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THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

June 14, 1977

Honorable Kenneth D. Gaver, M.D.
Commissioner, Texas Department
of Mental Health/Mental
Retardation
Austin, Texas

Open Records Decision No. 163

Re: Report of investigation
of Mexia State School.

Dear Dr. Gaver:

You request our decision pursuant to section 7 of article 6252-17a, V.T.C.S., the Open Records Act, on whether a report of an investigation, or some portion thereof, is excepted from required public disclosure under various exceptions in the Act.

On January 10, 1977, you initiated an investigation into the administration of the Mexia State School. The investigation was conducted by a team of Department of MHRM employees between January 17, 1977 and January 28, 1977. The report is in the form of a six-page letter dated February 8, 1977. The letter is accompanied by four pages entitled "Medically Related Recommendations for Mexia State School." Documentary support for the report and recommendations consists of a volume of materials of over 100 pages including detailed medical histories of residents, former residents, and deceased residents; correspondence to and from parents of residents; notes of visits with parents, correspondence from and notes of interviews with employees; memoranda from a staff attorney; and an audit report of the Centex Association for Retarded Children, a private non-profit corporation.

The initial request was made by four members of the House of Representatives. They have recently notified us that the request was made to determine if legislation is needed to correct any deficiencies should any be evident from the report. Additionally, you have informed us that after you forwarded the legislative request to us, the Department received requests for the information from members of the general public. Thus, two issues are presented by this request; i.e., first, whether a member of the general public has a right under the Open Records Act to examine the material, and second, whether a member of the Legislature who has indicated that the material is to be used for a specified legislative purpose has a greater right of access to the material than a member of the public.

We note that many of the records dealing with residents of the school are similar to those at issue in the recent case of Hutchins v. Texas Rehabilitation Comm'n, 544 S.W.2d 802 (Tex. Civ. App. -- Austin 1976, no writ). The court held that a former patient seeking her own records, made confidential by law, was given no special right of access by the Open Records Act, but that the patient could waive any right of confidentiality or could inspect those records herself, based on her common law right of inspection.

You contend that portions of the report and supporting materials are excepted from required public disclosure under section 3(a)(1) as information deemed confidential by statutory law. Article 5547-87, V.T.C.S., is applicable to the records of state hospitals and state schools under your jurisdiction. Open Records Decision No. 21 (1974); Attorney General Opinion No. M-317 (1968). This article provides:

(a) Hospital records which directly or indirectly identify a patient, former patient, or proposed patient shall be kept confidential except where

(1) consent is given by the individual identified, his legal guardian, or his parent if he is a minor;

(2) disclosure may be necessary to carry out the provisions of this Code;

(3) a court directs upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make such disclosure would be contrary to the public interest, or

(4) the Board or the head of the hospital determines that disclosure will be in the best interest of the patient.

(b) Nothing in this section shall preclude disclosure of information as to the patient's current condition to members of his family or to his relatives or friends.

We agree that this article is applicable to some of the information before us. We have previously determined that it applies to except from disclosure an autopsy report of a former student at the Travis State School insofar as the records directly or indirectly identify the patient. Open Records Decision No. 21 (1974). We cautioned in Open Records Decision No. 12 (1973), that records of the Department of MHMR made available to designated officials in connection with an investigation requested by the Committee on Human Resources of the Texas House of Representatives should be dealt with so as to assure their continued confidentiality.

Much of the information involves intimate details of the residents' mental and physical condition, their behavior, and family relationships. It is information containing highly intimate or embarrassing facts about these persons' private affairs, and its publication would be highly objectionable to a person of ordinary sensibilities. Protection of this privacy interest is the obvious purpose of the statutory provision making the information confidential. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 682-685 (Tex. 1976), cert. denied, No. 76-840 (U.S. March 21, 1977); Open Records Decision Nos. 6, 2 (1973). See also Open Records Decision No. 73 (1975) (family privacy).

It is our decision that the detailed medical histories of residents, former residents, and deceased residents; correspondence to and from parents of residents; and notes of visits with parents, are excepted under section 3(a)(1) as information deemed confidential by statute. These materials are excepted in their entirety and comprise your pages numbered 1-8, 10-58, and 105-138, inclusive. In addition, references to the names or other identifying information about residents or their parents should be deleted from the other materials.

You also contend that portions of the report and supporting documents are excepted from disclosure under section 3(a)(2), as "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We have held in a number of instances that evaluations of identifiable employees' performance are excepted from compelled public disclosure. Open Records Decision Nos. 159 (1977); 129, 119 (1976); 117, 115, 110, 106, 103, 102, 93, 90, 86, 82, 81, 71, 68 (1975); 60, 55, 20 (1974). See Department of Air Force v. Rose, 48 L.Ed.2d 11, 30 (1976) (evaluation of work performance intended to be

excepted by a similar federal exemption). In construing and applying this exception we have referred to that provision in the Open Meetings Act which permits a governmental body to exclude the public from discussions "involving the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee or to hear complaints or charges against such officer or employee. . . ." V.T.C.S. art. 6252-17, § 2(g).

