



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 30, 2008

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

OR2008-08804

Dear Mr. Norbraten:

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# 315342.

The Texas Department of Aging and Disability Services (the "department") received a request for specified information pertaining to the Lubbock State School, including statistics relating to the use of restraints and workers compensation claims. You state that the department does not have some of the requested information.<sup>1</sup> You also state that some of the requested information has previously been released, but claim that the submitted information is excepted from disclosure under sections 552.103, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received comments from the

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>We 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. We also note that the department failed to timely assert sections 552.117 and 552.136 of the Government Code. *See* Gov't Code § 552.301(b)(1), (4). However, because these sections are mandatory exceptions, we will address your argument under them. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302).

Civil Rights Division of the U.S. Department Of Justice (the "DOJ"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the DOJ objects to the release of information identifying individuals in expert reports that the DOJ provided to the department; however, the department did not submit any expert reports for our review. This ruling does not address information beyond what the department has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information. *See id.*

We next note that Exhibit B, which consists of workers' compensation report forms (Employer's First Report of Injury or Illness), is subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the department may not withhold this information under section 552.103. However, sections 552.117 and 552.136 of the Government Code constitute other law for purposes of section 552.022; therefore, we will consider whether these sections require you to withhold any of the information in these reports.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. But an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the department must withhold this personal information that pertains to a current or former employee of the department who elected, prior to the department's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We have marked information in Exhibit B that must be withheld if section 552.117 applies.

You assert that the tax identification numbers in Exhibit B are excepted under section 552.136 of the Government Code. Section 552.136(b) provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” A tax identification number is not an access device number for purposes of section 552.136; therefore, the department may not withhold this information under section 552.136.

You assert that Exhibit A is excepted under section 552.103 of the Government Code, which provides in 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.

...

(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 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 is 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, 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 section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). 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.* 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.<sup>3</sup> 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).

You inform us that, at the time of the request, the department was “subject to action” by the DOJ under the Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. §§ 1997 *et seq.* *See* 42 U.S.C. § 1997a; 28 C.F.R. §§ 35.172(a), 35.174; *see also* 42 U.S.C. § 1997b. The DOJ conducted an onsite visit of the Lubbock State School in June of 2005 and issued a report of its investigation on December 11, 2006.<sup>4</sup> You state that “although ongoing settlement negotiations may delay the filing of a lawsuit [by the DOJ], the DOJ has the ability to file a lawsuit at any time after the initial 49 days, which expired on January 29, 2007.” You further inform us that “it is likely that the DOJ will file a lawsuit in federal court to incorporate the settlement agreement into a judgment enforceable by the court, as that is the DOJ’s usual practice in CRIPA investigations.” Based on your representations and our review of the submitted documents, we conclude that, for purposes of section 552.103, you have established that litigation was reasonably anticipated when the department received the request for information. Our review of Exhibit A, which consists of statistics pertaining to restraint practices and workers’ compensation injuries, also shows that it relates to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree that the department may withhold Exhibit A under section 552.103.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

To conclude, the department must withhold the information we have marked under section 552.117 of the Government Code if the employees at issue timely elected to withhold that information. The department may withhold Exhibit A under section 552.103 of the

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<sup>3</sup>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, *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).

<sup>4</sup>This report is available at [www.usdoj.gov/crt/split/documents/lubbock\\_sch\\_findlet\\_12-11-06.pdf](http://www.usdoj.gov/crt/split/documents/lubbock_sch_findlet_12-11-06.pdf).

Government Code. The department must release the remaining information pursuant to section 552.022 of the Government Code.<sup>5</sup>

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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.

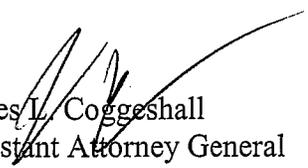
If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

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<sup>5</sup>We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 315342

Enc. Submitted documents

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