



May 18, 1999

Mr. David Wofford
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR99-1372

Dear Mr. Wofford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124435.

The Texas Youth Commission (“TYC”) received a request for documents concerning the Coke County Juvenile Justice Center and Wackenhut Corrections Corporation (“Wackenhut”). Wackenhut is under contract with TYC to operate the Coke County facility as a correctional facility for TYC youth. You contend that the requested documents are excepted from disclosure under sections 552.103 and 552.108 of the Government Code. You also argue that some of the documents at issue are confidential under sections 58.005 and 261.201 of the Family Code, and are therefore excepted from disclosure pursuant to section 552.101 of the Government Code. We have considered the exceptions you claim and reviewed a set of documents which you characterize as a representative sample of the documents at issue.¹

Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has

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.

the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *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 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). Concrete evidence to support a claim that 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.² Open Records Decision No. 555 (1990); *see* 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 that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You inform us that Wackenhut is currently involved in a lawsuit regarding its operation of the Coke County facility. *Barton v. Wackenhut Corp.*, No. 3-97-CV2677-H (N.D. Tex. filed Oct. 31, 1997). You contend that TYC reasonably anticipates being made a co-defendant in the lawsuit. Having carefully considered your arguments, we conclude that TYC does not reasonably anticipate litigation at this time. Therefore, TYC may not withhold any of the documents at issue from disclosure pursuant to section 552.103.³

²In addition, this office has concluded that 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).

³We note that your letter to this office of March 11, 1999, seems to indicate that some of the documents at issue were previously turned over to the plaintiffs during the discovery phase of the *Barton* case. Please note that absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information, regardless of who is requesting the information. Open Records Decision Nos. 349 (1982), 320 (1982).

Section 552.108 of the Government Code provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming section 552.108(a)(1) or (b)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body claiming section 552.108(a)(2) or (b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code §§ 552.108(a)(2), (b)(2). Lastly, a governmental body claiming section 552.108(a)(3) or (b)(3) must show that the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See* Gov't Code §§ 552.108(a)(3), (b)(3).

You generally allege that “the requested documents, reports, etc., regarding referral to law enforcement agencies would be excepted from disclosure under § 552.108.” You have not offered any specific arguments to support this general allegation. Therefore, we conclude that you have not met your burden of demonstrating that section 552.108 is applicable to the requested information. TYC may not withhold any of the requested documents from disclosure under section 552.108.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You contend that section 58.005 of the Family Code deems some of the information at issue confidential. Section 58.005(a) states that the following types of information may be disclosed only to certain individuals and agencies:

Information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court

Fam. Code § 58.005(a). Additionally, we note that section 58.007(c) of the Family Code deems confidential “law enforcement records and files concerning a child.” Fam. Code § 58.007(c). We have marked the information that is confidential under these provisions of the Family Code (see yellow tabs). TYC must withhold the marked information from disclosure pursuant to section 552.101.

Finally, you contend that some of the requested documents are excepted from disclosure pursuant to section 552.101 in conjunction with section 261.201 of the Family Code. Section 261.201(a) of the Family Code provides as follows:

(a) The 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:

- (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, 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 have reviewed the submitted documents and find that none of them fall within the scope of section 261.201(a). We note, however, that section 261.201(a) deems confidential in their entirety records and working papers used or developed in an investigation of child abuse or neglect. Therefore, TYC must withhold such documents from disclosure pursuant to section 552.101.

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.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 124435

encl. Submitted documents

cc: Ms. Patricia Lehtola
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(w/o enclosures)