



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2009

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

OR2009-02727

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# 336149 (Internal Tracking # 2008SOLEG0263).

The Texas Department of Aging and Disability Services (the "department") received a request for five categories of information pertaining to the Abilene State School. You indicate you will provide the requestor with information responsive to category four of the request upon receipt of proper payment by the requestor. We note that you have informed the requestor that information responsive to category five of the requested information is available on the department's website.¹ You claim that portions of the submitted information are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

¹We note that section 552.228 of the Government Code requires a governmental body to provide a requestor with a "suitable copy" of requested public information. We also note that "[a] public information officer does not fulfill his or her duty under the Act by simply referring a requestor to a governmental body's website for requested public information." Open Records Decision No. 682 at 7 (2005). Instead, section 552.221 of the Government Code requires a governmental body "to either provide the information for inspection or duplication in its offices or to send copies of the information by first class United States mail." *Id.*; see Gov't Code § 552.221. Thus, the department must provide access to or copies of the information at issue to the requestor; however, we note that a requestor may agree to accept information on a governmental body's website in fulfillment of a request for information under the Act. ORD 682 at 7.

We note that category three seeks information pertaining to complaints within a specified time period. However, you have only submitted information documenting disciplinary actions against employees. To the extent any information responsive to category three of the request existed on the date the department received this request, we assume the department has released it to the requestor. If the information at issue has not been released, then it must be released at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.103 provides in part:

(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 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 receives the request for information, and (2) the information at issue is related to that litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). See ORD 551 at 4.

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.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 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 in June of 2005. You state that the DOJ 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. 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.” You state that, at the time of the request, the DOJ had issued a report on the “Statewide CRIPA Investigation of the Texas State Schools and Centers” thereby placing state schools, such as the Abilene State School, in a “similar position to that described for the Lubbock State School.”

Based on your representations and our review, we determine that the department reasonably anticipated litigation on the date of the receipt of this request for information. Furthermore, upon review of the information at issue, we find that the submitted information relates to the anticipated litigation to the extent that it concerns the Abilene State School. Therefore, the department may withhold the submitted information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the anticipated 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 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 when the litigation has concluded or is

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).

no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/cc

Ref: ID# 336149

Enc. Submitted documents

cc: Requestor
(w/o enclosures)