



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 28, 2015

Ms. Patricia Fleming
Assistant General Counsel
TDCJ - Office of the General Counsel
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2015-18042

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# 577320.

The Texas Department of Criminal Justice (the "department") received three requests for information pertaining to inmate population data, home zip code or county of origin for current inmates at certain facilities, inmate grievance data for a specified time period, and internal audit assignment 1401 for audits from fiscal years 2013 and 2014. You indicate the department has released the requested population data. You claim the submitted information is excepted from disclosure under sections 552.028, 552.103, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We first address your claim that the department is not required to comply with the instant requests for information. Section 552.028 of the Government Code provides as follows:

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

(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

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

(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.

Gov't Code § 552.028. You claim the department is not required to release information to the requestors pursuant to section 552.028(a)(2) of the Government Code.

You explain the first requestor is a director of the Prison Justice League (the "league"), a "membership-based, incorporated non-profit organization" which includes more than seven hundred incarcerated individuals as its members. You state the league has brought suit against the department "relying on the standing of its members[.]" You assert the first requestor is not requesting information as an attorney representing an inmate. Upon review, we find the department has demonstrated the first requestor is acting as the agent of an individual confined in a correctional facility. *See* Gov't Code § 552.303(c). Accordingly, pursuant to section 552.028(a)(2) of the Government Code, the department is not required to accept or comply with the first request.

However, the second and third requestors do not indicate they are acting as agents of an incarcerated individual, and you have not demonstrated these requestors are, in fact, acting as agents of an incarcerated individual. Therefore, we conclude section 552.028 of the Government Code does not permit the department to decline to comply with the second and third requests.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). Some of the submitted information consists of a completed report from the department's internal audit division that is subject to section 552.022(a)(1). The information subject to section 552.022(a)(1) must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. *Id.* Although you assert the report is excepted from disclosure under section 552.103 of the Government Code, this

section is discretionary 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the completed report under section 552.103 of the Government Code. As you raise no other exception to disclosure of this information, the completed report must be released to the second and third requestors pursuant to section 552.022(a)(1) of the Government Code.

You seek to withhold the requested grievance data under section 552.103 of the Government Code. 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 department states, and provides documentation showing, a lawsuit styled *John Doe and the Prison Justice League v. Bailey*, Cause No. 4:14-cv-2985, was pending against the department in the United States District Court for the Southern District of Texas when it received the request for information. Therefore, we agree litigation was pending against the department when the department received the request. We also find the department has

established the requested grievance data is related to the pending litigation for purposes of section 552.103(a). Therefore, the department may withhold the grievance data under section 552.103(a).

However, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

You claim the home zip code or county of origin of an incarcerated inmate is excepted from public disclosure under section 552.134 of the Government Code. Section 552.134 relates to inmates of the department and provides, in relevant part, as follows:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

(b) Subsection (a) does not apply to:

(1) statistical or other aggregated information relating to inmates confined in one or more facilities operated by or under a contract with the department[.]

Gov't Code § 552.134(a), (b)(1). You assert the submitted information regarding home zip code or county of origin pertains to inmates of the department. However, in this instance, we note the information at issue consists of statistical or other aggregated information relating to inmates confined in one or more facilities operated by or under a contract with the department. We note section 552.134 is not applicable to such information. *See id.* § 552.134(b)(1). Accordingly, the department may not withhold the submitted information regarding home zip code or county of origin of inmates under section 552.134 of the Government Code.

In summary, the department may withhold the grievance data under section 552.103(a). The department must release the remaining information.

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 "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 577320

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)