



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2010

Ms. Alva Alvarez
Reeves County Attorney
P.O. Box 825
Pecos, Texas 79772

OR2010-13158

Dear Ms. Alvarez:

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# 392085.

Reeves County (the "county") received a request for information pertaining to (1) the prisoner riots at the Reeves County Detention Center (the "RCDC") that occurred in December 2008 and January 2009; (2) complaints regarding prisoner medical care and living conditions at the RCDC over a specified time period; and (3) complaints regarding the performance of the GEO Group, Inc. ("GEO") and Physicians Network Association, P.A. ("Physicians Network") at the RCDC over a specified time period.¹ You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. You also state release of the requested information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified GEO and Physicians Network of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from GEO and Physicians Network. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We note the county asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Initially, we note there is a pending lawsuit filed against our office: *Reeves County v. Greg Abbott*, Cause No. D-1-GN-10-000800, District Court, 261st Judicial District, Travis County, Texas. This lawsuit was filed against the Office of the Attorney General over the release of medical complaints at the RCDC from 2007 to 2009. Accordingly, to the extent the medical complaints contained in Exhibit H are identical to the information at issue in the pending litigation, we decline to issue a decision regarding such information and will allow the trial court to resolve the issue of whether this portion of the information at issue must be released. To the extent the medical complaints contained in Exhibit H are not at issue in the pending litigation, we will address the submitted arguments against disclosure.

We next address GEO's argument that the clarified request for information is overly broad and vague. We note that a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this case, the county has reviewed its records and has determined that the submitted documents are responsive to the request. Accordingly, we will address the applicability of the claimed exceptions to the submitted information.

We note Exhibits D through G are subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) 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 under this chapter unless they are expressly confidential under 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). In this instance, Exhibits D through G consist of completed reports, which fall within the purview of section 552.022(a)(1). The county may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The county claims Exhibits D through G are excepted from disclosure under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary exceptions that protect a governmental body's interest and may be waived. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103 and 552.111 do not constitute other law that makes information confidential for the purposes of section 552.022(a)(1). Consequently, Exhibits D through G may not be withheld under section 552.103 or section 552.111 of the Government Code. The Texas Supreme Court has

held, however, that the Texas Rules of Civil Procedure are “other law” that makes information confidential for the purposes of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The county also claims the attorney work product privilege pursuant to Texas Rule of Civil Procedure 192.5. Accordingly, we will consider the county’s assertions of that privilege under rule 192.5 for Exhibits D through G. In addition, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will address the county’s arguments under this exception for Exhibits D through G. We will also consider the county’s arguments under sections 552.103 and 552.111 for the information not subject to section 552.022(a)(1).

The county asserts Exhibits D through G are excepted from disclosure under section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov’t Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov’t Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state, and provide a supporting affidavit from the Special Investigative Supervisor for the RCDC (the “SIS”) confirming, that Exhibits D through G consist of law enforcement investigation materials prepared by the Federal Bureau of Investigation (the “FBI”) and the SIS. The SIS explains in his affidavit that the information at issue was obtained during an investigation of a specific prisoner disturbance and is “highly confidential, critical to law enforcement and maintaining security.” You explain Exhibits D through G “constitute detailed investigation files and analysis related to the prisoner riots.” The SIS informs this office the information at issue was shared with the FBI and is being used by the U.S. Attorney’s Office for the Western District of Texas in on-going criminal prosecutions of inmates involved in the disturbance. You assert release of this information would “disclose techniques and procedures for law enforcement investigations or prosecutions and would

compromise security at the RCDC.” Upon review of the submitted arguments and the information at issue, we conclude you have demonstrated that release of Exhibits D through G would interfere with law enforcement and crime prevention. Accordingly, the county may withhold Exhibits D through G under section 552.108(b)(1) of the Government Code.²

We next address the county’s claim under section 552.103 of the Government Code for the remaining information, which is not subject to section 552.022(a)(1). Section 552.103 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 that 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 that the department 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, no pet.); *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 under section 552.103(a).

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the

²As our ruling is dispositive for this information, we need not address the county’s or GEO’s remaining arguments against its disclosure.

requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You explain the county owns and operates the RCDC and the county has contracted with GEO to provide management services at the RCDC through multiple Management Services Agreements. You state that, prior to the county's receipt of the request for information, the county received a notice of claim letter from GEO pertaining to potential breaches of contract. You explain the Management Services Agreements require the county to name GEO as an additional insured on the county's property insurance policy and maintain a property insurance policy at all times. In its claim letter, GEO states it has received notice from the county's insurance provider, CNA, that GEO is not named as an additional insured on the insurance policy that was in effect during a specified prisoner disturbance at the RCDC. GEO asserts the county's failure to name GEO as an additional insured is a breach of contract that has exposed GEO to a subrogation claim by CNA for property damages sustained during the prisoner disturbance at the RCDC. GEO also states, and you confirm, the county has received a Notice of Cancellation of Insurance from CNA. GEO claims the county will be in breach of contract if the county does not obtain new property insurance and name GEO as an additional insured before the cancellation of the current policy. Finally, GEO's claim letter informs the county that GEO will pursue all available legal remedies if the county has violated the Management Services Agreements. Based on your arguments, the claim letter, and the totality of the circumstances, we find the county reasonably anticipated litigation on the date it received the request for information. You assert that because the remaining information pertains to, and is being sought in connection with, the insurance dispute at issue it is related to the anticipated litigation. Upon review, we agree the remaining information is related to the anticipated litigation. Accordingly, we find the county may withhold the remaining information under section 552.103 of the Government Code.³

We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the county may only withhold the submitted information that the opposing party to the litigation has not seen or had access to under section 552.103 of the Government Code. We also note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the medical complaints contained in Exhibit H are identical to the information at issue in the pending litigation, we decline to issue a decision regarding such information and will allow the trial court to resolve the issue of whether this portion of the information at issue must be released. The county may withhold Exhibits D through G under

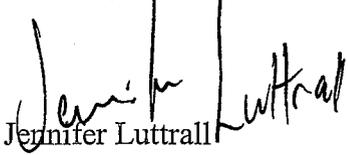
³As our ruling is dispositive for this information, we need not address the remaining arguments against disclosure asserted by the county, GEO, or Physicians Network.

section 552.108(b)(1) of the Government Code. The county may withhold the remaining information under section 552.103 of the Government Code.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 392085

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Charles A. Deacon
Fulbright & Jaworski, L.L.P.
For GEO Group, Inc.
300 Convent Street, Suite 2200
San Antonio, Texas 78205-3792
(w/o enclosures)

Mr. Seth E. Meisel
K & L Gates, L.L.P.
For Physicians Network Association, P.A.
111 Congress Avenue, Suite 900
Austin, Texas 78701-4043
(w/o enclosures)