



February 19, 2015

Ms. Patricia Fleming
Assistant General Counsel
Office of General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2015-03268

Dear Ms. Fleming:

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# 555805.

The Texas Department of Criminal Justice (the "department") received a request for seven categories of information related to a specified department unit. You state you have released some information to the requestor. You assert the department need not comply with this request pursuant to section 552.028 of the Government Code. In the alternative, you claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information, a portion of which consists of a representative sample.¹

Section 552.028 of the Government Code reads as follows:

(a) A governmental body is not required to accept or comply with a request for information from:

(1) an individual who is imprisoned or confined in a correctional facility; or

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

(2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under [the Act].

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

(c) In this section, "correctional facility" means:

(1) a secure correctional facility, as defined by Section 1.07, Penal Code;

(2) a secure correctional facility and a secure detention facility, as defined by Section 51.02, Family Code; and

(3) a place designated by the law of this state, another state, or the federal government for the confinement of a person arrested for, charged with, or convicted of a criminal offense.

Gov't Code § 552.028. We understand you to assert the department is not required to release information to the requestor pursuant to section 552.028 of the Government Code because the requestor is the agent of incarcerated individuals. However, the requestor does not indicate she is acting as the agent of incarcerated individuals, and you have not provided any arguments establishing the requestor is, in fact, acting as the incarcerated individuals' agent. Therefore, we conclude section 552.028 of the Government Code does not permit the department to decline to comply with this request.

We note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Id. § 552.022(a)(2). The information we have marked consists of the name, sex, ethnicity, salary, title, and dates of employment of employees of the department that is subject to section 552.022(a)(2). The department must release this information pursuant to section 552.022(a), unless it is made confidential under the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the

Act. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (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), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the information we have marked under section 552.103 of the Government Code. As you raise no further exceptions to disclosure for this information, the department must release the information subject to section 552.022 of the Government Code. However, we will consider your argument under section 552.103 of the Government Code for the submitted information not subject to section 552.022 of the Government Code.

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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). See Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, prior to the department's receipt of the instant request, a lawsuit styled *Doe v. Bailey*, Cause No. 4-14-CV-02985, was filed and is currently pending in the United States District Court for the Southern District of Texas, Houston Division. We note this lawsuit was filed against department employees in their official and individual capacities. Therefore, we agree litigation was pending on the date the department received the present request for information. You state the requestor represents the plaintiff in the pending litigation. You also state the information at issue pertains to the substance of the lawsuit. Based on your representations and our review, we

find the information at issue is related to the pending litigation. Therefore, we conclude the department may withhold the remaining information under section 552.103 of the Government Code.

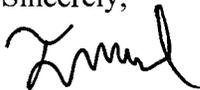
Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending 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); *see also* Open Records Decision No. 350 (1982).

In summary, the department must release the information we have marked under section 552.022(a)(2) of the Government Code. The department may withhold the remaining information 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 555805

Enc. Submitted documents

c: Requestor
(w/o enclosures)