



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2012

Ms. Janet I. Monteros
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2012-08383

Dear Ms. Monteros:

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# 455723 (CA-OP-12-127).

The El Paso Sheriff's Office (the "sheriff's office") received a request for information, including photographs, pertaining to a specified incident. You inform us that the sheriff's office does not have any responsive photographs.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in 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.

...

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

(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 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 the governmental body received the request for information and (2) the information at issue is related to that litigation. *See 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).

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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *See 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. *See* Open Records Decision Nos. 555 (1990), 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* ORD 518 at 5; *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result").

You assert the submitted information is subject to section 552.103 and state this information pertains to a deactivated case. You assert that based on the fact the submitted information is being requested by an attorney that the complainant in this case has contacted, litigation was reasonably anticipated on the date the request was received. We note, however, you have not informed us, nor does this information indicate, any party has taken any concrete steps toward the initiation of litigation against the sheriff's office. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply); ORD 331. Further, you have failed to provide any

arguments demonstrating that litigation to which the sheriff's office would be a party is realistically contemplated by the sheriff's office. Thus, we find you have not established the sheriff's office reasonably anticipated litigation when it received the request for information. Accordingly, the sheriff's office has failed to demonstrate the applicability of section 552.103 of the Government Code to the submitted information, and it may not be withheld on that basis.

Section 552.108 of the Government Code 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; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(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:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2), (b)(2). Subsection 552.108(a)(1) is mutually exclusive of subsections 552.108(a)(2) and 552.108(b)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, subsections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You assert the submitted information pertains to an inactive criminal investigation that has not resulted in a conviction or a deferred adjudication, and is, therefore, excepted from

disclosure under subsections 552.108(a)(2) and 552.108(b)(2). However, you also cite subsection 552.108(a)(1) and state release of this information would interfere with the detection, investigation, or prosecution of crime. Because you have provided this office with contradictory representations, we find you have failed to demonstrate the applicability of section 552.108 to the submitted information. *See Gov't Code § 552.301(e)(1)(A)*. Therefore, we conclude the sheriff's office may not withhold the submitted information under section 552.108 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 455 (1987)* (prescription drugs, illnesses, operations, and physical handicaps). We note a portion of the information you seek to withhold under common-law privacy pertains to the requestor's client. Section 552.023(a) of the Government Code states that a person or person's authorized representative has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest. *See Gov't Code § 552.023(a)*; *Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when individual requests information concerning herself). Thus, the requestor has a right of access to his client's information and the sheriff's office may not withhold the information pertaining to that individual under section 552.101 of the Government Code in conjunction with common-law privacy. However, upon review, we have marked information related to another individual that we find is highly intimate or embarrassing and not of legitimate public interest. Accordingly, this information must be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.147(a) of the Government Code excepts the social security number of a living individual from public disclosure. *See Gov't Code § 552.147*. You seek to withhold the requestor's client's social security number under section 552.147. However, as previously noted, the requestor has a right of access to information pertaining to his client that would otherwise be withheld on the basis of privacy. *See id.* § 552.023(a); *ORD 481 at 4*. Because section 552.147 is based on principles of privacy, the social security number at issue may not be withheld from the requestor.

In summary, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff's office must release the remaining information.²

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 455723

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the information being released contains confidential information to which the requestor has a right of access as his client's authorized representative. See Gov't Code § 552.023(a); ORD 481 at 4. Thus, if the sheriff's office receives another request for this information from a different requestor, then the sheriff's office should again seek a decision from this office.