Some of the report and supporting documents consist of notes of interviews with employees and letters from employees in which complaints and charges are made against other employees. We believe that these materials are excepted from required public disclosure under section 3(a)(2). This includes pages numbered 72-104, inclusive. Also, the paragraphs on pages 64 and 65 making evaluations of the employees interviewed are excepted from required public disclosure by section 3(a)(2). In addition, the statements of the Superintendent, Assistant Superintendent, and two other employees responding to charges made are excepted from required public disclosure by section 3(a)(2).

You contend that portions of the report of the investigation and supporting documents are excepted by section 3(a)(11), which excepts:

(11) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency. . . .

This exception is designed to protect from disclosure advice and opinion on policy matters and to encourage open and frank discussion between subordinate and chief with regard to administrative action. Attorney General Opinion H-436 (1974); Open Records Decision Nos. 149, 137, 128 (1976). The exception does not apply to purely factual information. We believe that this exception applies to some of the materials presented for our decision.

It is our decision that the six pages entitled "Medically Related Recommendations for Mexia State School," the two legal memoranda dated January 27, 1977, from Martha H. Allan, Attorney to Mr. E. M. Scott, Assistant Commissioner, and portions of the memorandum dated February 14, 1977 from Mr. E. M. Scott, Assistant Commissioner to Dr. Kenneth M. Gaver, M.D., Commissioner, making recommendations for action related to the investigation are excepted from required public disclosure by section 3(a)(11).

Because of the volume of materials involved and the applicability of a number of exceptions to various materials, we will review and summarize those materials connected with this investigation which we believe are available to the general public, and those which are excepted from public disclosure.

A. Memorandum dated January 10, 1977, from Kenneth D. Gaver, M.D. to Earl Scott, Assistant Commissioner, directing an investigation into administration at Mexia State School. Names of parents mentioned should be deleted. Sec. 3(a)(1). The portion of paragraph 3 naming a physician against whom an allegation is made may be deleted. Sec. 3(a)(2).

B. Memorandum dated February 14, 1977, from Earl Scott, Assistant Commissioner, forwarding report of investigation. Name and identifying information concerning former patient in paragraph 2 should be deleted. Sec. 3(a)(1). The recommendations in paragraphs 3, 4, 5, and 6 may be deleted. Sec. 3(a)(11).

C. Letter from Kay R. Lewis, M.D. and Oliver R. Jelks, Jr., Chief, Internal Audit, to Earl M. Scott, Assistant Commissioner, dated February 8, 1977, reporting an investigation conducted at Mexia State School. Delete name of former patient on page 2. Sec. 3(a)(1). Page 4, item (b) and (c), reporting on specific allegations against administrative personnel may be deleted. Sec. 3(a)(2). The names of parents and patients occurring on page 4 should be deleted. Sec. 3(a)(1). Heading (e) as indicated on page 5 and item (f) on page 5 may be deleted. Sec. 3(a)(2). Six page attachment, "Medically Related Recommendations," may be deleted. Sec. 3(a)(11). The balance of the letter is public.

D. Letter from Kenneth M. Gaver, M.D., Commissioner, to Representative Jerry Donaldson, dated March 9, 1977, reporting summary of findings in investigation and action taken by Commissioner as result of investigation. This letter is public.

E. Letter from Kenneth M. Gaver, M.D., Commissioner, to Mr. Malcolm Lauderdale, Superintendent, Mexia State School, dated March 14, 1977, enclosing "Recommendations to Superintendent of Mexia State School." This letter and the recommendations are public.

F. Memorandum to E. M. Scott, Assistant Commissioner, from Oliver R. Jelks, Jr., Chief, Internal Audit Division,

dated February 1, 1977, on Centex Association for Retarded Children, Mexia, Texas. This factual report on the structure and financial status of the Association is public.

G. Memorandum to E. M. Scott, Assistant Commissioner, from Martha H. Allan, Attorney, Legal and Claims Division, dated January 27, 1977, concerning Centex Association at Mexia State School. This memorandum making recommendations for administrative action is excepted from required public disclosure. Sec. 3(a)(11).

H. Memorandum to E. M. Scott, Assistant Commissioner, from Martha H. Allan, Attorney, Legal and Claims Division, dated January 27, 1977, concerning grievance procedures at Mexia State School. This memorandum making recommendations for administrative action is excepted from required public disclosure. Sec. 3(a)(11).

