



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2004

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

OR2004-5374

Dear Ms. Kendall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204457.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for the requestor's records of employment, including records of changes in shifts, homes, or work patterns; records of absences while employed by the State School; and records of any of the requestor's actions that were the cause of any type of disciplinary action. You state that you have released some of the information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 40.005 of the Human Resources Code provides statutory authority for the Department of Family and Protective Services ("DFPS")¹ to promulgate rules regarding release of DFPS's records. In pertinent part it reads:

¹The Department of Protective and Regulatory Services has been renamed the Department of Family and Protective Services.

(a) [DFPS] shall establish and enforce rules governing the custody, use, and preservation of [DFPS's] records, papers, files, and communications.

(b) [DFPS] shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a [DFPS] service or to an investigation the [DFPS] conducts in performing its duties and responsibilities. The safeguards must be consistent with the purposes of [DFPS's] programs and must comply with applicable state and federal law and [DFPS] rules.

You claim that section 711.601 of title 40 of the Texas Administrative Code makes the submitted records confidential. Section 711.601 applies to investigations of department facilities by DFPS and provides that “[t]he reports, records, and working papers used by or developed in the investigative process, and the resulting investigative report, are confidential and may be disclosed only as allowed by law or this chapter.” Section 711.613 of title 40 of the Texas Administrative Code permits release of an investigative report in accordance with section 417.512(d) of title 25 of the Texas Administrative Code, which provides in pertinent part:

(d) When disciplinary action is taken against an employee based on confirmed abuse or neglect, the head of a facility notifies the employee in writing of the disciplinary action taken and any right to a grievance hearing the employee may have under the department’s internal policies and procedures relating to employee grievances. If the employee files a complaint in response to a written reprimand resulting from confirmed abuse or neglect, or if the employee files a grievance in response to disciplinary action resulting from confirmed abuse or neglect, the head of the facility, upon the employee’s written request, provides the employee with a copy of or access to the investigative report.

You state that the requestor did not file a grievance against the department. Thus, section 417.512(d) does not permit release of the investigative report. As the submitted information consists of a DFPS investigative report of a department facility, and section 417.512(d) does not apply in this instance, you must withhold the submitted information under section 552.101 of the Government Code in conjunction with 711.601 of title 40 of the Texas Administrative Code.

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,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 204457

Enc. Submitted documents

c: Mr. Noel R. Trevino
c/o Frances Kendall
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P.O. Box 12668
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(w/o enclosures)