



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 3, 2008

Mr. Brett Norbraten  
Open Records Attorney  
Department of Aging and Disability Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2008-07497

Dear Mr. Norbraten:

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# 311836.

The Department of Aging and Disability Services (the "department") received a request for two categories of information pertaining to open records requests and interactions with reporters at state schools as well as two categories pertaining to disciplinary actions against employees and e-mails and memoranda regarding state survey reports and abuse investigations sent or received by a named individual. You claim that a portion of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). To demonstrate that litigation is reasonably anticipated, the department must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

You explain that at the time of the request, the department was subject to an action by the United States Department of Justice (the "DOJ") under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. §§1997 *et seq.*, after the DOJ's investigation of the conditions at the Lubbock State School. You state that DOJ conducted an onsite visit of the Lubbock State School in June 2005 and issued its report in December 2006. You explain that under CRIPA, the DOJ may file a lawsuit against the state after 49 days have elapsed from the date of the report. You further inform us that "it is likely that the DOJ will file a lawsuit in federal court to incorporate the settlement agreement into a judgment enforceable by the court, as that is the DOJ's usual practice in CRIPA investigations."

You further state that, at the time of the request, the DOJ has commenced an investigation into the care and treatments of residents at the Denton State School under CRIPA. You argue that, "given the chronology of events and the federal procedure described in the matter of the Lubbock State School above, the department is currently anticipating federal CRIPA litigation and/or settlement negotiations with respect to the Denton State School." Based on the foregoing, you assert that the department anticipated litigation with regard to the Lubbock and Denton State Schools on the date it received the written request.

Based on your representations and our review of the submitted information, we agree that you have shown litigation was reasonably anticipated when the department received the request for information. In addition, we find that the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the department may withhold Exhibits A, concerning the Lubbock State School, and C, concerning the Denton State School, under section 552.103 of the Government Code.

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).

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).

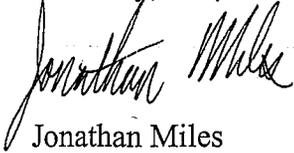
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 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,

A handwritten signature in cursive script, appearing to read "Jonathan Miles".

Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/jh

Ref: ID# 311836

Enc. Submitted documents

c: Mr. David Mann  
Texas Observer  
307 West 7<sup>th</sup> Street  
Austin, Texas 78701  
(w/o enclosures)