



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2014

Mr. Jonathan Miles
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2014-09103

Dear Mr. Miles:

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# 526771 (DFPS Ref. No. 03282014NPI).

The Texas Department of Family and Protective Services (the "department") received a request for specified categories of information pertaining to the requestor's client.¹ The department states it will withhold certain information pursuant to Open Records Decision No. 684 (2009) and the previous determination issued in Open Records Letter No. 2003-5590 (2003).² The department states it will release some of the requested information, but claims the submitted information is excepted from disclosure under

¹The department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office. Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, without the necessity of seeking a decision from this office, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, unless the department's rules permit the department to release requested records to a particular requestor.

section 552.103 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.³

Initially, we note you informed the requestor some of the responsive information was available on the department's website. Section 552.228 of the Government Code requires a governmental body to provide a requestor with a "suitable copy" of requested public information. Gov't Code § 552.228(a). We also note "[a] public information officer does not fulfill his or her duty under the Act by simply referring a requestor to a governmental body's website for requested public information." Open Records Decision No. 682 at 7 (2005). Instead, section 552.221 of the Government Code requires a governmental body "to either provide the information for inspection or duplication in its offices or to send copies of the information by first class United States mail." *Id.*; see Gov't Code § 552.221(b). Thus, the department must provide to the requestor access to or copies of the responsive information that is on the department's website. Nevertheless, we note a requestor may agree to accept information on a governmental body's website in fulfillment of a request for information under the Act. See ORD 682 at 7.

Section 552.103 of the Government Code provides in 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 governmental body has the burden of providing relevant facts and documents to show 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 received 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, orig. proceeding);

³We assume 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 those records contain substantially different types of information than that submitted to this office.

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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

For purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. Open Records Decision Nos. 588 at 2 (1991), 474 at 6 (1987) (disciplinary action before Texas State Board of Pharmacy), 368 at 2 (1983) (administrative hearing before Commissioner of Insurance), 301 at 1-2 (1982). Factors this office considers in determining whether an administrative proceeding is conducted in a quasi-judicial forum include whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588 at 3-4.

You inform us the requestor's client filed a grievance against the department regarding her termination before the department received the request for information. We understand the department to assert its grievance hearings are "litigation" because the department follows administrative procedures in handling such disputes. The department states the requestor's client is entitled to a hearing before an administrative law judge. The department also explains that, at the hearing, the requestor's client may present relevant evidence and testimony at the hearing, may be represented by an attorney, and has access to documentary evidence on which the disciplinary action at issue is based. Based on the department's representations and our review, we find the department's administrative procedure for the dispute at issue, as described above, is conducted in a quasi-judicial forum. Thus, the department's administrative procedure for disputes constitutes litigation for purposes of section 552.103. Accordingly, we determine the department was involved in pending litigation when it received the request for information. We also find the department has established the submitted information is related to the pending litigation for purposes of section 552.103(a). Therefore, the department may withhold the submitted information under section 552.103(a).

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

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 526771

Enc. Submitted documents

c: Requestor
(w/o enclosures)