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ATTORNEY GENERAL OF TEXAS

June 10, 2019

Mr. Mark Wolfe
Executive Director
Texas Historical Commission
Post Office Box 12276
Austin, Texas 78711-2276

Opinion No. KP-0255

Re: Authority of the Historical Commission to permit the destructive testing of human remains for research purposes, including for the purpose of obtaining DNA samples adequate to enable the identification of genetically related descendants (RQ-0259-KP)

Dear Mr. Wolfe:

You ask whether the Historical Commission (“Commission”) has “authority to permit the destructive testing of human remains for research purposes.”¹ In the event the answer is yes, you ask whether “the purpose of destructive analysis [can] be to obtain DNA samples.” Request Letter at 1. In the event the answer to either question is no, you ask whether “such authority is held by some other public entity.” *Id.* Briefing informs us that your request relates to a discovery during a construction project by Fort Bend Independent School District of the skeletal remains of ninety-five individuals.² Archeologists associated with the project believe the remains to be from a forgotten historic cemetery from the State’s convict leasing program, which operated from the 1870s to the 1910s,³ but note that few records exist to identify the remains to facilitate the notification of descendants and install headstones for each individual. *See* City Brief at 1; *see also* Morris Brief, Exhibit C, at 1. Briefing also informs us that the proposed destructive testing involves “a molar and incisor from each individual for the use of invasive analysis such as isotope and DNA analysis,” which is intended to “eliminate the need for potential descendants to ever re-exhume the remains once . . . reinterred.” Morris Brief at 1.

As a state agency, the Commission has only those powers expressly given it by the Legislature and those implied powers reasonably necessary to carry out its express functions or

¹Letter from Mr. Mark Wolfe, Exec. Dir., Tex. Historical Comm’n, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 10, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²*See* Brief from Mr. Douglas Brinkley, Assistant City Manager, City of Sugar Land, Tex. at 1 (Jan. 16, 2019) (“City Brief”); *see also* Brief from Ms. Michelle R. Morris, Rogers, Morris, & Grover, L.L.P. at 1 (Jan. 22, 2019) (“Morris Brief”) (letters on file with the Op. Comm.).

³This opinion does not address tribal restrictions on invasive or destructive testing of Native American remains that may be subject to federal law. *See* 13 TEX. ADMIN. CODE § 22.5(c)(2)(H) (Tex. Historical Comm’n, Removal of Remains from Abandoned or Unknown Cemetery).

duties. See *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017). When the Legislature grants authority, it “does not intend that agency functions be an exercise in futility.” *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

[W]ith respect to a power specifically granted the agency, the full extent of *that* power must be ascertained with due regard for the rule that the Legislature generally intends that an agency should have by implication such authority as may be *necessary* to carry out the specific power delegated, in order that the statutory purpose might be achieved.

Id. When considering the scope of an agency's authority, courts examine the language of the relevant statutes to determine and give effect to the Legislature's intent with respect to the agency's implied powers. See *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd. of Tex. Dep't of Transp.*, 156 S.W.3d 91, 101 (Tex. App.—Austin 2004, pet. denied). You tell us that “[n]othing in state law refers specifically to destructive testing of human remains for research purposes including for the purpose of obtaining DNA samples.” Request Letter at 1. Thus, we consider whether such power is reasonably necessary for the Commission to carry out its express functions.

The three related statutes relevant to your questions are Government Code chapter 442, Natural Resources Code chapter 191, and Health and Safety Code chapter 711. We first examine provisions in Government Code chapter 442 and Natural Resources Code chapter 191. Government Code section 442.005 generally sets out the Commission's powers and duties, most of which relate to the preservation of archeological or historic structures, sites, or landmarks. See TEX. GOV'T CODE § 442.005. Section 442.007 gives the Commission authority over the State's archeological program, which includes the authority to enter into contracts or cooperative agreements with certain entities and individuals “for prehistoric or historic archeological investigations, surveys, excavations, or restorations in this state.” *Id.* § 442.007(a), (c).

Natural Resources Code chapter 191 is the Antiquities Code. See TEX. NAT. RES. CODE §§ 191.001–.174; see also *id.* § 191.001 (entitling chapter 191 as the “Antiquities Code of Texas”). It declares the Commission the “legal custodian of all items described by this chapter that have been recovered and retained by the State of Texas.” *Id.* § 191.051(a). Section 191.053 authorizes the Commission to contract with specified entities and individuals for the “discovery and scientific investigation of . . . archeological deposits or treasure imbedded in the earth.”⁴ *Id.* § 191.053(a); see also *id.* § 191.051(b)(3) (providing that the Commission shall contract or provide for discovery operations and scientific investigations under section 191.053); see also 13 TEX. ADMIN. CODE § 26.3(5) (Tex. Historical Comm'n, Definitions) (defining “archeological site” to mean “[a]ny land or marine-based place containing evidence of prehistoric or historic human activity”). Further, section 191.055 provides that the operations conducted under section 191.053 must be supervised by the Commission and must be carried out “in such a manner that the *maximum* amount of

⁴Briefing submitted in response to your request explains: “All work has been or is being conducted under existing Antiquities Permit #8197, issued by the [Commission] and sponsored by [Fort Bend] ISD, for the 23-acre complex containing archeological site 41FB355.” Morris Brief, Exhibit C at 1.

historic, scientific, archeological, and educational information may be recovered and preserved in addition to the physical recovery of items.” TEX. NAT. RES. CODE § 191.055(1), (3) (emphasis added). “Investigation” means “[a]rcheological or architectural activity including, but not limited to: reconnaissance or intensive survey, testing, exhumation, or data recovery.”⁵ 13 TEX. ADMIN. CODE § 26.3(37) (Tex. Historical Comm’n, Definitions); *see* TEX. NAT. RES. CODE § 191.052 (authorizing the Commission to employ the power to formulate and adopt requirements of general applicability).

