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ATTORNEY GENERAL OF TEXAS

April 19, 2016

Ms. Patricia Fleming  
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P.O. Box 4004  
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OR2016-08762

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# 608834.

The Texas Department of Criminal Justice (the "department") received three requests from the same requestor for information pertaining to certain American Correctional Association reports, specified inmate grievances, and workers' compensation claims. The department claims it is either not required to respond to the request for information pursuant to section 552.028 of the Government Code, or the requested information is excepted from disclosure under sections 552.103 and 552.134 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.028 of the Government Code provides, in relevant part, the following:

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<sup>1</sup>We 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.

(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(a)-(b). The department explains the requestor is (1) the director of the University of Texas Law School's Human Rights Clinic, which published a report on heat-related complaints that quotes a particular inmate and (2) a designated expert witness for the plaintiffs, who include that inmate, in a pending lawsuit against the department that pertains to heat risks for Texas inmates. Thus, the department asserts the requestor is an agent of the inmate at issue for purposes of section 552.028(a)(2). However, upon review we find the department has not established the requestor is requesting information on behalf of an inmate. Accordingly, section 552.028 is not applicable to the requestor, and we will address the department's argument against disclosure of the submitted information under the Act.

Next, we note the submitted information contains completed accreditation reports that are subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The department asserts this information is excepted from release under section 552.103 of the Government Code. However, section 552.103 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 submitted accreditation reports under section 552.103, but instead, must release them.

The department asserts the remaining information is excepted from release under section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides the following:

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.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding Section . . . 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] is subject to required disclosure under Section 552.021:

(1) the inmate's name, identification number, age, birthplace, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate[.]

*Id.* § 552.029(1). The department seeks to withhold information related to inmate grievances and worker's compensation claims under section 552.134. Upon review, we find the department has failed to establish the information pertaining to workers' compensation claims relates to department inmates. Thus, the department may not withhold this information under section 552.134. Nevertheless, we agree the records pertaining to inmate grievances, which we have marked, constitute information about inmates for purposes of that section. However, the records contain information concerning inmates' health and injuries. Thus, the department must release basic information concerning the inmates' health and injuries, but must withhold the remaining information in the records we have marked under section 552.134.<sup>2</sup>

The department asserts the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

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<sup>2</sup>As our ruling is dispositive, we do not address the department's remaining argument against disclosure of this information, except to note information that is subject to release under section 552.029 is not excepted from disclosure under section 552.103. *Cf.* Open Records Decision No. 597 (1991) (section 552.103 does not protect basic information).

(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 section 552.103 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 informs a class action lawsuit styled *Bailey v. Livingston*, Cause No. 3:12-cv-02037, was pending against the department in the United States District Court for the Southern District of Texas when it received the request for information. Thus, we agree litigation was pending when the department received the request. Furthermore, upon review we find the remaining information is related to the pending proceedings for purposes of section 552.103. Therefore, the department may withhold the remaining information, which we have marked, under section 552.103 of the Government Code.

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.

To conclude, with the exception of basic information under section 552.029(1) of the Government Code, which the department must release, the department must withhold the information we have marked under section 552.134 of the Government Code. The department may withhold the information we have marked under section 552.103 of the Government Code. 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](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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/bhf

Ref: ID# 608834

Enc. Submitted documents

c: Requestor  
(w/o enclosures)