



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 12, 2007

Mr. Brett Norbraten
Open Records Attorney
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2007-07394

Dear Mr. Norbraten:

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# 280784.

The Texas Department of Aging and Disability Services (the "department") received two requests for several categories of information regarding the investigations at all of the Texas state schools. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially we must address the department's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

the request. Gov't Code § 552.301(a), (b). In this instance, while you timely submitted a request for the attorney general's decision, you did not raise section 552.101, section 552.103, or section 552.107 in that request or within the ten business day period mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason 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). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold any of the submitted information under section 552.103 or section 552.107. However, the department also raises section 552.101 of the Government Code. Since section 552.101 can constitute a compelling reason for non-disclosure, we will consider whether this exception applies to the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses statutory confidentiality provisions. You contend that some of the submitted information is confidential under section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

(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.

Hum. Res. Code § 48.101(a), (b). You state that the marked documents in Exhibits A and B relate to reports and investigations made under chapter 48 of the Human Resources Code. Based upon your representations and our review, we find that the documents you have marked in Exhibits A and B consists of files, reports, records, communications, and working papers used or developed in investigations made under chapter 48. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b). *But see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances). You do not indicate, nor does it appear, that an exception to confidentiality applies in this instance. Accordingly, we conclude that the department must withhold the documents you have marked in Exhibits A and B in their entirety pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.²

You state that the remaining information in Exhibits A and B, and the entirety of Exhibit C are excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code, which provides that “[r]ecords 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 are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004.” Health & Safety Code § 595.001. You state that the information at issue consists of records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the Texas state schools’ provision of mental retardation services. You further state that the requestors have not demonstrated that they have a right of access to the submitted records under section 595.003 or section 595.004 of the Health and Safety Code. Having considered your representations and reviewed the submitted records, we conclude that the remaining portion of Exhibit A and the information we have marked in Exhibit B are confidential under section 595.001 of the Health and Safety Code and must withheld under section 552.101 of the Government Code.³ As to the remaining documents in Exhibit B and the entirety of Exhibit C, however, we find that this information consists of memoranda, letters, and e-mails concerning incidents and

²Because we are able to make a determination under section 48.101, we need not address your additional arguments against the disclosure of these records.

³As our ruling on this issue is dispositive, we need not address your remaining arguments for this information.

staff discipline that took place at several Texas state schools. Thus, the remaining documents in Exhibit B and all of Exhibit C do not consist of the records of the identity, diagnosis, evaluation, or treatment of a person pursuant to section 595.001 of the Health and Safety Code. Accordingly, the department may not withhold the remaining documents in Exhibit B or any of Exhibit C on this basis.

We note that some of the remaining information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy.⁴ The common-law right of privacy protects information that is 1) highly intimate or embarrassing, such that its release 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 (Tex. 1976). The types 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. We find, in this instance, that the identities of the department's clients are intimate and embarrassing information of no legitimate public interest. However, because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App. Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d); see Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are... of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Accordingly, with the exception of the identifying information of the deceased, we have marked the identifying information of the department's clients that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department must withhold the information you have marked in Exhibits A and B in their entirety pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. The department must withhold the remaining portion of Exhibit A and the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code. The department must withhold the identifying information we have marked under section 552.101 of the Government Code in conjunction with common-law

⁴The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

privacy. As you do not raise any other exceptions against disclosure, the remaining information must be released.

Although you request a previous determination regarding this type of information, we decline to issue such a ruling at this time. Accordingly, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the *Government Code* or file a lawsuit challenging this ruling pursuant to section 552.324 of the *Government Code*. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/ma

Ref: ID# 280784

Enc. Submitted documents

c: Ms. Emily Ramshaw
Dallas Morning News
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(w/o enclosures)

Ms. Janet Elliott
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