



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2012

Mr. David Kemp
First Assistant County Attorney
Civil Division
Potter County Attorney's Office
500 South Fillmore, Room 303
Amarillo, Texas 79101

OR2012-16368

Dear Mr. Kemp:

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# 467868.

The Potter County Sheriff's Office (the "sheriff's office") received a request for all records from a specified time period pertaining to three named individuals, the Amarillo Wildlife Refuge, the Texas Wildlife Center, or a specified address. 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.

Initially, we note some of the submitted information, which we have marked, is not responsive to the request because it was created after the request was received. See *Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). This decision does not address the public availability of the non-responsive information, and that information need not be released in response to the present request.

Next, we note you have redacted driver's license numbers pursuant to section 552.130(c) of the Government Code, personal e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), and social security numbers pursuant to section 552.147(b) of the Government Code.¹ However, we note you have also redacted telephone numbers. You do not assert, nor does our review of our records indicate, the sheriff's office has been authorized to withhold this information without seeking a ruling from this office. *See Gov't Code § 552.301(a); Open Records Decision No. 673 (2001)*. Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information at issue; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the sheriff's office should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See Gov't Code § 552.302*.

We next note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

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 unless made confidential under this chapter or 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

¹Section 552.130(c) allows a governmental body to redact the information described in subsection 552.130(a)(1) without the necessity of seeking a decision from the attorney general. *See Gov't Code § 552.130(c)*. If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an email address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision. Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b).

See id. § 552.022(a)(1), (3). In this instance, the submitted information contains completed reports subject to section 552.022(a)(1), and checks and invoices subject to section 552.022(a)(3). The information subject to section 552.022(a)(1), which we have marked, must be released unless it is excepted by section 552.108 of the Government Code or made confidential by the Act or other law. *See id.* The information subject to section 552.022(a)(3), which we have marked, must be released unless it is made confidential by the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for the information at issue, this is a discretionary exception that may be waived and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Thus, the sheriff's office may not withhold the information subject to section 552.022 of the Government Code under section 552.103 of the Government Code. However, we note portions of this information are subject to sections 552.130 and 552.136 of the Government Code.² As these sections make information confidential under the Act, we will address their applicability to the information subject to section 552.022. We will also address your claim under section 552.103 for the information not subject to section 552.022.

We first address your claim under section 552.103 of the Government Code for the information not subject to section 552.022 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.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 the governmental body 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 litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” ORD 452 at 4. Concrete evidence to support a claim 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.³ See ORD 555; see also 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). Further, the fact 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

We understand you to assert the sheriff’s office reasonably anticipated litigation relating to the information at issue prior to the receipt of the request for information by the sheriff’s office. You inform us, and provide documentation showing, a petition for writ of mandamus styled *In re King*, Cause No. 99466-B, was filed in the 181st Judicial District Court for Potter County on March 30, 2011, seeking to compel the sheriff’s office to enforce state regulations regarding dangerous wild animals. You state, and provide documentation demonstrating, this writ of mandamus was dismissed on October 18, 2011, and the opposing party in this litigation appealed the district court’s decision to the Seventh Court of Appeals of Texas, which affirmed the district court’s ruling on June 18, 2012. However, the sheriff’s office anticipates that the opposing party will appeal the court of appeal’s decision to the Supreme Court of Texas. Based upon your representations and our review, we find litigation involving the sheriff’s office was reasonably anticipated when it received the request and the

³In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

information at issue is related to this anticipated litigation. Accordingly, the sheriff's office generally may withhold this information under section 552.103 of the Government Code.

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). In this instance, a portion of the information at issue appears to have been provided to the opposing party's attorney. Therefore, this information may not be withheld under section 552.103 of the Government Code. However, the sheriff's office may withhold the remaining information under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We next address the applicability of sections 552.130 and 552.136 of the Government Code to the information subject to section 552.022 of the Government Code. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a)(1). Upon review, the sheriff's office must withhold the driver's license information we have marked in the information at issue under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b), *see also id.* § 552.136(c) (defining "access device"). Thus, the sheriff's office must withhold the bank account and routing numbers we have marked in the remaining information at issue under section 552.136 of the Government Code.

In summary, with the exception of the information that appears to have been provided to the opposing party's attorney, the sheriff's office may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The sheriff's office must withhold the information we have marked in the information subject to section 552.022 of the Government Code under sections 552.130 and 552.136 of the Government Code. The sheriff's office must release the remaining information.

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/bhf

Ref: ID# 467868

Enc. Submitted documents

c: Requestor
(w/o enclosures)