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ATTORNEY GENERAL OF TEXAS

February 11, 2016

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

OR2016-03413

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# 597990 (DFPS Reference No. 1162015GIA).

The Texas Department of Family and Protective Services (the "department") received a request for the number of child abuse and child neglect complaints and investigations involving two specified facilities during a specified time period, the number of investigations by the department during that time period, and the number of abuse complaints confirmed and unconfirmed during that time period. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note portions of the submitted information are not responsive to the instant request because they do not pertain to the number of child abuse and child neglect complaints and investigations involving the two specified facilities during a specified time period. The department need not release nonresponsive information in response to this request, and this ruling will not address that information.

¹We 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 that those records contain substantially different types of information than that submitted to this office.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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). Some of the responsive information is part of a completed investigation subject to section 552.022(a)(1) of the Government Code. The department must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the responsive information that is part of a completed investigation may not be withheld under section 552.103 of the Government Code. However, we note the information subject to section 552.022(a)(1), as well as the remaining responsive information, may be subject to section 552.101 of the Government Code, which can make information confidential under the Act.² Accordingly, we will address the applicability of this exception to the responsive information. Further, we will address your argument under section 552.103 for the responsive information that is not subject to section 552.022(a)(1).

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 261.201(a) of the Family Code, which provides as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the responsive information may be subject to section 261.201(a). You state the information at issue relates to “the current prevalence of abuse and neglect complaints in the facilities.” However, we are unable to determine whether the responsive information was used or developed in investigations under chapter 261. Accordingly, to the extent the responsive information consists of files, reports, records, communications, audiotapes, video tapes, or working papers used or developed in an investigation under chapter 261, the information is within the scope of section 261.201 of the Family Code. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code ch. 261); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). In that instance, the responsive information must be withheld under section 552.101 of the Government Code in conjunction with 261.201(a) of the Family Code. However, to the extent the responsive information was not used or developed in investigations of child abuse and neglect, it may not be withheld under section 552.101 on the basis of section 261.201(a).

Section 552.103 of the Government Code provides 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). 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 was 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); *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 section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state the facilities at issue are facilities in which the United States Immigration and Customs Enforcement (“ICE”) has been detaining female-headed families. You state the department is in the public comment period to determine whether the department should implement a permanent rule to allow such facilities to be licensed by the department. You state the department anticipates litigation regarding the licensing of the facilities at issue. You state “the department believes the same entities that brought forward the litigation on behalf of unaccompanied and accompanied minors [against ICE in a specified case] are likely to similarly bring forward litigation in Texas, given that the [d]epartment’s licensing of the facilities would allow the facilities to remain in operation[.]” However, upon review of your arguments, we find the department has not demonstrated any party had taken concrete steps toward filing litigation when the department received the request for information. Thus, we conclude the department has failed to demonstrate it reasonably anticipated civil litigation when it received the request for information. Therefore, the department may not withhold the remaining responsive information under section 552.103(a) of the Government Code.

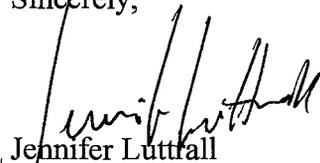
³In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In summary, to the extent the responsive information was used or developed in investigations of child abuse or neglect, the department must withhold it under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. To the extent the responsive information was not used or developed in investigations of child abuse or neglect, it must be released.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 597990

Enc. Submitted documents

c: Requestor
(w/o enclosures)