



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2012

Ms. Dana Colbert
Records Coordinator
Office of the General Counsel
Texas Juvenile Justice Department
P.O. Box 12757
Austin, Texas 78711

OR2012-02275

Dear Ms. Colbert:

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# 445417 (TJJD ORR Nos. 18291, 18342, 18343, 18344, and 18345).

The Texas Juvenile Justice Department (the "department") received five requests from the same requestor for the investigation file and video tape concerning a specific incident, several categories of information involving the requestor and department grievances, various e-mails and video tapes, and employee information. The department states it has released some information to the requestor. You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the department's obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days

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

after receiving the request. *See* Gov't Code § 552.301(b). You state you received the first request for information on May 26, 2011. Therefore, the ten-business-day deadline fell on June 10, 2011. However, you did not request a ruling from this office until December 8, 2011. Accordingly, with respect to the first request, we conclude the department failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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 section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because the department's claims under section 552.101 of the Government Code can provide compelling reasons for non-disclosure under section 552.302, we will address your arguments under that exception.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 244.003 of the Human Resources Code.² Section 244.003 provides as follows:

(a) The department shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control.

(b) Except as provided by Section 243.051(c), these records and all other information concerning a child, including personally identifiable information, are not public and are available only according to the provisions of Section 58.005, Family Code, Section 244.051, and Chapter 61, Code of Criminal Procedure.

Hum. Res. Code § 244.003. For the purposes of section 244.003 of the Human Resources Code, a "child" includes an eighteen year old committed to the department. *Id.* § 201.001(a)(2)(b). You state that the requested videotapes, e-mail correspondence, and other information contain personally identifiable information relating to children in the

²We note that the 82nd Texas Legislature passed Senate Bill 653, which redesignated section 61.073 of the Human Resource Code as section 244.003 of the Human Resource Code. Act of May 9, 2011, 82nd Leg., R.S., S.B. 653, § 1.007.

custody of the department, and thus, are within the scope of section 244.003. You state that the requestor does not have a right of access to the information at issue under section 58.005 of the Family Code because although he is an employee of the department, he is seeking the information for his private use, as a member of the public. Further, the submitted information does not indicate the requestor has a right of access to the information under section 243.051(c) of the Human Resources Code, section 244.051 of the Human Resources Code, or chapter 61 of the Code of Criminal Procedure. Based on your representations and our review, we find section 244.003 is applicable to the submitted videotapes and photographs. However, you state that the department does not have the technology to redact only the information subject to section 244.003 from the videotapes. We therefore conclude that the department must withhold the videotapes and the photographs you have marked pursuant to section 552.101 of the Government Code in conjunction with section 244.003 of the Human Resources Code.³ However, we conclude none of the remaining documents constitute information concerning a child for the purposes of section 244.003, therefore, none of the remaining information is subject to section 244.003 of the Human Resources Code and may not be withheld on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public.⁴ *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. The type of information considered highly intimate or 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. Therefore, the department must withhold the identifying information of youths in the custody of the department, which you have marked, in addition to the information that we have marked, under section 552.101 in conjunction with common-law privacy. *Cf.* Hum. Res. Code § 244.003.⁵

You seek to withhold the remaining information in Exhibit D in whole or in part pursuant to section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code, which states in pertinent part:

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(a) Records and files concerning a child, including personally identifiable information, and 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.

Fam. Code § 58.005(a). Under section 58.005 of the Family Code, a “child” is a person who is “ten years of age or older and under 17 years of age.” Fam. Code § 51.02(2)(A). The submitted information in Exhibit D involves an eighteen year old. Therefore, the department may not withhold any of Exhibit D under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code.

In summary, the department must withhold the videotapes in their entirety and the photographs you have marked under section 552.101 of the Government Code in conjunction with section 244.003 of the Human Resources Code. The department also must withhold the identities of youths the department has marked and the information we have marked under

section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, reading "Kathryn R. Mattingly". The signature is written in a cursive style with a large, looping "y" at the end.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/som

Ref: ID# 445417

Enc. Submitted documents

c: Requestor
(w/o enclosures)