



May 3, 2002

Ms. Peggy D. Rudd
Director and Librarian
Texas State Library and Archives Commission
P.O. Box 12927
Austin, Texas 78711-2927

OR2002-2314

Dear Ms. Rudd:

The Texas State Library and Archives Commission (“TSLAC”) seeks a ruling from this office concerning whether certain finding aids for the records of former Governor George W. Bush must be released to the public under chapter 552 of the Government Code. Your request was assigned ID# 163883.

Pursuant to section 441.201 of the Government Code, Governor George W. Bush designated the George Bush Presidential Library as the repository for his gubernatorial records in December 2000.¹ Since the former Governor designated the George Bush Presidential Library as the repository for his records, disputes have arisen concerning the ownership of the records, the role of TSLAC in the designation process, and the applicability of the Public Information Act (the “Act”) to the records. Consequently, the Governor’s Office and TSLAC have requested an Attorney General’s Opinion under section 402.042 of the Government Code to help resolve these disputes.

During the pendency of the opinions process, the NARA, TSLAC, a representative of President George W. Bush, and the Governor’s Office entered into an Interim Memorandum of Understanding (“IMOU”) under which the NARA agreed to continue to maintain former Governor Bush’s records and forward to TSLAC any request for the records within 72 hours of the NARA’s receipt of the request. The terms of the agreement specify that TSLAC was given legal title to former Governor Bush’s records as well as the authority and responsibilities afforded it under Texas law. Specifically, TSLAC agreed to review any

¹The George Bush Presidential Library is a part of the National Archives and Records Administration, a federal agency, and is not a “governmental body” for the purpose of the Public Information Act. See Gov’t Code § 552.003. We will collectively refer to the George Bush Presidential Library and the National Archives and Records Administration as the NARA.

requested records for information that could be excepted from disclosure under the Act and request a decision from this office if and when the public availability of the information came into question. The IMOU may be terminated under its terms by any of the parties thereto upon the issuance of a formal Attorney General Opinion.

Before the IMOU was entered into, TSLAC received a public information request for finding aids for former Governor Bush's records from the Associated Press. You indicate that TSLAC released information responsive to that request, which consisted of nineteen finding aids. During the term of the IMOU, TSLAC received two more requests for the finding aids for former Governor Bush's records from the Courtroom Television Network ("Court TV") and Lucius Lomax.² TSLAC contends that the responsive information now consists of thirty-seven finding aids and that some of the information in the finding aids is excepted from public disclosure.

We begin by addressing whether you have timely requested a decision from our office with regard to the requests of Court TV and Mr. Lomax. Section 552.301 provides in relevant part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). You state that the requests of Mr. Lomax and Court TV were submitted to the NARA. You further state that Mr. Lomax sent TSLAC a copy of his request. On the other hand, you indicate that the request from Court TV was forwarded to TSLAC by the NARA. We must first determine the point at which the ten-business-day deadline began to run for TSLAC. You contend that the deadline should not begin to run until the requested records at issue are available to TSLAC, within its actual reach. However, you do not cite any authority, nor are we aware of any, supporting this position. *See id.* § 552.301(b) (governmental body must request decision within ten-business days of receipt of request for information).

²Court TV also requested a videotape made by former Governor Bush on January 8, 1997, "for Rich Kinder's going away party." Because TSLAC does not seek a ruling on the videotape, we assume that, to the extent it exists, TSLAC has released the tape to Court TV. If TSLAC has not released the videotape to Court TV, it must do so now. *See* Gov't Code §§ 552.021, .221, .301, .302.

