



June 18, 1999

Ms. Susan I. Goodman
Hilgers & Watkins
P.O. Box 2063
Austin, Texas 78768

OR99-1682

Dear Ms. Goodman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125066.

The Austin-Travis County Mental Health-Mental Retardation Center (the "center"), which you represent, received a request from an attorney who represents the mother of a particular center client. You explain that the client is an adult who has not been declared incompetent by any court, and that her mother is not her legal guardian. The requestor asks for documentation concerning claims of personal injury suffered by the center client. Specifically, the requestor seeks:

- 1) Any and all employment records pertaining to employee Kenneth E. Gould;
- 2) Any and all documents pertaining to supervision of clients in assisted living facilities;
- 3) Any and all documents reflecting care standards for clients in assisted living facilities;
- 4) Any and all policy and procedure manuals which pertain to the operation of assisted living facilities;
- 5) Any and all employee training manuals;
- 6) Any and all investigative files pertaining to criminal act by employees against clients of MHMR;

7) The complete investigative file for the incident between Kenneth E. Gould and [a center client]; [and]

8) The complete file on [a center client].

You claim that the requested information is excepted from disclosure by section 552.103 of the Government Code. Alternatively, you claim that portions of the requested information are confidential under section 552.101 of the Government Code in conjunction with various state statutes and the privacy doctrine. We have considered the exceptions you claim and have reviewed the representative sample of documents at issue.¹

First, we will address the documents that are not governed by the Public Information Act as they are governed by other state statutes that provide for the confidentiality and access to such records. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 595.001 of the Health and Safety Code provides that:

Records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004.

We agree that information responsive to item 8 falls within the ambit of section 595.001. Thus, the information must be withheld under section 595.001. You may release the information only in accordance with sections 595.003, 595.004, and 595.005 of the Health and Safety Code.

Next, you contend that information responsive to items 6 and 7 is confidential under section 48.101 of the Human Resources Code. Section 48.101 pertains to disclosure of information about reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 reads in part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

¹In reaching our conclusion here, we 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.

- (1) a report of abuse, neglect, or exploitation made under . . . chapter [48 of the Human Resources Code];
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

We believe that information responsive to items 6 and 7, which you state was provided by the Department of Protective and Regulatory Services to the center, is confidential pursuant to section 48.101(a) of the Human Resources Code. *See* Hum. Res. Code § 48.081 (investigative reports of abuse, neglect, or exploitation of individuals in community centers); 40 T.A.C. §§ 710.45 (client abuse and neglect in community mental health and mental retardation centers), .46 (responsibilities of Office of Facility Investigation of Department of Protective and Regulatory Services); *see also id.* § 48.002 (definitions). Consequently, the information must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b); *but see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances).

As for the remaining requested information, you assert that section 552.103 of the Government Code excepts the information from public disclosure. Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

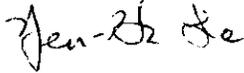
To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

After reviewing your arguments and the submitted information, we conclude that the center reasonably anticipates litigation, and that the information relates to the anticipated litigation. Thus, you may withhold the remaining information under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHLnc

Ref: ID# 125066

Encl.: Submitted documents

cc: Mr. Jay R. Beatty
Michalk, Beatty & Alcozer, P.L.L.C.
2210 East Central Texas Expressway
Killeen, Texas 76543
(w/o enclosures)