



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 16, 2013

Mr. Gerard A. Calderon
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2013-08141

Dear Mr. Calderon:

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# 488027.

The Bexar County Sheriff's Office (the "sheriff's office") received a request for twenty-five categories of information related to the death of a named inmate. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, we note the requested video recordings were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-06398 (2013). In this prior ruling, we ruled the sheriff's office may withhold the

¹Although you raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim under this section. *See* Gov't Code §§ 552.301, .302.

²We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

information at issue under section 552.103 of the Government Code. As we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the sheriff's office may rely on Open Records Letter No. 2013-06398 as a previous determination and withhold the requested video recordings in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the submitted information includes a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides the attorney general shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Code Crim. Proc. art. 49.18(b). The format of a custodial death report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The Office of the Attorney General has determined the four-page report and summary must be released to the public but any other documents submitted with the revised report are confidential under article 49.18(b). Although you claim the submitted custodial death report and summary are protected by section 552.103 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the sheriff's office must release this information, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

We next note the remaining information includes a completed report subject to section 552.022(a)(1) of the Government Code, which provides:

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[.]

Gov't Code § 552.022(a)(1). Although you seek to withhold the completed report under section 552.103 of the Government Code, this section is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas*

³As our ruling for this information is dispositive, we need not address your argument against its disclosure.

Morning News, S.W.3d 69, 475-6 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2n.5 (2000) (discretionary exceptions generally). Thus, the sheriff's office may not withhold the completed report subject to section 552.022(a)(1), which we have marked, under section 552.103 of the Government Code. As no further exceptions to disclosure are raised for this information, the sheriff's office must release it. However, we will address your argument under section 552.103 for the remaining information, which is not subject to section 552.022(a)(1).

Section 552.103, which provides, in relevant part, the following:

(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 applies 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 requested information 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 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. *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.⁴ 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). This office has concluded a governmental body’s receipt of a claim letter it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *Id.*

You inform us, and submit documentation showing, that prior to the sheriff’s office’s receipt of the present request for the information, the sheriff’s office received a notice of claim letter from the requestor. In this instance, the requestor is an attorney who represents the estate, parents, and heirs of the named inmate. You do not state the notice of claim letter you submitted for our review complies with the requirements of the TTCA; however, we note this letter concerns the death of the named inmate and alleges liability on the part of the sheriff’s office. Further, you inform us the submitted information directly relates to the subject of the anticipated litigation. Based on your representations, our review of the submitted information, and the totality of the circumstances, we conclude the remaining information pertains to litigation the sheriff’s office reasonably anticipated when it received the request for information. Accordingly, the sheriff’s office may withhold the remaining information under section 552.103 of the Government Code.

In summary, the sheriff’s office may rely on Open Records Letter No. 2013-06398 as a previous determination and withhold the requested video recordings in accordance with that ruling. The sheriff’s office must release (1) the custodial death report we have marked pursuant to article 49.18(b) of the Code of Criminal Procedure and (2) the completed report

⁴In addition, this office has concluded that 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).

we have marked under section 552.022(a)(1) of the Government Code. The sheriff's office may withhold the remaining information under section 552.103 of the Government Code.⁵

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# 488027

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵This ruling does not affect an individual's right of access to a patient's EMS records from the EMS provider. See Health & Safety Code §§ 773.092, .093; cf. *Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (Medical Practice Act does not provide patient general right of access to his or her medical records from governmental body responding to request for information under Public Information Act).