



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2003

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

OR2003-8797

Dear Ms. Rudd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192242.

The Texas State Library and Archives Commission ("TSLAC") received a request for "all death-penalty clemency memos provided to former Gov. George W. Bush . . . by General Counsel Alberto Gonzales and/or other members of the general counsel staff." You ask whether the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you raise and reviewed the submitted information.

Initially, we note that two documents submitted to this office for review are not responsive to the pending request for information. This letter ruling does not apply to any information that is not responsive to the pending request, and TSLAC need not release any such information. We have marked the non-responsive information accordingly.

On behalf of the Office of the Governor, you raise section 552.107 of the Government Code for some of the requested information. Section 552.107(1) protects information coming within the attorney-client privilege. You have indicated to this office that TSLAC notified both the Office of the Governor and counsel for former Governor Bush of the pending request for information and the opportunity to submit arguments as to why some of the requested information should be excepted from disclosure under section 552.107. *See Gov't Code § 552.304* (allowing any interested party to submit written comments stating reasons why information at issue should or should not be released). However, no one has provided

arguments to this office demonstrating the applicability of section 552.107 to any of the requested information. Therefore, we find that none of the requested information may be withheld from disclosure pursuant to section 552.107. *See* Gov't Code § 552.301(e) (governmental body must submit written comments demonstrating applicability of claimed exceptions), Open Records Decision Nos. 665 at 2 n.5 (2000) (waiver of discretionary exceptions generally), 630 at 4 (1994) (section 552.107(1) may be waived); *see also* Open Records Letter Nos. 2003-6361 at 1 (2003) (Office of Governor did not assert section 552.107 for clemency memoranda prepared by former General Counsel Alberto Gonzales for former Governor Bush), 2002-2313 at 5 (2002) (section 552.107 waived for clemency memoranda responsive to request for certain records of former Governor Bush).

Next, you contend that certain information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the common law right to privacy and various statutes. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the common law right to privacy. Common law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999); *see also* Open Records Decision Nos. 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked the information that is protected by the common law right to privacy, and TSLAC must withhold this information under section 552.101.

Based on advice from the General Counsel of the Texas Youth Commission (the "commission"), you express concern that juvenile criminal history information contained in the clemency memoranda may be excepted from disclosure. The documents at issue are neither commission records nor the records of a law enforcement agency. Therefore, confidentiality statutes applicable to commission and juvenile law enforcement records do not apply here. The common law right to privacy protects certain criminal history information. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this case, however, neither adult nor juvenile criminal history

information is protected by privacy. We note that a deceased individual has no right to privacy. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.), Open Records Decision No. 272 at 1 (1981) (privacy is personal right that lapses at death); *see also* Attorney General Opinions JM- 229 (1984); H-917 (1976). Therefore, the juvenile and adult criminal histories of a deceased inmate are not protected by privacy. Additionally, information in which the public has a legitimate interest is not protected by privacy. *See Indus. Found.*, 540 S.W.2d at 685. The public has a legitimate interest in the juvenile and adult criminal histories of an inmate who committed a capital crime and is being considered for clemency. Therefore, this information is not protected by privacy even during the inmate's life.

You also ask whether certain information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. Chapter 508 of the Government Code relates to parole and mandatory supervision and applies to the Texas Department of Criminal Justice (the "department"). Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) The department, on request or in the normal course of business, shall provide information that is confidential and privileged under Subsection (a) to:

(1) the governor[.]

Gov't Code § 508.313. Section 508.313 of the Government Code requires the department to transfer information to the Office of the Governor for consideration in clemency matters; such a transfer does not affect the confidentiality of the information. *See* Gov't Code § 508.313(c)-(d). Several of the submitted clemency memoranda indicate that they

contain information from department documents transferred to the Governor pursuant to section 508.313. You ask whether section 508.313 deems this information confidential in the clemency memoranda. Information contained in a clemency memorandum prepared for the Governor is confidential under section 508.313 only if the information is taken directly from department documents and recorded verbatim in the clemency memorandum. No one has established, and it is not clear from our review of the submitted memoranda, that any of the information contained in the memoranda was taken verbatim from department documents. Therefore, we find that none of the information is confidential under section 508.313.

Next, you ask whether certain information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 414.008 of the Government Code. Section 414.008 provides in part:

- (a) Except as otherwise provided by this section, evidence of a communication between a person submitting a report of a criminal act to the [Crime Stoppers Advisory Council] or a crime stoppers organization and the person who accepted the report on behalf of the council or organization is not admissible in a court or an administrative proceeding.

Gov't Code § 414.008. Section 414.008 privileges certain communications for purposes of legal proceedings but does not deem this information confidential for purposes of section 552.101. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, we find that the information you have marked under section 414.008 of the Government Code is not confidential.

Finally, you ask whether certain information is excepted from disclosure under section 552.101 in conjunction with section 12.003 of the Human Resources Code. Section 12.003 provides in part:

- (a) Except for purposes directly connected with the administration of the [Texas Department of Human Services'] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Human Res. Code § 12.003. You have marked information in the clemency memoranda relating to certain individuals' receipt of benefits from public assistance programs. However, there is no evidence that this information was directly or indirectly derived from the records of the Texas Department of Human Services. Therefore, we find that this information is not confidential under section 12.003 of the Human Resources Code.

In summary, the information we have marked is protected by the common law right to privacy and must be withheld from disclosure under section 552.101 of the Government Code. All other requested information must be released.

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,



Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 192242

Enc. Submitted documents

c: Mr. Jordan Smith
Staff Writer
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