



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 16, 2009

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

OR2009-05056

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# 340187 (Department of Aging and Disability Services No. 2009SOLEG0019).

The Texas Department of Aging and Disability Services (the "department") received a request for state school mortality information from December 1, 2006 to the present. You claim a portion of the submitted tables is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code 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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. Téx. 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. *See* Open Records Decision No. 555 (1990); Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You inform us that, at the time of the request, the department was "subject to 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.* *See* 42 U.S.C. § 1997a; 28 C.F.R. §§ 35.172(a), .174; *see also* 42 U.S.C. § 1997b. You inform us that 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, 2006.¹ You state "[a]lthough 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 state 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 also inform us that the DOJ has completed a similar investigation of the remaining state schools in Texas and issued a report of its investigation

¹This report is available at www.usdoj.gov/crt/split/documents/lubbock_sch_findlet_12-11-06.pdf.

on December 1, 2008.² You state that as a result of this report, the remaining state schools “find themselves in a similar position to the Lubbock State School.” Based on your representations and our review of the submitted information, we conclude that you have established litigation was reasonably anticipated when the department received the request for information. You state that the marked information in the submitted tables relates to the anticipated litigation because it is the type of information that the DOJ will be investigating for possible litigation. Thus, we find the marked information is related to the anticipated litigation. Therefore, the department may withhold the marked information in the submitted tables under section 552.103 of the Government Code.

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. *See 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 must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).*

In summary, the department may withhold the information it has marked under section 552.103 of the Government Code. The remaining information 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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/sdk

²This report is available at www.usdoj.gov/crt/split/documents/TexasStateSchools_findlet_12-1-08.pdf.

Mr. Brett Norbraten - Page 4

Ref: ID# 340187

Enc. Submitted documents

c: Requestor
(w/o enclosures)