



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2008

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

OR2008-08657

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# 314005.

The Department of Aging and Disability Services (the "department") received a request for seven categories of information related to the Denton State School. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

Initially, we note that one of the submitted documents is not responsive to the instant request for information because it was created after the date of the request. We have marked this non-responsive document. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

¹We 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.

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed reports made for or by the department, which are expressly public under section 552.022(a)(1). Although you claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.² Thus, the department may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. Because section 552.101 of the Government Code is "other law" for purposes of section 552.022, we will consider your arguments under that exception.

We address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. 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.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Id. § 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. You state that this action was subsequent to 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 treatment 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 the information not subject to section 552.022 under section 552.103 of the Government Code.

We note, however, that once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the

litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, we address your claims under section 552.101 of the Government Code for the information subject to section 552.022. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses statutory confidentiality provisions. You contend that Exhibit B-7 is confidential under section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

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

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (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 or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). You state that the documents in Exhibit B-7 relate to a report and investigation made under chapter 48 of the Human Resources Code. Based upon your representations and our review, we find that the documents in Exhibit B-7 consist of files, reports, records, communications, and working papers used or developed in an investigation made under chapter 48. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency 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). You do not indicate, nor does it appear, that an exception to confidentiality applies in this instance. Accordingly, we conclude that the department must withhold Exhibit B-7 in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.³

³Because we are able to make a determination under section 48.101, we need not address your additional arguments against the disclosure of these records.

You state that some of the remaining information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code, which provides that “[r]ecords 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.” Health & Safety Code § 595.001. You state that the information at issue consists of records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the Texas state schools’ provision of mental retardation services. You further state that the requestor has not demonstrated that he has a right of access to the information at issue under section 595.003 or section 595.004 of the Health and Safety Code.

We have reviewed the information that you have marked, and agree that some of it is confidential under section 595.001 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. We have marked some additional information in that is confidential under section 595.001 and must be withheld under section 552.101. However, we find that the remaining information, which we have marked for release, is not the type of information that is confidential under section 595.001 of the Health and Safety Code and the department may not withhold it under section 552.101 on that ground.

In summary, the department may withhold the documents not subject to section 552.022(a)(1) under section 552.103 of the Government Code. Exhibit B-7 must be withheld in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. Except for the information that we have marked for release, the department must withhold the information you have marked, as well as the additional information that we have marked, under 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code. The remaining information that is subject to section 552.022(a)(1) must be released to the requestor.⁴

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

⁴We note that the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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). If the governmental body does not file suit over 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,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 314005

Enc. Submitted documents

c: Mr. Jesse Hyde
Dallas Observer
c/o Mr. Brett Norbraten
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(w/o enclosures)