



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2009

Ms. Myrna S. Reingold
Legal Department
Galveston County
722 Moody, 5th Floor
Galveston, Texas 77550-2317

OR2009-15196

Dear Ms. Reingold:

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# 359294.

Galveston County (the "county") received a request for information pertaining to the county's jail policies regarding evacuations, Hurricane Ike, and county jail conditions during a specified date. You state you have released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.¹ We have considered the exceptions 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

¹Although 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 Therefore, we assume you have withdrawn this exception.

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 received 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.*, 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).

You inform us, and provide information showing, that prior to the county's receipt of the request for information, the county's Sheriff's Office was named as a defendant in multiple lawsuits pertaining to the evacuation of inmates during Hurricane Ike. We therefore agree that litigation was pending on the date the county received the request. Based on your representations and our review, we find that the information you have marked relates to the evacuation and conditions of the county jail in the aftermath of Hurricane Ike, and is thus, related to the pending proceedings for purposes of section 552.103. Therefore, the county may generally withhold the information you have marked under section 552.103 of the Government Code.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). You state that various inmates have filed suit against the county due to policies surrounding Hurricane Ike. A portion of the submitted information consists of inmate complaints pertaining to these circumstances and responses to these complaints by county officials. If the complaints at issue were submitted by inmates who filed suit against the county, then the complaints and the responses to these complaints were provided to or accessed by opposing parties.

Therefore, to the extent the information at issue has either been obtained from or provided to an inmate who filed suit against the county, this information is not excepted from disclosure under section 552.103(a) of the Government Code. Furthermore, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, to the extent an opposing party has seen or had access to the submitted inmate complaints and responses, we address your argument under section 552.101 of the Government Code for this information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information you have marked, however, is not highly intimate or embarrassing and of no legitimate public concern, and may not be withheld under common-law privacy.

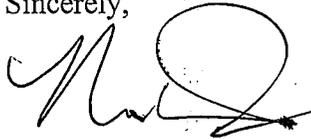
In summary, to the extent the submitted information has not been seen by an opposing party in the pending litigation, the county may withhold the submitted information under section 552.103 of the Government Code. To the extent the submitted inmate complaints and responses have been seen by an opposing party in the pending litigation, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/eeg

Ref: ID# 359294

Enc. Submitted documents

cc: Requestor
(w/o enclosures)