These provisions in Government Code chapter 442 and Natural Resources Code 191 evidence the Legislature’s intent to place the Commission in charge of authorizing the archeological investigation, scientific testing, and recovery of data from items, including exhumed human remains, found in places containing indications of historic human activity. Such investigation, testing, and data recovery serve the Commission’s statutory duty in Natural Resources Code section 191.055(3) to glean the maximum amount of historic, scientific, and archeological information from the State’s archeological sites. Moreover, the Commission, as the legal custodian of recovered items, has the authority to determine which discovery or scientific investigations may be necessary. Accordingly, a court would likely conclude that to the extent the destructive testing of human remains is reasonably necessary for the Commission to fulfill its functions and duties under these chapters, the Commission is authorized to permit it.

We next consider Health and Safety Code chapter 711, which grants the Commission authority over nonperpetual care cemeteries,⁶ including those unknown or abandoned. *See* TEX. HEALTH & SAFETY CODE §§ 711.001–.084; *see id.* §§ 711.001(36) (defining “[u]nknown cemetery” to mean “an abandoned cemetery evidenced by the presence of marked or unmarked graves that does not appear on a map or in deed records”), 711.001(1) (defining an “[a]bandoned cemetery” to mean “a cemetery . . . that is not owned or operated by a cemetery organization, does not have another person legally responsible for its care, and is not maintained by any person”). Section 711.010 prohibits a property owner from constructing improvements that would disturb an unknown or abandoned cemetery until the human remains are removed “under a written order issued by the state registrar⁷. . . and under an order of a district court.” *Id.* § 711.010(a). It authorizes the Commission, after receiving notice from the property owner, to intervene and become a party to a suit. *Id.* § 711.010(c). The Commission is part of the process of the removal of human remains from an unknown or abandoned cemetery. *See* 13 TEX. ADMIN. CODE § 22.5(b), (c) (Tex. Historical Comm’n, Removal of Remains from an Abandoned or Unknown Cemetery); *see also* TEX. GOV’T CODE § 442.017(d) (authorizing the Commission to adopt rules implementing its program to identify and preserve abandoned cemeteries across the State); HEALTH & SAFETY

⁵Moreover, the Commission recognizes the need for the use of destructive analysis. *See* 13 TEX. ADMIN. CODE § 29.5(g) (Tex. Historical Comm’n, Disposition of State Associated Collections) (providing that the Commission is the authority to approve the use of destructive analysis through its approval of the research design submitted in connection with an application for an Antiquities permit).

⁶A “[n]onperpetual care cemetery” is a “cemetery that is not a perpetual care cemetery.” TEX. HEALTH & SAFETY CODE § 711.001(28). “Perpetual care” means “the maintenance, repair, and care of all places in the cemetery.” *Id.* § 711.001(29).

⁷The state registrar is the “Unit Director of the Vital Statistics Unit, Texas Department of State Health Services.” 25 TEX. ADMIN. CODE § 181.1(27) (Dep’t of State Health Servs., Definitions).

CODE § 711.012(c) (authorizing the Commission to adopt rules to enforce and administer sections 711.010 and 711.011 and other provisions to the extent they relate to cemeteries that are not perpetual care cemeteries). As part of its involvement, the Commission “shall ensure that a reasonable effort has been made to identify the remains and that the next of kin is notified if the name of the decedent is determined.” 13 TEX. ADMIN. CODE § 22.5(b)(2) (Tex. Historical Comm’n, Removal of Remains from Abandoned or Unknown Cemetery). The Commission’s rules provide that “[u]nless otherwise specified, all physical anthropological investigations of human remains . . . will use noninvasive techniques.” *Id.* § 22.5(c)(2)(C). Yet, those same rules recognize that invasive techniques may be utilized if “otherwise specified,” and place approval for such techniques with the Commission. *See id.* Destructive DNA testing, such as proposed here, could be found to serve the Commission’s obligations to make a reasonable effort to identify the remains. *See id.* § 29.5(g) (Tex. Historical Comm’n, Disposition of State Associated Collections) (providing the Commission is the authority to approve the use of destructive analysis through its approval of the research design submitted in connection with an application for an Antiquities Permit); *id.* §§ 26.3(23), 29.4(17) (Tex. Historical Comm’n, Definitions) (defining “destructive analysis”). A court would likely determine that to the extent destructive analysis for the purpose of obtaining DNA samples is reasonably necessary for the Commission to carry out its functions and duties under Health and Safety Code chapter 711, the Commission is authorized to permit it.⁸

⁸Given the answers to your first two questions, we need not address your third. *See* Request Letter at 1.

S U M M A R Y

A court would likely conclude that the Historical Commission is authorized to permit the destructive testing of human remains for research purposes, including the purpose of obtaining DNA samples adequate to enable the identification of genetically related descendants pursuant to the Commission's authority in Government Code chapter 442, Natural Resources Code chapter 191, and Health and Safety Code chapter 711.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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