



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 11, 2007

Mr. Brett Norbraten  
Open Records Attorney  
Texas Department of Aging and Disability Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2007-07313

Dear Mr. Norbraten:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 279493.

The Texas Department of Aging and Disability Services (the "department") received a request for all grievances filed against department state schools for abuse, sanitation, safety, conditions or overcrowding since January 1, 2006; all audits, citations, inspection results or reports concerning the above-mentioned subjects since March 7, 2002; and department policies in the hiring and screening of department job candidates and employees. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted sample information.<sup>1</sup>

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 statutory confidentiality provisions. You contend that some of the submitted information is confidential under section 48.101 of the Human Resources Code, which

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<sup>1</sup>We assume that the sample 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.

pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). You represent that some of the submitted documents relate to reports and investigations made under chapter 48 of the Human Resources Code. Based upon your representations and our review, we find that Exhibit A consists of files, reports, records, communications, and working papers used or developed in investigations made under chapter 48. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b). *But see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances). You do not indicate, nor does it appear, that an exception to confidentiality applies in this instance. Accordingly, we conclude that the department must withhold Exhibit A in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.<sup>2</sup>

Next you argue that the records submitted as Exhibit B are excepted under section 552.103. Section 552.103, the litigation exception, provides in relevant 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.

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<sup>2</sup>Because we are able to make a determination under section 48.101, we need not address your additional arguments against the disclosure of these records.

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(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 department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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, 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). To demonstrate that litigation is reasonably anticipated, the department must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

You explain that at the time of the request, the department was subject to an action by the United States Department of Justice (the "DOJ") under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § §1997 *et seq.*, after the DOJ's investigation of the conditions at the Lubbock State School. You state that DOJ conducted an onsite visit of the Lubbock State School in June 2005 and issued its report in December 2006. You explain that under CRIPA, the DOJ may file a lawsuit against the state after 49 days have elapsed from the date of the report. Based on the foregoing, you assert that the department anticipated litigation on the date it received the written request. Exhibit B consists of pages from the DOJ report and an abuse and neglect report.

We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, when the opposing party has seen or had access to information relating to anticipated litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the report was provided to the department by DOJ, the opposing party. Accordingly, the department may not withhold the report under section 552.103.

You also claim that Exhibit B is confidential under section 552.101 in conjunction with section 595.001 of the Health and Safety Code, which provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under

Sections 595.003 and 595.004.” Health & Safety Code § 595.001. Exhibit B is an investigation of the management and overall quality of care being administered at the Lubbock State School; it is not a record of the identity, diagnosis, evaluation, or treatment of a client of the state school. Thus, we find that Exhibit B is not confidential under section 595.001. We note, however, that attached to the report is a copy of an abuse and neglect report that is confidential under section 48.101 of the Health and Safety Code and must be withheld under section 552.101. The remaining portions of Exhibit B must be released.

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).

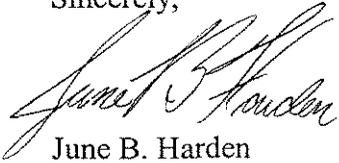
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/sdk

Ref: ID# 279493

Enc: Submitted documents

c: Mr. Steve McVicker  
Houston Chronicle  
801 Texas Avenue  
Houston, Texas 77002  
(w/o enclosures)