally, you have marked the names of commission staff in the submitted documents that you seek to withhold under section 552.132 of the Government Code. Section 552.132(f) permits an employee of a governmental body who is also a "crime victim," as defined under the Crime Victims' Compensation Act, subchapter B of chapter 56 of the Code of Criminal Procedure, to elect whether to allow public access to information held by the Office of the Attorney General or other governmental body that would identify or tend to identify the crime victim. *See* Gov't Code § 552.132(f). In this instance, however, we find that you have not established that the individuals at issue are "crime victims" within the scope of the Crime Victims' Compensation Act. Thus, we determine that the commission has failed to demonstrate the applicability of section 552.132 of the Government Code to the information at issue. Consequently, the commission may not withhold any of the submitted information pursuant to section 552.132 of the Government Code.

In summary, we have marked the information that the commission must withhold pursuant to section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code. We have marked the names of youths in the custody of the commission that are protected by common-law privacy and must be withheld under section 552.101 of the Government Code. We further determine that the commission must withhold the portions of the submitted audiotape containing the names of youths in the custody of the

commission pursuant to section 552.101 in conjunction with common-law privacy. The remainder of the submitted information must be released to the requestor.

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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge

this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 195586

Enc: Submitted documents

c: Mr. George M. Kirk
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(w/o enclosures)