ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2003

Mr. Michael Shaunessy
The Shaunessy Law Firm, P.C.
1000 Norwood Tower
114 West Seventh Street
Austin, Texas 78701

OR2003-8351

Dear Mr. Shaunessy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191448.

Comal County, the Comal County Juvenile Probation Board, the Comal County Human Resources Department, and the Comal County Juvenile Probation Department (collectively the "county") received a request for:

> (1) All communications (or records thereof) regarding any complaint, grievance, disciplinary action, contemplated disciplinary action, changes in job assignment or in job description, evaluation, achievement, award, or recognition.
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> (2) All communications (or records thereof) regarding or involving any accusation made against the requestor in connection with events of July 22, 2003.
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> (3) All communications (or records thereof) regarding or involving any support for the requestor in connection with events of July 22, 2003.
>
> (4) All communications (or records thereof) regarding or involving any information concerning events of July 22, 2003.
>
> (5) All communications (or records thereof) concerning plans to eliminate the job or job assignment of the requestor.

You state that most of the requested information has been released to the requestor but claim that other requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code as well as under Texas Rule of Evidence 503 and Texas Disciplinary Rule of Professional Conduct 1.05. We have considered your arguments and reviewed the submitted information.[1]

We begin by addressing your contention that the names of juvenile offenders are made confidential by section 58.307 of the Family Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses other laws that make information confidential. Section 58.307 restricts access to "[i]nformation that is part of a local juvenile justice system." A "local juvenile justice system" is "a county or multicounty computerized database of information concerning children, with data entry and access by the partner agencies that are members of the system." *See* Fam. Code § 58.301(4). The information submitted as Exhibit D is not from a computerized database. Because the information in Exhibit D is not from a "local juvenile justice system," it is not made confidential under section 58.307, and none of it may be withheld under section 552.101 on this basis. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

You also assert that the identities of juvenile offenders are protected by common law privacy. The doctrine of common law privacy, which is also encompassed by section 552.101, protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.,* 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Based on your arguments and our review of the information at issue, we agree that section 552.101 and common law privacy require the county to withhold information in Exhibit D that identifies juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007.

We turn now to the documents submitted as Exhibit E. Because your claim regarding section 552.103 is the broadest, we address it first. This exception provides in part:

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[1]In addition to the responsive information, you have submitted documents that were created after this request for information was received. Because these documents, which we have marked, are not encompassed by this request, we do not address them in this ruling.

> (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 sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See 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 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

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. 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).[2] Further, the fact that a potential opposing party has hired an attorney who makes a request

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[2]In 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 ("EEOC"), *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).

for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Having considered your arguments and representations, we conclude that you have established that litigation was reasonably anticipated when the county received this request. *See* ORD 555 (specific threat to sue by attorney for opposing party sufficient to establish that litigation was reasonably anticipated). Thus, the information submitted as Exhibit E may be withheld pursuant to section 552.103.

Generally, however, once information has been obtained by all parties to the 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). Thus, information in Exhibit E that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, pursuant to section 552.101 and common law privacy, the county must withhold the information in Exhibit D that identifies juvenile offenders. Until litigation has concluded or is no longer reasonably anticipated, the information submitted as Exhibit E may be withheld under section 552.103 to the extent the opposing party has not previously had access to it. As our ruling on these issues is dispositive, we need not address your remaining arguments.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

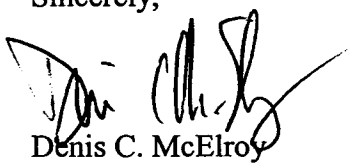
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 191448

Enc. Submitted documents

c: Mr. Jon Bohlmann
c/o Joe Gilbreath
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(w/o enclosures)