



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 23, 2008

Ms. Cathy Anderson  
Open Government Attorney  
Texas Department of Family and Protective Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2008-10002

Dear Ms. Delaney:

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# 316572.

The Texas Department of Family and Protective Services ("DFPS") received a request for the number of confirmed cases of deaths attributed to neglect or abuse reported at each state school since 2004. You state that release of the requested information may implicate the proprietary interests of a third-party. You state that you have notified the Texas Department of Aging and Disability Services ("DADS") of the request and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third-party to raise and explain the applicability of exception to disclosure under the Act in certain circumstances). We have received from DADS arguments as to why the requested information is excepted from required public disclosure. We have considered their arguments and reviewed the submitted information.<sup>1</sup>

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<sup>1</sup>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.

Initially, we must address DFPS's obligations under the Act. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). You inform us that DFPS received this request for information on April 17, 2008. However, you did not seek an attorney general's decision until May 16, 2008. Additionally, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exception applies that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). However, you did not submit a copy of the request until July 9, 2008 or a copy of the requested information until July 21, 2008. Thus, we find that DFPS failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or the release of the requested information implicates a third-party's interests. *See* Open Records Decision Nos. 630 (1994), 150 (1977). As DADS, an interested third-party, has submitted arguments for withholding the requested information, we will review their arguments against disclosure. *See* Open Records Decision No. 586 (1991) (need of governmental body, other than body that failed to timely seek open records decision, may be compelling reason for non-disclosure).

DADS asserts that portions of the requested information are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 of the Government Code provides:

- (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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

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). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

In situations such as this in which the governmental body that received the request has no litigation interest in the information at issue, we require a representation from the governmental body whose litigation interests are at stake. DADS asserts that the statistics pertaining to the Lubbock and Denton State Schools are excepted from disclosure under section 552.103. DADS states that prior to the instant request, it was subject to action by the United States Department of Justice (“DOJ”) “under the Civil Rights of Institutionalized Persons Act (“CRIPA”) . . . by virtue of the DOJ’s investigation into and report on conditions at the Lubbock State School.” DADS states that under CRIPA, the DOJ’s time frame for filing a lawsuit has not elapsed, and “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.” DADS also states that historical rates of abuse and neglect confirmation relate to improvements made at the Lubbock State School and therefore impact settlement negotiations and are germane to the anticipated litigation. DADS further explains that it is currently “anticipating federal CRIPA litigation and/or settlement negotiations with respect to the Denton State School” as well. DADS states that this litigation is anticipated because on March 11, 2008, the DOJ informed Governor Rick Perry that it is commencing an investigation into the “conditions of care and treatment of residents at the Denton State School, pursuant to [its] authority under [CRIPA].” DADS argues that this letter to the Governor is analogous to a notice letter under the Texas

Tort Claims Act. DADS asserts that “based on the procedures employed by the DOJ in its investigation of Lubbock, litigation relating to Denton is reasonably anticipated.” Based on DADS’s representations and our review, we determine that DADS reasonably anticipated litigation on the date that DFPS received this request for information. Furthermore, upon review of the information at issue, we find that the submitted information relates to the anticipated litigation to the extent that it concerns the Lubbock and Denton State Schools. Accordingly, we conclude that DFPS may withhold the submitted information pursuant to section 552.103 to the extent that the submitted information relates to the Lubbock or Denton State Schools and the DOJ has not already obtained the information. Once the requested information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). To the extent that the submitted information relates to schools other than the Denton or Lubbock State School, or the DOJ has had access to the information, section 552.103 does not apply and, as no other exceptions were raised, the information is subject to disclosure to the requestor.<sup>2</sup>

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). 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).

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<sup>2</sup>We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

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,



Jessica J. Maloney  
Assistant Attorney General  
Open Records Division

JJM/jh

Ref: ID# 316572

Enc. Submitted documents

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