



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2008

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2008-02234

Dear Ms. Alexander:

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# 302409.

The Texas Department of Transportation (the "department") received a request for a copy of an inventory of Native American remains removed from archeological site 41NU2. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, you note that some of the information at issue was the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2005-08404 (2005) and 2007-04284 (2007). In these previous letter rulings, this office concluded that the department must withhold some information pursuant to section 552.101 of the Government Code in conjunction with section 191.004(b) of the Natural Resources Code and may withhold the remaining information under section 552.107 of the Government

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.

Code. With regard to the requested information that is identical to the information previously requested and ruled upon by this office in the prior letter rulings, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior letter rulings were based have changed, you must continue to rely on them as previous determinations. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent that the requested information was not the subject of these prior letter rulings, we will address your arguments against disclosure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 191.004 of the Natural Resources Code provides:

- (a) Information specifying the location of any site or item declared to be a state archeological landmark under Subchapter D of this chapter is not public information.
- (b) Information specifying the location or nature of an activity covered by a permit or an application for a permit under this chapter is not public information.
- (c) Information specifying details of a survey to locate state archeological landmarks under this chapter is not public information.

Nat. Res. Code § 191.004(a), (b), (c). You state that the submitted documents contain information specifying the location and nature of an activity covered by a permit or application for a permit under Chapter 191, Natural Resources Code. Upon review of the submitted information, we find that it qualifies as information specifying the location or nature of an activity covered by a permit or an application for a permit for the purposes of section 191.004. Therefore, we conclude that the submitted information is confidential under section 191.004(b) of the Natural Resources Code.

We note that the requestor, as a representative of the Gulf Coast Indian Confederation, indicates that he has a right of access to the submitted information under the Native American Graves Protection and Repatriation Act ("NAGPRA"), chapter 32 of title 25 of the United States Code. *See* 43 C.F.R. § 10.5 (requiring consultation with Indian tribes under certain circumstances). In order to have standing to make a claim under NAGPRA, an Indian tribe must be a lineal descendant of the subject remains or recognized as eligible for special programs and services provided by the United States to Indians because of their status as

Indians. *See id.* § 10.2. The department explains that the Gulf Coast Indian Confederation is not presently an Indian tribe under 25 U.S.C. 3001 (7) and 43 C.F.R § 10.2(b)(2) and has not shown themselves to be a lineal descendent of the subject remains; thus, the department asserts that “the requestor does not have a right to the requested information under [NAGPRA].” Further, the requestor has submitted a letter from the United States Department of the Interior, addressed to the department, which states “[t]he Gulf Coast Indian Confederation is not presently an Indian tribe, as the term ‘Indian tribe’ is defined at 25 U.S.C. 3001 (7) and 43 C.F.R § 10.2(b)(2)” and the Gulf Coast Indian Confederation “did not provide [the department] with facts tending to show that an individual was the lineal descendant of Native American human remains and associated funereal objects from” archeological site 41NU2. Accordingly, based on the information before us, we cannot conclude that the requestor has a right of access to the requested information under NAGPRA. The requestor also asserts that the department is not prohibited from sharing the information at issue with the Gulf Coast Indian Confederation. However, we note that pursuant to section 191.004 of the Natural Resources Code, the information at issue is confidential by law. Accordingly, the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 191.004 of the Natural Resources Code.²

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

²As our ruling is dispositive, we need not address your argument under section 552.111 of the Government Code.

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 challenge 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 302409

Enc. Submitted documents

c: Mr. Fred L. McGhee, Ph.D.
Fred L. McGhee & Associates
6300 Carson Ridge
Austin, Texas 78741-6602
(w/o enclosures)