You also contend that “[t]his situation is somewhat analogous to that discussed in ORD-617.” In Open Records Decision No. 617, this office discussed open records procedures applicable to the Records Management Division (the “RMD”) of TSLAC. There, a request was made to TSLAC for microfilm copies of certain records produced by the Texas State Board of Veterinary Medical Examiners (“TSBVME”). Open Records Decision No. 617 at 2 (1993). TSBVME had transferred the source records to the RMD for microfilming before the records were destroyed. *Id.* at 1-2. The RMD then provided TSBVME with microfiche copies of the microfilm duplicates and kept the master microfilm copies. *Id.* at 2. This office found that the RMD served as a mere warehousing facility for TSBVME, which still had legal custody of the documents, and the RMD was not in a position to respond to public information requests for the information it warehoused. *Id.* at 3. Although the NARA is serving, in part, as a warehousing facility under the terms of the IMOU, the NARA’s role extends beyond the mere warehousing function of the RMD in Open Records Decision No. 617.

In Open Records Decision No. 576, this office determined that an entity performing document maintenance services for a governmental body can become that governmental body’s agent for purposes of receiving a public information request under certain circumstances. Open Records Decision No. 576 at 3-4 (1990). There, the legislature had recently shifted the duty of administering and enforcing the Bingo Enabling Act from the Comptroller of Public Accounts (the “comptroller”) to the Texas Alcoholic Beverage Commission (“TABC”). *Id.* at 1. The comptroller and TABC entered into an interagency agreement under which the comptroller agreed to continue to maintain certain computer and microfilm records created prior to the transfer of bingo regulation to TABC. *Id.* The comptroller further agreed to notify TABC promptly upon its receipt of an open records request for the information it maintained. *Id.* On the other hand, TABC agreed to be responsible for replying to any public information requests. *Id.* Based on the agreement between the two parties, this office found that the comptroller was the agent of TABC for the purpose of receiving open records requests. *Id.* at 4. However, “[r]esponsibility for responding to the open records request remain[ed] with [TABC].” *Id.* We further found that, for the purposes of the Act, an open records request was considered received by TABC when it was received by the comptroller. *Id.* at 4-5.

We find the facts in Open Records Decision No. 576 analogous to the facts before us in this file. Pursuant to the IMOU, the NARA and TSLAC agreed that the NARA would continue to maintain former Governor Bush’s records and forward to TSLAC any request for the records within 72 hours of the NARA’s receipt of a request. On the other hand, TSLAC was given legal title to former Governor Bush’s records, and TSLAC agreed to be responsible for reviewing the records and requesting a ruling from this office when necessary under the Act. Based on the agreement between the NARA and TSLAC, we find that the NARA was the agent of TSLAC for the purpose of receiving requests for former Governor Bush’s records during the time that the IMOU was in effect. *See id.* at 4. Therefore, under the terms of the agreement, TSLAC’s ten-business-day period for requesting a decision from this

office was triggered by the NARA's receipt of the requests. *See id.* at 4-5; Gov't Code § 552.301(b). Because both of the requests at issue in this instance were received by the NARA during the time that the IMOU was in effect, we find that TSLAC's period for requesting a decision from this office began the day after the NARA received the requests.

The NARA received Court TV's request on March 6, 2002, and Mr. Lomax's request on March 20, 2002. Accordingly, TSLAC was required to request a decision from this office by March 20, 2002, with respect to Court TV's request, and April 3, 2002, with respect to Mr. Lomax's request. TSLAC submitted its request for a decision for both requests on April 2, 2002. Thus, while TSLAC timely requested a decision with respect to Mr. Lomax's request, it failed to request a decision within ten-business days of its receipt of Court TV's request. Consequently, the requested finding aids are presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). Generally, a compelling reason exists for withholding information "if the information is deemed confidential by some other source of law, or if an exception designed to protect the interest of a third party is applicable." Open Records Decision No. 150 at 2 (1977). Among other arguments, you contend that a portion of the submitted information may be excepted from disclosure under the informer's privilege. Because the purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege can be waived. *See* Open Records Decision No. 549 at 6 (1990). Therefore, by failing to timely request a decision with respect to Court TV's request, TSLAC waived its claim under the informer's privilege. *Id.* However, because TSLAC's remaining arguments are based on confidentiality provisions and exceptions designed to protect the interests of third parties, we will address these arguments. *See* ORD 150 at 2.

