



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 7, 2013

Mr. Robert J. Davis
Counsel for the County of Collin
Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P.
8131 LBJ Freeway, Suite 700
Dallas, Texas 75251

OR2013-02181

Dear Mr. Davis:

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# 478211 (File No. 1600-65054).

The Collin County Sheriff's Office (the "sheriff's office"), which you represent, received a request for reports and audio or video recordings pertaining to the requestor's client and policies regarding officer professionalism, use of force, the maximum time a prisoner or detainee may be held in the intake or processing area of the jail, and medical care of an injured prisoner or detainee. You claim the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted any audio or video recordings for our review. Thus, to the extent any responsive audio or video recordings existed when the present request was received, we assume they have been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Access

to medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004. Upon review, we find none of the submitted information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the sheriff's office may not withhold any of the submitted information under section 552.101 in conjunction with the MPA.

Section 552.103 of the Government Code provides in 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 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). 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 with “concrete evidence showing 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. *See id.* 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.¹ *See* Open Records Decision No. 555 (1990); *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).

You assert the sheriff’s office anticipated litigation regarding the requestor’s client on the date it received the present request. You explain the requestor’s client was arrested by the Princeton Police Department (the “department”) for public intoxication and transported to the Collin County Detention Facility. You state, and submit documentation showing, the requestor’s client posted an inquiry on a website seeking an attorney to help him sue his neighbors and the City of Princeton Police (the “city”). You also state that, in his request, the requestor, who is not an attorney, states he is seeking the information at issue for his “client’s civil and criminal cases.” You contend that because the requestor submitted a request, states he seeks the information for civil and criminal cases, and the requestor’s client sought legal counsel and threatened to sue the city, the sheriff’s office anticipates the requestor’s client will file suit against the sheriff’s office. However, you have not informed us, nor do the submitted documents 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);

¹In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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).

ORD 331. Thus, we find you have not established the sheriff's office reasonably anticipated litigation on the date the sheriff's office 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(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). 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 id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The submitted information consists of administrative jail records and policies of the sheriff's office. We note section 552.108 is generally not applicable to purely administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). Where a governmental body possesses information relating to a pending case of a different law enforcement agency, the custodian of the records may withhold the information under section 552.108 only if it provides this office with (1) a demonstration that the information relates to the pending case, and (2) a representation from the entity with the law enforcement interest stating that entity wishes to withhold the information.

You state “the requestor references ‘his client’s civil and criminal cases’, suggesting that there are indeed pending criminal cases against” the requestor’s client. You also state the documents submitted by the department in connection with the arrest state the investigation of a shooting is ongoing. We note the department arrested the requestor’s client for public intoxication after stopping him to ask about the reported shooting. However, the information at issue pertains to the confinement of the requestor’s client in the Collin County Detention Facility and certain policies of the sheriff’s office. You do not explain how the policies and administrative information relate to a pending criminal investigation or prosecution nor do you explain how release of this information would interfere with the detection, investigation, or prosecution of crime. Further, you have not provided a representation from the department or any other law enforcement entity asking the sheriff’s office, as proper custodian of information relating to alleged criminal conduct, to withhold the information because its release would interfere with a pending criminal investigation or prosecution. Thus, we find you have failed to establish the applicability of section 552.108(a)(1) to the information at issue. Accordingly, we find the submitted information is not subject to section 552.108(a)(1), and the sheriff’s office may not withhold it on that basis.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n 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 ... if ... release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code

§ 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state releasing the submitted policies of the sheriff's office would interfere with law enforcement by resulting in security issues in the jail or law enforcement activities at the jail. You state release of the information at issue could reveal security procedures, restraint techniques, or procedures for handling intoxicated detainees and result in other prisoners learning about such security or detention procedures and developing ways to thwart them. Based on your representations, we find release of the information we have marked would interfere with law enforcement. The sheriff's office may withhold this marked information under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated that release of any of the remaining information would interfere with law enforcement or crime prevention. Therefore, the sheriff's office may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

In summary, we find the sheriff's office may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The remaining information must be released.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

²Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, the sheriff's office must again seek a decision from this office if it receives a request for this information from a different requestor.

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,

A handwritten signature in cursive script that reads "Jennifer Luttrall". The signature is written in black ink and is positioned above the typed name.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 478211

Enc. Submitted documents

c: Requestor
(w/o enclosures)