



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2009

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

OR2009-07355

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# 344533 (DADS #2009SOLEG0051).

The Department of Aging and Disability Services (the "department") received a request for information regarding the number of employees terminated for cause, the number of employees terminated for abuse or neglect, and the number of deaths to include those caused by abuse, neglect, or suicide at a specified state school during a specified time period. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the department has not submitted information responsive to the request for the number of employees terminated for cause at the specified state school during the specified time period, or the number of employees terminated for abuse or neglect, nor do you inform this office that such information has been released to the requestor. In this regard, we note that in Open Records Letter No. 2009-03649 (2009) this office concluded that the department may generally withhold information concerning the number of employees terminated for abuse or neglect at the specified state school during the specified time period under section 552.103 of the Government Code. To the extent that the requested information pertaining to the termination of employees was subject to Open Records Letter 2009-03649, as we have no indication that the law, facts, or circumstances surrounding this prior ruling has changed, you may continue to rely on Open Records Letter No. 2009-03649 as a previous determination and release or withhold this information in accordance with this ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on

which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information pertaining to the termination of employees was not subject to Open Records Letter No. 2009-03649, we presume the department has released it. If not, the department must release such information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that the submitted information may have been ruled upon in Open Records Letter No. 2009-02939 (2009). In that ruling, we concluded that, pursuant to sections 552.301 and 552.302 of the Government Code, the department must release documents showing death totals for all state schools since January 2004 compared to total persons served or total admissions, because the department had not submitted that information to our office for review. We note section 552.007 of the Government Code prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. *See* Gov't Code § 552.007 (b). As a general rule, if a governmental body releases information to one member of the public, the Act's exceptions to disclosure are waived unless public disclosure is expressly prohibited by law. Open Records Decision Nos. 490 (1988), 400 (1983). You seek to withhold the submitted information under section 552.103 of the Government Code. This section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not prohibit release of information or make information confidential under law. In Open Records Letter No. 2009-02939, you waived the discretionary exception you claimed. Therefore, to the extent the department released the submitted information to members of the public in accordance with Open Records Letter No. 2009-02939, the department may not now withhold such information under the claimed discretionary exception.

We note, in this instance, you have submitted the requested information pertaining to deaths at the specified state school for our review. You also claim portions of the information at issue are confidential under sections 552.101. This exception makes information confidential by law. Because section 552.007 does not apply to information made confidential by law, we will now address your arguments under sections 552.101 for the information at issue. We will also address section 552.103 to the submitted information in the event the submitted information was not ruled upon by this office in Open Records Letter No. 2009-02939.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by statute. You

claim that portions of the submitted information are excepted from public disclosure under section 552.101 of the Government Code 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. You state that the submitted information consists of records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the Texas state schools’ provision of mental retardation services. You further state that the requestor has not demonstrated that she has a right of access to the information at issue under section 595.003 or section 595.004 of the Health and Safety Code.

However, upon review of the submitted information, we find that it is not the type of information that is confidential under section 595.001 of the Health and Safety Code. Therefore, the submitted information is not confidential under section 595.001 of the Health and Safety Code and the department may not withhold it under section 552.101 on that ground.

Section 552.103 of the Government Code provides the following:

(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. *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."¹ 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 do not inform us whether the DOJ has had access to 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,

¹Letter 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).

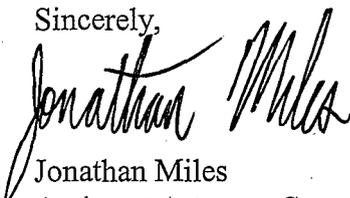
resident mortalities, and treatment planning at the remaining 11 [Texas State Schools (the "Facilities)]." See letter from Acting Assistant U.S. Attorney General Grace Chung Becker, U.S. Dep't of Justice, to Texas Governor Rick Perry (Dec. 1, 2008), Statewide CRIPA investigation of the Texas State Schools and Centers (http://www.usdoj.gov/crt/split/documents/TexasStateSchools_findlet_12-1-08.pdf) at 2. Therefore, to the extent the DOJ has seen or had access to any of the remaining 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 remaining 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.

In summary, to the extent that the requested information pertaining to the termination of employees was subject to Open Records Letter 2009-03649, you may continue to rely on Open Records Letter No. 2009-03649 as a previous determination and release or withhold this information in accordance with this ruling. If the requested information pertaining to the termination of employees was not subject to Open Records Letter 2009-03649, the department must release such information at this time. If the department released the submitted information to members of the public in response to Open Records Letter No. 2009-02939, the department may not now withhold such information under section 552.103 and it must be released to the requestor. To the extent the submitted information was not the subject of Open Records Letter No. 2009-02939 and to the extent the DOJ has not seen or had access to the submitted information, it may be withheld under section 552.103. To the extent the DOJ has had access to the submitted information, it 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 344533

Enc. Submitted documents

c: Requestor
(w/o enclosures)