First, you contend that the finding aids contain e-mail addresses that TSLAC will redact. Section 552.137 of the Government Code provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]."³ While you contend that the requested finding aids contain e-mail addresses, you have not submitted any finding aids containing such e-mail addresses. Consequently, we have no way of determining whether such e-mail addresses are excepted from disclosure under section 552.137. Thus, we find that TSLAC must release any e-mail addresses contained in the requested finding aids. *See* Gov't Code §§ 552.301(e), .302.

³The identical exception has been added as section 552.136 of the Government Code.

You also contend that the requested finding aids contain the home addresses of state employees. Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Normally, a governmental body is not required to protect the home address and telephone number, social security number, or family member information of individuals who are not and have not ever been employees of that governmental body. Open Records Decision No. 674 at 4 (2001). However, information that was protected under section 552.117 at the time the records were in the custody of the originating governmental body remain confidential when submitted to TSLAC for archiving. *Id.* Thus, before releasing the home addresses of any state employees, TSLAC should inquire with the originating governmental bodies whether the relevant individuals elected to keep their home addresses confidential under section 552.024 of the Government Code. *Id.* at 5. To the extent the employees did elect to keep their home addresses confidential, TSLAC must withhold the home addresses under section 552.117(1).

You also appear to contend that some of the submitted information is confidential under section 58.005 of the Family Code. Section 552.101 of the Governmental Code exempts 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 58.005 of the Family Code provides, in relevant part:

(a) Information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to:

- (1) the professional staff or consultants of the agency or institution;
- (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (3) an attorney for the child;
- (4) a governmental agency if the disclosure is required or authorized by law;
- (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;

(6) the Texas Department of Criminal Justice and the Texas Juvenile Probation Commission for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or

(7) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

You state that four of the submitted documents deal with juveniles in the custody of the Texas Youth Commission, and that the Texas Youth Commission cites section 58.005 in withholding the identities of juveniles in its custody. However, you do not explain, nor is it apparent, that any of the information in the submitted finding aids was obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by an agency or institution providing supervision or having custody of children. Therefore, we find that none of the submitted information is confidential under section 58.005 of the Family Code. Nevertheless, the identities of the juveniles are protected under common-law privacy, as discussed below.

You contend that information in the submitted finding aids relating to medical conditions, state employee misconduct, and sexual harassment may be private information. You also contend that the identities of individuals receiving social services as well as information concerning individuals who have had criminal records expunged should be withheld from disclosure. Section 552.101 of the Government Code 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. *Indus. Found. v. Tex. 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. Similarly, in *Morales v. Ellen*, the El Paso Court of Appeals held that the identity of an alleged victim of sexual harassment is protected under the doctrine of common-law privacy. 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied). On the other hand, this office has determined that the public has a legitimate interest in certain information, including information about a public employee's conduct on the job. *See Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common law right of privacy).*

We agree that some of the submitted information is highly intimate and embarrassing and of no legitimate concern to the public. TSLAC must withhold this information, which we have marked, under section 552.101 of the Government Code and common-law privacy. *See Indus. Found.*, 540 S.W.2d at 685; *Morales*, 840 S.W.2d at 525; ORD 373 at 2-3; *cf.* Fam. Code §§ 58.007, 261.201. However, this office was not provided sufficient information to determine whether the remaining submitted information is protected by common-law privacy or is otherwise confidential by law. *See generally* Gov't Code § 552.301(e)(1)(A)(requiring governmental body to submit arguments to attorney general explaining why raised exception applies to requested information). Thus, the remainder of the submitted information must be released.

In conclusion, TSLAC must withhold the home addresses of public employees under section 552.117(1) of the Government Code to the extent TSLAC determines that the employees elected to keep this information confidential under section 552.024 of the Government Code. TSLAC must also withhold the marked portions of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. TSLAC must release the remainder of the submitted information.

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); *Tex. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 163883

Enc: Submitted documents

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