



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2009

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

OR2009-07677

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# 345119 (DADS # 2009SOLEG0065).

The Department of Aging and Disability Services (the "department") received a request for four categories of information pertaining to state schools. You state that you do not possess the requested video footage.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information was created after the date of the request. Thus, this information, which we have marked, is not responsive to the instant request for information. 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.

Next, we note that you did not submit information responsive to the portion of the request seeking information about employees fired or suspended from the 13 state schools or centers in fiscal year 2008 for abuse, neglect, or mistreatment of residents, nor do you inform us this

¹The Act does not require a governmental body that receives a request for information to create responsive information or obtain information that is not held by or on behalf of the department. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²Although you raised section 552.108 of the Government Code in your initial brief, you make no arguments explaining the applicability of this exception to the submitted information. Therefore, we assume you have withdrawn this exception.

information has been released to the requestor. However, we note that this information may have been previously ruled upon by this office in Open Records Letter No. 2009-03649 (2009). In Open Records Letter No. 2009-03649 we concluded that the department may generally withhold information concerning the number of employees terminated for abuse or neglect at the state schools during the specified time period under section 552.103 of the Government Code. Therefore, as we have no indication that the law, facts, or circumstances surrounding this prior ruling has changed, to the extent the information at issue is identical to that addressed in the prior ruling, you may continue to rely on Open Records Letter No. 2009-03649 as a previous determination and release or withhold the information at issue in accordance with this prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information pertaining to employee terminations is not covered by the prior ruling, we assume you have released it to the requestor. If not, you must do so at this time. *See* Gov't Code §§ 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). We next address your arguments for the submitted information.

You assert that the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides the following:

(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 on the date the governmental body receives the request for information, 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.*, 684S.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 ORD 452 at 4.

The department states that prior to the instant request, it was subject to action by the United States Department of Justice (the "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." The department 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." The department further explains that it is currently "anticipating federal CRIPA litigation and/or settlement negotiations with respect to the other state schools" as well. The department informs us that on December 1, 2008, the DOJ issued a findings letter on the "Statewide CRIPA Investigation of the Texas State Schools and Centers."³ The department argues that, as a result of this letter, the remaining "state schools and centers now find themselves in a similar position to the Lubbock State School[.]" In this regard, we note that the December 1, 2008 findings letter states that, if the DOJ and the state "are unable to reach a resolution regarding our concerns, the [U.S] Attorney General may institute a lawsuit pursuant to CRIPA to correct deficiencies of the kind identified in this letter 49 days after appropriate officials have been notified of them." *Id.* at 60. Based on your representations and our review, we determine that the department reasonably anticipated litigation on the date that it received this request for information. Furthermore, upon review of the information at issue, we find that the submitted information relates to the anticipated litigation because it pertains to conditions at one of the state schools. Accordingly, we conclude that the department may generally withhold the remaining submitted information pursuant to section 552.103.

We note, however, that once information has been obtained by all parties to the anticipated 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). Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2; Open Records Decision

³Letter from Acting Assistant U.S. Attorney General Grace Chung Becker, U.S. Dep't of Justice, to Texas Governor Rick Perry (Dec. 1, 2008), "Statewide CRIPA investigation of the Texas State Schools and Centers" (http://www.usdoj.gov/crt/split/documents/TexasStateSchools_findlet_12-1-08.pdf).

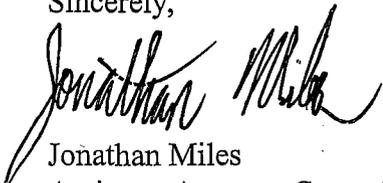
Nos. 350 at 3 (1982), 349 at 2. In this instance, we note that a portion of the submitted information consists of communications involving employees of the DOJ. Because the DOJ has had access to this information, there is no justification in withholding it under section 552.103. Therefore, to the extent the DOJ has seen or had access to the remaining information, any such information is not protected by section 552.103 and may not be withheld on that basis. With the exception of such information, which we have marked, the department may withhold the remaining information under section 552.103 of the Government Code. As you raise no further arguments against release of the information we have marked, this information must be released to the requestor.⁴

In summary, to the extent the requested information pertaining to employee terminations was ruled upon in Open Records Letter 2009-03649, you may continue to rely on Open Records Letter No. 2009-03649 as a previous determination and release or withhold information in accordance with this prior ruling. The communications with the DOJ that we have marked must be released to the requestor. The remaining submitted information may be withheld under section 552.103 of the Government 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

⁴We note that although you also raised section 552.107 for the marked communications with the DOJ, you did not raise section 552.107 until your letter of April 7, 2009, which was beyond the 10-day deadline for raising applicable exceptions as required under section 552.301(b). Accordingly, because section 552.107 is a discretionary exception that may be waived, we find that you had waived this exception. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(a)), 522 at 4 (1989) (discretionary exceptions in general).

Ref: ID# 345119

Enc. Submitted documents

c: Requestor
(w/o enclosures)