



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 18, 2015

Mr. Michael Shaunessy
Counsel for the Hays County Sheriff's Office
McGinnis Lochridge LLP
600 Congress Avenue, Suite 2100
Austin, Texas 78701

OR2015-09604

Dear Mr. Shaunessy:

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# 565249.

The Hays County Sheriff's Office (the "sheriff's office"), which you represent, received a request for all records relating to the incarceration of a named individual and all reports pertaining to any injury sustained by the named individual while he was incarcerated. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted information includes a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record[.]" unless the information is expressly made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although you raise section 552.103 of the Government Code for this information, section 552.103 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the sheriff's office may not withhold the court-filed document we have marked under section 552.103 of the Government

Code. As you raise no further exceptions to disclosure, it must be released. However, we will address the sheriff's office's argument under section 552.103 for the remaining information.

Section 552.103 of the Government Code provides in relevant part as follows:

(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). The 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 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, 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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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 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, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. See Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does

not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You assert the sheriff's office reasonably anticipated litigation when it received the request for information. You state, and provide documentation showing, the requestor sent a demand letter to Hays County (the "county") prior to the sheriff's office's receipt of the request for information. In this letter, the requestor, who is the named individual's attorney, threatened to sue the county if it did not satisfy a claim made against it pertaining to injuries allegedly sustained by the named individual while he was incarcerated. Further, we note the county hired outside counsel for the specific purpose of defending the county in the matter of this claim. Based on your representations and our review, we find the sheriff's office reasonably anticipated litigation when it received the request for information. We also find you have established the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the remaining information.

However, 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). 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). We note the opposing party to the anticipated litigation has seen or had access to some of the information at issue. Therefore, the sheriff's office may not withhold this information, which we have marked, under section 552.103(a). However, we agree the sheriff's office may withhold the remaining information under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

In summary, the sheriff's office must release the court-filed document we have marked pursuant to section 552.022(a)(17) of the Government Code. Except for the information that the opposing party has seen or had access to, which we have marked for release, the sheriff's office may withhold the remaining information under section 552.103(a).

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,

A handwritten signature in black ink, appearing to read "BBj", written over the typed name.

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 565249

Enc. Submitted documents

c: Requestor
(w/o enclosures)