



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2009

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

OR2009-02939

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# 336543 (DADS internal tracking number 2008SOLEG0268).

The Texas Department of Aging and Disability Services (the "department") received a request for four categories of information pertaining to Texas state schools since January 2004. You indicate that the requested information responsive to category four of the request will be released to the requestor. You claim that the requested information responsive to the remaining categories 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 information.¹ We have also considered comments submitted on behalf of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that you have not submitted any "documents showing death totals [for all state schools since January 2004] compared to total persons served or total admissions." To the extent any documents responsive to this portion of the request existed on the date the department received the request, we assume you have released them. If you have not released any such information to the requestor, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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.

Next, we note that Exhibit C is not responsive to the instant request for information because it was created after the date of the request and does not pertain to "events resulting in permanent loss of function" or "deaths" at Texas state schools. Instead, it pertains to an event resulting in a minor injury. 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.

We note, and the requestor contends that the responsive information is subject to required public disclosure under section 552.022(a)(1) of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Gov't Code § 552.022(a)(1). Upon review, we conclude that the responsive information, which consists of a Department of Family and Protective Services ("DFPS") investigative report and a Death Summary are a completed investigation and a completed report, respectively, made of, for, or by the department. See Hum. Res. Code § 48.252(a)(1) (authorizing DFPS to conduct investigations in a facility of the department formerly operated by the Department of Mental Health and Mental Retardation), 40 T.A.C. § 711.1 (relating to chapter 48 of the Human Resources Code investigations in department facilities). Thus, the responsive information is subject to section 552.022(a)(1) of the Government Code. Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the department may not withhold this information under section 552.103. However, section 552.101 of the Government Code constitutes other law for purposes of section 552.022; therefore, we will consider your claims under section 552.101 for the responsive information.

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 A 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 DFPS investigative report in Exhibit A relates to an investigation made under chapter 48 of the Human Resources Code.² *See id.* § 48.252(a)(1), 40 T.A.C. § 711.1. Based upon your representations and our review, we find that Exhibit A consists 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* Hum. Res. Code § 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 A in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.³

Section 552.101 also encompasses 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 indicate that Exhibit B pertains to the identity, diagnosis, evaluation, or treatment of a state school client and that “the state school system itself is a ‘program or activity relating to mental retardation.’” You also assert that the release provisions set forth in sections 595.003 and 595.004 of the Health and Safety Code are inapplicable here. Having considered your representations and reviewed the submitted records, we agree that Exhibit B is confidential under section 595.001; therefore, the department must withhold the Exhibit B under section 552.101 of the Government Code.⁴

²We note that pursuant to House Bill 2292 of the 78th Texas Legislature, “the Texas Department of Aging and Disability Services took over operation of mental retardation and state school programs of the former Texas Department of Mental Health and Mental Retardation, community care and nursing home services programs of the former Texas Department Services, and aging services programs of the former Texas Department on Aging.”

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.

⁴As our ruling is dispositive, we need not address your remaining arguments against the disclosure of Exhibit B.

In summary, the department need not release the non-responsive information. The department must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. The department must also withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 336543

Enc. Submitted documents

cc: Requestor
(w/o enclosures)