



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 30, 1997

Mr. Boyd Kennedy
Staff Attorney
Law Enforcement Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR97-1486

Dear Mr. Kennedy:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107295.

The Texas Parks and Wildlife Department (the "department") received an open records request for a report prepared by department employees during the course of an investigation of the drowning death of a child in Caddo Lake. The requestor also seeks the department's video tape recording of the scene where the drowning occurred. You seek to withhold the requested information pursuant to sections 552.101, 552.103, and 552.107 of the Government Code.

We note at the outset that the department has previously released the requested information to the Tri-County Child Fatality Review Team (the "review team"). Generally, when a governmental body releases information to the public, the information must be released to any other person who requests it. Gov't Code § 552.007. In this instance, however, the review team has a statutory right of access to the department's records pertaining to the child's death. *See* Fam. Code § 264.509. We therefore conclude that the department's release of the requested information to the review team does not constitute a "selective disclosure" prohibited under section 552.007 of the Government Code. We accordingly will consider the exceptions to disclosure that you have raised.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) You contend that the requested information must be withheld from the public in accordance with section 264.511(a) of the Family Code, which makes confidential all records acquired by the review team during the course of its investigation of a child's death.

This provision is applicable, however, only to records held by the review team -- it does not suggest that confidentiality extends to the same records held by other entities. *See* Fam. Code § 264.511(d). Section 264.511(a) does not apply to records in the hands of the department.

To secure the protection of section 552.103(a) of the Government Code, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* We do not believe that you have met your burden in establishing that the likelihood of litigation against the department in connection with this matter is more than speculation. We therefore conclude that the department may not withhold the requested information pursuant to section 552.103.

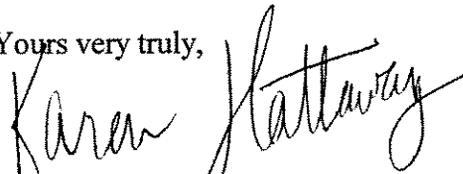
Finally, we address your claim that the requested information comes within the attorney-client privilege and thus is excepted from required public disclosure by section 552.107(1) of the Government Code. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *See* Open Records Decision No. 574 (1990). Because none of the information at issue may be considered as an attorney's legal advice, the information may be withheld from the requestor only if the information constitutes a client confidence rendered to an attorney.

The requested report consists primarily of a compilation of statements of witnesses, including two game wardens, who were present at the time of the drowning. These statements and supporting data were then submitted to the department's Regional Law Enforcement Commander for Region VIII, who then forwarded the report, with an accompanying memorandum, to his Division Director. It was only then that the report was forwarded to you in your capacity as staff attorney. Please note that the attorney-client privilege is limited to communications with those governmental representatives who fit within the "control group" as discussed by the Texas Supreme Court in *National Tank v. Brotherton*, 851 S.W.2d 193, 197-200 (Tex. 1993). Because we find that the individuals making these statements do not fit within such a "control group," we conclude the report may not be withheld under section 552.107(1).

Because the requested information does not come within any of the exceptions you have raised, we conclude that the department must release the requested information in its entirety. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/RWP/cbh

Ref.: ID# 108295

Enclosures: Submitted documents

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