



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 4, 2009

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

OR2009-07687

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# 344974 (DADS Tracking No. 2009SOLEG0060).

The Department of Aging and Disability Services (the "department") received a request for all e-mails from six specified department employees concerning a specified incident. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>2</sup>

Initially, we note that some of the responsive information, which we have marked, was previously ruled upon by this office in Open Records Letter No. 2009-07677 (2009). In that ruling, we concluded that, with the exception of the information that had been seen by the Department of Justice (the "DOJ"), which must be released, the department may withhold

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<sup>1</sup>Although you raised section 552.108 of the Government Code in your initial brief, you make no arguments explaining the applicability of this exception to the submitted information. Therefore, we assume you have withdrawn this exception.

<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.

the e-mails at issue in that ruling under section 552.103 of the Government Code. Therefore, as we have no indication that the law, facts, or circumstances surrounding this prior ruling has changed, to the extent the submitted information is identical to that addressed in the prior ruling, you must continue to rely on Open Records Letter No. 2009-07677 as a previous determination and release or withhold the information in accordance with this prior 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); see also Gov't Code § 552.007 (prohibiting selective disclosure of information that a governmental body has voluntarily made available to any member of the public). For the remaining submitted information not encompassed by that prior ruling, we address your arguments.

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).

You state, and provide documentation showing, that prior to the department's receipt of this request for information, a lawsuit was filed against the department and is currently pending in the 214<sup>th</sup> District Court of Nueces County, Texas. You inform us that the suit is filed by the parent-guardian of a former client of the state school at issue and that the suit alleges that the "plaintiff's ward was allegedly a victim of the exact incident from which the requestor

is requesting Departmental e-mails.” Based on your representations and our review of the submitted information, we agree litigation was pending when the department received the instant request. We further find that the submitted information is related to the pending litigation for the purposes of section 552.103. We therefore conclude that the department may withhold the remaining information under section 552.103 of the Government Code.

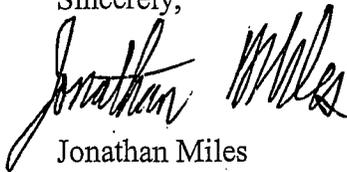
We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 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.<sup>3</sup>

In summary, to the extent the submitted information is identical to that addressed in Open Records Letter No. 2009-07677, you must continue to rely on Open Records Letter No. 2009-07677 as a previous determination and release or withhold the information in accordance with this prior ruling. The remaining information may be withheld under section 552.103 of the Government Code.

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](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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments.

Ref: ID# 344974

Enc. Submitted documents

c: Requestor  
(w/o enclosures)