



April 5, 2000

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2000-1320

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID # 134330.

The Texas Department of Criminal Justice (the "department") received a request for information relating to a disciplinary matter involving a particular inmate, including various reports, tape recordings, and other records. You have submitted for our review a disciplinary report and hearing record and what you describe as an exemplar of responsive records relating to a use of force.¹ You claim that the information that is responsive to the request is excepted from disclosure under sections 552.103, 552.107, and 552.131 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.²

¹We assume that the "exemplar" of responsive information that you submitted is truly representative of the requested records as a whole, including the videotape. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This letter ruling does not reach, and therefore does not authorize the department to withhold, any responsive information that is substantially different from that which was submitted to this office.

²We presume that any responsive information not submitted in connection with your request for this letter ruling has been released. *See* Gov't Code §§ 552.301(e)(1)(D), 552.302. We caution you, however, that chapter 552 of the Government Code prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.101, 552.352.

As section 552.103 of the Government Code is the most inclusive exception you raise, we will consider it first. As amended by the Seventy-sixth Legislature, section 552.103, the “litigation exception,” provides in relevant 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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref’d n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* 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 establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). In this instance, you claim that litigation is reasonably anticipated because the requestor states, “We are trying to file a writ in court[.]” We have held that such a statement, standing alone, does

not establish that litigation is reasonably anticipated under section 552.103. *See* Open Records Decision Nos. 452 at 5 (1986) (requestor's public statements of intent to sue do not trigger litigation exception), 331 at 1 (1982) (mere threats of litigation are not sufficient to substantiate claim under predecessor statute). Accordingly, we conclude that the requested information is not excepted from public disclosure under section 552.103 of the Government Code.

You also raise section 552.131 of the Government Code, which relates to inmates of the department. Section 552.131(a) provides as follows:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice 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.

Section 552.029 of the Government Code provides:

Notwithstanding . . . Section 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure [:]

...

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Thus, section 552.131 is explicitly made subject to section 552.029. Pursuant to section 552.029, "basic information" regarding an incident involving the use of force or an alleged crime involving an inmate is subject to required disclosure. *See* Gov't Code § 552.029(8). In this instance, the responsive information includes records pertaining to a use of force and to a related inmate disciplinary matter. The materials relating to the disciplinary matter reflect that the inmate was charged with assaulting a correctional officer and possession of contraband. As you acknowledge, the use of force and the conduct that resulted in the disciplinary matter are not necessarily the same incident. Therefore, we conclude that basic information about both the use of force and the disciplinary matter are subject to required disclosure pursuant to section 552.029(8). Basic information that is subject to disclosure under section 552.029(8) includes the time and place of the incident, names of the inmate and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. All of the other submitted information is excepted from disclosure pursuant to section 552.131.

In summary, the department must release basic information relating to the use of force and to the disciplinary matter pursuant to section 552.029(8) of the Government Code. The other submitted information must be withheld pursuant to section 552.131.³ This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

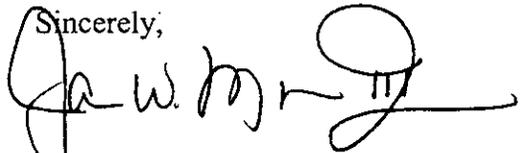
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

³This ruling is limited to the application of sections 552.131 and 552.029. This ruling does not consider the applicability and effect of the Final Judgment in the case of *Ruiz v. Collins*, No. H-78-987 (S.D. Tex., filed Dec. 11, 1992), to the information at issue. However, we note that *Ruiz* is still in effect and that it prohibits the release of certain "sensitive information," which may include information that is subject to public disclosure under section 552.029. We remind you that section 552.107(2) of the Government Code requires the department to withhold information that is made confidential by court order and that section 552.352 prescribes criminal penalties for the disclosure of confidential information.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a large, stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ch

Ref: ID# 134330

Encl. Submitted documents

cc: Ms. Joyce Lewis
3923 Shady Hollow
Dallas, Texas 75233
(w/o enclosures)