I. Materials accompanying item C above.

- unnumbered: Statements of administrative personnel responding to charges made. Excepted by section 3(a)(2).
- pp. 1 - 8,
19 - 22: Correspondence to, from, and concerning parent of former resident. Excepted under 3(a)(1).
- p. 9: Memorandum from Norman E. Green, M.D., to all physicians, Medical Technicians and Clinic Nurses dated January 20, 1977. This memorandum directing action is public.
- pp. 10 - 18,
23 - 31: Correspondence from parents of residents. Excepted under 3(a)(1).
- pp. 32 - 37: Notes of visits with parents of residents by Kay R. Lewis, M.D. Excepted under 3(a)(1).
- pp. 38 - 41: Letters from Superintendent of Mexia State School to parents of residents. Excepted under 3(a)(1).

- pp. 42 - 58: Notes of review of 1976 deaths of Mexia State School residents. Excepted under 3(a)(1).
- pp. 59 - 61: Notes of infirmary tour, January 23, 1977, by Kay R. Lewis, M.D. Delete names of residents as indicated on page 59. The balance is public.
- pp. 62 - 69: Notes of visits and conferences at Mexia State School of January 27, 1977, by Kay R. Lewis, M.D. Delete names of residents and former residents as indicated on pages 62, 63, 65, 67, 68, and 69. Sec. 3(a)(1). The last paragraph on page 64, evaluating personnel and the last paragraph on page 65, evaluating personnel may be deleted. Sec. 3(a)(1). Delete last paragraph on page 68, concerning family relationship of resident, parents, and doctor-patient relationship. Sec. 3(a)(1). The balance of these notes are factual and are public.
- pp. 70 - 71: Memorandum from Norman E. Green, M.D., Medical Director, to Mr. Lauderdale, Superintendent, dated February 7, 1977, reporting on visit of dermatologist, and forwarding correspondence from dermatologist. These factual reports are public.
- pp. 72 - 74: Notes of interviews with employees. These notes reflect complaints and charges made by employees against other employees. They are excepted under section 3(a)(2).
- pp. 74 - 75: Notes of interview with parents of resident, concerning son's contracting scabies, and doctor's diagnosis. This information is excepted under section 3(a)(1).

pp. 76 - 104: Handwritten letters from employees to Mr. Harold Parrish, Internal Audit Division, and to Kenneth D. Gaver, M.D., Commissioner. These letters are excepted under 3(a)(2) and portions relating to specific patients are excepted under section 3(a)(1).

pp. 105-138: Notes of detailed review of medical and other files of residents. Excepted under 3(a)(1).

Our decision relating to the rights of members of the general public may be summarized as follows: the factual report of the investigation and the final conclusions and recommendations and action taken thereon, as expressed by the Commissioner, are public. However, information which would disclose the identity of a resident or former resident, including identity of the parents, is excepted as information deemed confidential by statute, article 5547-87, V.T.C.S. Also, information concerning complaints or charges and evaluation of identifiable personnel are excepted from required public disclosure as "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," under section 3(a)(2).

Legislators, however, stand in a somewhat different position under the Open Records Act than members of the general public. Section 3(b) of the Act provides in part:

This section is not authority to withhold information from individual members or committees of the legislature to use for legislative purposes.

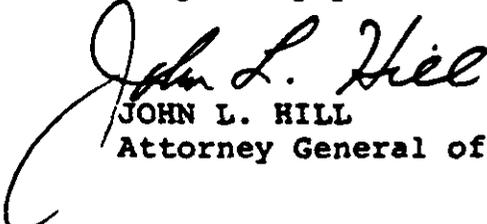
A virtually identical provision is found in section 14(c).

It is well established that this language does not give legislators the right to examine records which are made confidential by some statute other than the Open Records Act. Attorney General Opinions H-427 (1974); H-353 (1974); Open Records Decisions Nos. 119 (1976); 113 (1975); 62 (1974) and 44 (1974). Thus, that information which is excepted by disclosure under section 3(a)(1) -- that is, information deemed confidential by some other law -- is not required to be made available to members of the Legislature.

The Open Records Act is structured to make all government records public unless they fall within one of the sixteen exceptions of section 3. Those exceptions do not provide authority to withhold information from legislators who seek it for legislative purposes. Thus, if a government record is not excepted from disclosure by some other law, it is available to legislators even though it would be excepted by section 3 of the Open Records Act from release to the general public. The records excepted under some law other than the Open Records Act are the same as those covered by section 3(a)(1). Thus, it can be said that any information excepted only by sections 3(a)(2) through 3(a)(16) is available for legislators to use for legislative purposes. The legislative purpose must be specifically expressed. Open Records Decision No. 119 (1976); see Ashland Oil, Inc. v. Federal Trade Comm'n., 409 F.Supp. 297 (D.D.C. 1976); c.f., Watkins v. United States, 354 U.S. 178 (1957).

Accordingly, it is our decision that the entire report is available to the four legislators with the exception of those portions which fall under section 3(a)(1).

Very truly yours,



JOHN L. HILL
Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee

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