



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 20, 2009

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

OR2009-03649

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# 336541 (Department Tracking No. 2008SOLEG0265).

The Texas Department of Aging and Disability Services (the "department") received a request for the following five categories of information pertaining to the Texas State Schools: (1) the number of staff engaging in direct care with clients and the number of clients; (2) amount of overtime paid in both wages and compensatory time; (3) number of overtime hours worked from the beginning of 2007; (4) number of employees injured on the job since the beginning of 2007; and (5) number and type of disciplinary actions taken against employees in situations pertaining to allegations of abuse and neglect. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

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.

Initially, we note that you have not submitted any information responsive to the request for number of employees injured on the job since the beginning of 2007, pertaining to and organized by state school. To the extent this information exists, 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 of the Government Code provides:

(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, 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.*, 684S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). A 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). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

The department states that prior to the instant request, it was subject to action by the United States Department of Justice ("DOJ") "under the Civil Rights of Institutionalized Persons Act ("CRIPA") . . . by virtue of the DOJ's investigation into and report on conditions at the Lubbock State School." The department states that under CRIPA, the DOJ's time frame for filing a lawsuit has not elapsed, and "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." The department further explains that it is currently "anticipating federal CRIPA litigation and/or settlement negotiations with respect to the other state schools" as well. The department informs us that on December 1, 2008, the DOJ issued a findings letter on the "Statewide CRIPA Investigation of the Texas State Schools and Centers."² The department argues that, as a result of this letter, the remaining "state schools and centers now find themselves in a similar position to the Lubbock State School[.]" In this regard, we note that the December 1, 2008 findings letter states that, if the DOJ and the state "are unable to reach a resolution regarding our concerns, the [U.S] Attorney General may institute a lawsuit pursuant to CRIPA to correct deficiencies of the kind identified in this letter 49 days after appropriate officials have been notified of them." *Id.* at 60. Based on your representations and our review, we determine that the department reasonably anticipated litigation on the date that it received this request for information. Furthermore, upon review of the information at issue, we find that the submitted information relates to the anticipated litigation because it pertains to conditions at the state schools. Accordingly, we conclude that the department may generally withhold the submitted information pursuant to section 552.103.

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). You represent that the DOJ "has not requested, nor [has it] been provided with" the submitted information. We note, however, that in the December 1, 2008 findings letter, the DOJ states it "requested several documents related to the organization, census, staffing, risk factors, incidents, restraint use, medical emergencies, medication use, community placement, abuse and neglect investigations, resident mortalities, and treatment planning at the remaining 11 [Texas State Schools (the "Facilities)]." *See* letter from Acting Assistant U.S. Attorney General Grace Chung Becker, U.S. Dep't of Justice, to Texas Governor Rick Perry (Dec. 1, 2008), Statewide CRIPA investigation of the Texas State Schools and Centers (http://www.usdoj.gov/crt/split/documents/TexasStateSchools_findlet_12-1-08.pdf) at 2. The DOJ specifically states, on the subject of employee discipline, "more than 800 employees across all 13 Facilities have been suspended or fired for abusing Facility residents since Fiscal Year 2004. Over 200 of the Facilities' employees reportedly were fired in Fiscal Year 2007 alone for abuse, neglect, or exploitation of residents, and another 200 reportedly

²Letter from Acting Assistant U.S. Attorney General Grace Chung Becker, U.S. Dep't of Justice, to Texas Governor Rick Perry (Dec. 1, 2008), "Statewide CRIPA investigation of the Texas State Schools and Centers" (http://www.usdoj.gov/crt/split/documents/TexasStateSchools_findlet_12-1-08.pdf).

were fired for these reasons in Fiscal Year 2006." *See id.* at 5. Therefore, to the extent the DOJ has seen or had access to any of the submitted information, that information is not subject to section 552.103 and the department may not withhold it on that basis. To the extent the DOJ has not seen or had access to the submitted information, it may be withheld under section 552.103. We also note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2. As you raise no further exceptions to disclosure, any submitted information that the DOJ has seen or had access to must be released.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 336541

Enc. Submitted documents

c: Requestor
(w/o enclosures)