



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 25, 2016

Ms. Debbie F. Harrison
Assistant District Attorney
Collin County Criminal District Attorney's Office
2100 Bloomdale Road, Suite 100
McKinney, Texas 75071

OR2016-11989

Dear Ms. Harrison:

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# 611488.

The Collin County Criminal District Attorney's Office (the "district attorney's office") received a request for information relating to a specified fatal incident, excluding photographs depicting the body of the deceased individual.¹ You state the district attorney's office is releasing some of the requested information to the requestor. You state the district attorney's office will withhold the responsive autopsy photographs and x-rays without requesting a decision from our office pursuant to subsection 11(b) of article 49.25 of the Code of Criminal Procedure.² You claim the submitted information is excepted from disclosure under sections 552.103 and 552.1085 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹We note the requestor modified his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request). *See also* *City of Dallas v. Abbott*, 304 S. W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²Section 11(b) of article 49.25 of the Code of Criminal Procedure permits a governmental body to withhold a photograph or x-ray taken during an autopsy without requesting a ruling from this office. Crim. Proc. Code art. 49.25, § 11(b).

Initially, we note the submitted photographs that depict the body of the deceased individual are not responsive to the instant request. This ruling does not address non-responsive information, and the district attorney's office need not release non-responsive information in response to the request.

Section 552.103 of the Government Code provides, in part, the following:

(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.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(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), (b), (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 that (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).*

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 that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue

the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). We also note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

The district attorney’s office claims the responsive information, which relates to a capital murder case in which the defendant was convicted in 2007, is excepted from disclosure under section 552.103 of the Government Code. We note you have submitted information that reflects the defendant filed an appeal with the Court of Criminal Appeals (the “court”) on September 25, 2012, which was denied by the court on February 4, 2013. Nonetheless, you state the information at issue relates to a case for which the district attorney’s office is “working on setting an execution date at this time and the defendant may have the right to file additional post-conviction remedies.” However, you do not assert any post-conviction proceedings were pending on the date the district attorney’s office received the instant request, nor do you affirmatively state the defendant has yet to exhaust all appellate and post-conviction remedies. Furthermore, you have not demonstrated the defendant had taken any concrete steps towards initiating a post-conviction proceeding prior to the date the district attorney’s office received the request for information. Therefore, we find you have failed to demonstrate the district attorney’s office was a party to pending or anticipated litigation on the date it received the request for information. Accordingly, none of the responsive information may be withheld on the basis of section 552.103.

Section 552.1085 of the Government Code, provides, in pertinent part:

(c) A sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section. This section applies to any sensitive crime scene image regardless of the date that the image was taken or recorded.

Gov’t Code § 552.1085(c). For purposes of section 552.1085, “sensitive crime scene image” means “a photograph or video recording taken at a crime scene, contained in or part of a

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

closed criminal case, that depicts a deceased person in a state of dismemberment, decapitation, or similar mutilation or that depicts the deceased person's genitalia." *See id.* § 552.1085(a)(6). Upon review, we find the responsive photographs do not consist of sensitive crime scene images for the purposes of section 552.1085. Thus, the district attorney's office may not withhold the responsive photographs under section 552.1085 of the Government Code. As the district attorney's office does not raise another exception to disclosure, the district attorney's office must release the responsive 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/bw

Ref: ID# 611488

Enc. Submitted documents

c: Requestor
(w/o enclosures)