



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2010

Mr. William W. Krueger, III
McKamie Krueger, L.L.P.
2007 North Collins Boulevard, Suite 501
Richardson, Texas 75080

OR2010-16307

Dear Mr. Krueger:

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# 398188 (File No. SLA.7093).

The Hood County Sheriff's Office (the "sheriff"), which you represent, received a request for three categories of information pertaining to a specified incident involving the requestor's client. You claim the submitted 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. The submitted information contain the requestor's client's fingerprints. The public availability of fingerprints is governed by chapter 560 of the Government Code, which is encompassed by section 552.101. *See id.* §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Therefore, as the authorized representative of the individual whose fingerprints are contained in the submitted documents, the requestor has a right of access to his client’s fingerprint information under section 560.002(1)(A) of the Government Code. Therefore, the sheriff must release the requestor’s client’s fingerprints, which we have marked, pursuant to section 560.002 of the Government Code. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). *See* Open Records Decision No. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

We note the remaining information includes a completed investigation, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “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). Pursuant to section 552.022(a)(1), a completed investigation is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under “other law.” Although you raise section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *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 No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the sheriff may not withhold the completed investigation, which we have marked, under section 552.103 of the Government Code. As you raise no further exceptions to the disclosure of the completed investigation, it must be released.

You claim the remaining information is excepted under section 552.103 of the Government Code. Section 552.103 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). 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.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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.* 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 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). 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).

You inform us, and have provided documentation reflecting, that prior to the sheriff's receipt of the present request, the sheriff received a notice of claim letter from the requestor. In the letter, the requestor alleges the sheriff committed constitutional violations against his client and states he intends to pursue damages for the actions of the sheriff. Upon review, we agree the sheriff reasonably anticipated litigation when it received the present request. We further conclude the submitted information is related to the anticipated litigation for the purposes of section 552.103(a). Therefore, the sheriff may generally withhold the remaining information under section 552.103 of the Government Code.

We note, however, the requestor's client, who is also the sheriff's potential opposing party, appears to have seen some of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. See ORD 551 at 4-5. Thus, when the opposing party has seen or had access to

information relating to anticipated litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the sheriff may not withhold the information we have marked for release under section 552.103. However, the sheriff may withhold the remaining information under section 552.103. We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the sheriff must release the requestor's client's fingerprints, which we have marked, pursuant to section 560.002 of the Government Code. The sheriff must release the completed investigation subject to section 552.022(a)(1) of the Government Code, which we have marked. With the exception of the information marked for release, the sheriff 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tp

Ref: ID# 398188

Enc. Submitted documents

c: Requestor
(w/o enclosures)