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ATTORNEY GENERAL

September 10, 1973

Mr. Raymond W. Vowell, Commissioner
State Department of Public Welfare
John H. Reagan Building
Austin, Texas 78701

Open Records Decision No. 2

Dear Commissioner Vowell:

In a letter dated June 27, 1973, you asked a number of questions about the Open Records Act, including some about its applicability to a specific request for information. Your general inquiries about the meaning of the Act, as well as your specific queries about the relation of certain other statutes to the effectuation of the Act's purposes, are answered in Opinion No. H-90. This decision is limited to the determination required by Section 7 (b) of H. B. 6.

A request to examine "all records maintained by the State Department of Public Welfare relating to" 1) East Texas Guidance and Achievement Center, Tyler, Smith County, 2) Kendall Hills Ranch Academy, Boerne, Kendall County, 3) The Golden Fawn, Boerne, Kendall County, 4) Camp Little Springs, Lexington, Lee County, and 5) Girlstown, U S A, Whiteface, Cochran County, was made by Arthur E. Wiese, Jr., a reporter for The Houston Post, in a letter dated June 21, 1973. Your request of June 27 was necessitated by your refusal to disclose any of the requested records on the ground that "these records fall within the exceptions of Section 3 of the Act, especially exceptions No. 1 and No. 3". Along with the letter you sent to this office several files concerning the five cited institutions.

Your reference to exception number 3 applied to only two of the five institutions and was based on separate letters from you on the same date, June 27, seeking legal action by this office against Kendall Hills Ranch Academy and Camp Little Springs, Inc. Prior to the issuance of this decision, the proposed legal action against the former institution was initiated and completed by this office. However, the allegations which would be the basis of the sought for legal action against the latter institution are still under active investigation by this office.

In the fourth question in your letter, you raise the "right of privacy" as the hypothetical basis for the application of exception number 1 to certain types of information in the files. Exception number 1 consists of "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You state that "The records contain a wide assortment of private information that would be embarrassing, if not actually harmful to the persons involved. Such information would include the identity of teen-age girls who have had illegitimate children, descriptions of children with bizarre behavior patterns, marital problems of parents, etc." Of course, since "there has been no previous determination that it [such information] falls within" exception number 1, it was incumbent upon this office to make a determination.

The right to privacy as expounded by the United States Supreme Court and most recently enunciated in Roe v. Wade, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) is an affirmative and broader statement of a concept that was earlier described as the right "to be let alone". See Union Pacific Railway Company v. Botsford, 141 U. S. 250, at 251, 11 S. Ct. 1000, at 1001, 35 L. Ed. 734 (1891) and Olmstead v. United States, 277 U. S. 438, at 478, 48 St. Ct. 564, at 572, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

In 1952, a Dallas Court of Civil Appeals decision concluded that there was no common law right of privacy, Milner v. Red River Valley Publishing Company, 249 S. W. 2d 227 (no writ). See also McCullagh v. Houston Chronicle Publishing Company, 211 F. 2d 4 (5th Cir. 1954), cert. den. 348 U. S. 827. But in 1965, the seedling right to privacy which had been planted in 1870 by Warren and Brandeis in 4 Harv. L. Rev. 193 blossomed forth in Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

> "The Court never has made any attempt to define this right, or to indicate its limitations, if any; and nothing in the decisions has referred to tort liability. They suggested none the less that the Constitutional right, thus declared to exist, must have some application to tort liability; and that the decisions in four states denying any recognition of the right are to be overruled, as well as the limitation to commercial appropriation contained in the statutes of four other jurisdictions." William L. Prosser, The Law of Torts, at 816 (emphasis added).

And indeed in 1973, the Texas Supreme Court did overrule Milner, supra, allowing a tort recovery for wiretapping, and approving a definition of the right of privacy as

> ". . . the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. 62 Am.Jur. 2d, Privacy Section 1, p. 677, and cases cited." Billings v. Atkinson, 489 S. W. 2d 858 (Emphasis added).

Before proceeding to consider the application of this right to the situation at hand we must be cognizant of the fact that

> ". . . the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone' . . . " Prosser, supra, at 804.

These five forms of invasion of privacy are denominated by Prosser as follows: 1) the appropriation for one's benefit or advantage of another's name or likeness; 2) the intrusion upon a person's physical solitude or seclusion, as by an illegal search or seizure or by wiretapping; 3) publicity which places someone in a false light in the public eye; and 4) public disclosure of private information of a highly objectionable kind.

It is primarily, and perhaps only, this last form of invasion which is potentially involved in the disclosure of certain information in the files referred to us by the Department of Public Welfare. There are three elements which must exist for a breaking of this branch of the right of privacy to occur: 1) a public disclosure; 2) a disclosure of private facts; and 3) a disclosure of matter "which would be offensive and objectionable to a reasonable man of ordinary sensibilities." Prosser, supra, at 811.

This office examined the files of the five institutions referred to us and measured the information contained therein by Prosser's standards. On this basis it was determined that the revelation of certain information in each file (except that of The Golden Fawn) would constitute an invasion of privacy by reason of being a public disclosure of private information of a highly objectionable kind. While in certain instances it was necessary to withhold an entire document, in most cases the protection of the privacy of the particular individual mentioned required only the removal of his name, and sometimes other identifying information. In the case of Camp Little Spring, other documents were temporarily withheld on the basis that they closely related to possible litigation and their disclosure at this time would be deleterious to the conduct of that litigation. Then, the files were returned to your office with instructions to immediately make them available with only the approved deletions to the person requesting to see them.

Sincerely,

John L. Hill
Attorney General

C. J. Carl
Staff Legislative Assistant

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