



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2004

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2004-0857

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195691.

The Texas Department of Criminal Justice (the "department") received two requests from the same requestor for "videotapes showing any forcible removal or extraction of [the requestor's client] from his cell at the Polunsky Unit" and "[a]ny and all recreation logs, shower logs, visitation logs, and records documenting the times [the requestor's client] was authorized to leave his cell, and regarding whether he did leave his cell or refused to do so." You claim that the requested 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.¹ We have also considered comments submitted by the Office of the Attorney General (the "OAG") and by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.103 provides in part:

¹We note that some of the submitted information relates to inmates other than the requestor's client. To the extent the submitted information pertains to other inmates, it is not responsive to the present request, and we do not address it in this ruling.

(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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.*

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that 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).² Further, the fact that a potential opposing party has hired an attorney who makes a request

²In 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 ("EEOC"), *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).

for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

The OAG notes that the requestor has directly appealed his conviction and filed a series of state and federal habeas proceedings. The OAG contends that:

Based on communications with [the inmate's] counsel and the El Paso County District Attorney ("District Attorney") that occurred prior to [the department's] receipt of [the requestor's] first request for information, the OAG reasonably anticipates that [the inmate] will challenge his competency to be executed under TEX. CODE CRIM. PROC. art 46.05 and in yet another federal habeas petition under 28 U.S.C. § 2254. More specifically, during a telephone conversation between the OAG and the District Attorney, the District Attorney informed the OAG that it had been informed by [the inmate's] counsel that they planned to challenge [the inmate's] competency to be executed and that, as a result, the District Attorney had retained experts to evaluate [the inmate's] competency. The OAG will represent [the department] in any such proceeding.

Having considered the OAG's representations, we find that litigation involving the inmate was reasonably anticipated at the time the department received this request. *See* ORD 555 (specific threat to sue by attorney for opposing party sufficient to establish that litigation was reasonably anticipated).

The OAG further asserts:

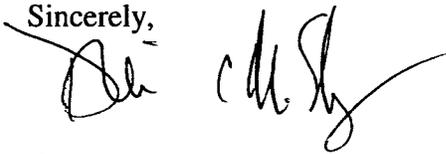
The requested information relates to [the inmate's] behavior and interaction, violent or otherwise, with [department] personnel and with his own attorneys. Information regarding [the inmate's] behavior, including his willingness or refusal to leave his cell to shower, for recreation, or to meet with visitors, would be relevant to [the inmate's] competency to be executed, as defined by TEX. CODE CRIM. PROC. art. 46.05(b) and *Ford v. Wainwright*, 477 U.S. 399 (1986). The information would also be relevant to [the inmate's] competency to prevent his attorneys from filing further appeals on his behalf, as defined by *Rees v. Peyton*, 384 U.S. 312 (1966), and *Mata v. Johnson*, 210 F.3d 324, 327 (5th Cir. 2000). For example, [the inmate] has recently refused to meet with his attorneys and, therefore, refuses to leave his cell to meet with visitors. It could be argued that [the inmate's] unwillingness to meet with his attorneys supports a finding that [the inmate] is not competent enough to be executed.

Having considered the OAG's representations, we find that the requested information relates to the anticipated litigation and may be withheld pursuant to section 552.103.

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 195691

Enc. Submitted documents

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