



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2010

Ms. Vanessa A. Gonzalez
Allison, Bass & Associates, L.L.P.
For Brown County
402 West 12th Street
Austin, Texas 78701

OR2010-16056

Dear Ms. Gonzalez:

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# 397675.

The Brown County Sheriff's Office (the "sheriff"), which you represent, received a request for three categories of information pertaining to a named former officer. You state the sheriff has released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted documents, which we have marked, are non-responsive to the request for information because they were created after the request was received. This ruling does not encompass the non-responsive information, and the sheriff need not release that information in response to the request.¹

You contend the responsive information in Exhibit A of Tab 3 is excepted under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

¹As we are able to make this determination, we do not address your arguments against the disclosure of this 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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.*); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish 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. Open Records Decision No. 331 (1982). Further, 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. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state, and the written request for information reflects, the requestor accused the sheriff of violating both chapter 614 of the Government Code and the Family Medical Leave Act

in terminating his client, and demanded his client be reinstated as an officer with the sheriff. You do not explain, however, nor do the request or the submitted information reflect, that the requestor actually threatened to file a lawsuit on behalf of his client. Moreover, you do not provide any further arguments explaining how the sheriff otherwise anticipated litigation from the requestor when it received his request. Thus, we find you have failed to demonstrate the sheriff reasonably anticipated litigation on the date the sheriff received the request for information. Accordingly, the sheriff may not withhold the responsive information in Exhibit A under section 552.103 of the Government Code.

You also raise section 552.108 of the Government Code for the responsive information in Exhibit A. Section 552.108 provides in pertinent part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). Section 552.108(a)(1) applies when release of information relating to a pending criminal investigation will interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref' d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Section 552.108(b)(1) is applicable to internal records of a law enforcement agency, provided the law enforcement agency reasonably explains how and why release of the information at issue would interfere with law enforcement or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) exception 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 law enforcement efforts). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Gov't Code* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, we note that as a general rule, section 552.108 is not applicable to a law enforcement agency's personnel records. *See City of Fort Worth v. Cornyn*, 86

S.W.3d 320 at 329 (section 552.108(b)(1) not applicable to documents obtained by police department for purpose of evaluating applicant's fitness for employment); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) not applicable to employment information in police officer's file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) not applicable to background information collected on unsuccessful applicant for employment with sheriff's department).

You raise sections 552.108(a)(1) and 552.108(b)(1) for the responsive information in Exhibit A, which consists of a single memorandum. This memorandum is not a law enforcement record, but a personnel record pertaining to the termination of the officer named in the request. Further, although you state the incident described in the memorandum "could turn into criminal charges[,]" we note this incident occurred in an area outside of Brown County. You do not explain how the sheriff has a law enforcement interest in any criminal incident outside its jurisdiction. Additionally, you do not provide a representation from any other law enforcement entity that release of the memorandum will interfere with any ongoing criminal investigation of that entity. Accordingly, we find you have failed to demonstrate how release of the memorandum at issue would interfere with the detection, investigation or prosecution of crime or would otherwise undermine law enforcement and crime prevention efforts. Therefore, the sheriff may not withhold the memorandum pursuant to section 552.108 of the Government Code. As you raise no further exceptions for this information, it must be released.

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,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 397675

Enc. Submitted documents

c: Requestor
(w/o enclosures)