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ATTORNEY GENERAL OF TEXAS

March 22, 2017

Mr. Zachary Brown
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2017-05916

Dear Mr. Brown:

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# 649897.

The Texas Department of Criminal Justice (the "department") received a request for documents and communications related to climate change, heat-related deaths in department facilities, and installing air conditioning in prison units, during a specified time period. You state the department does not maintain information responsive to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107(2), 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.103 of the Government Code provides in relevant 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

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).

²We assume the "representative sample" of records 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 that submitted to this office.

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). 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. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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 from disclosure under section 552.103(a).

You state a lawsuit styled *David Bailey, et al. v. Brad Livingston et al.*, Cause No. 3:12-CV-02037, was pending against the department in the United States District Court for the Southern District of Texas when the department received the request for information. You additionally provide documentation showing a lawsuit styled *Keith Cole, et al., v. Brad Livingston, et al.*, Cause No. 4:14-CV-1698, was pending against the department in the United States District Court for the Southern District of Texas when the department received the request for information. Upon review, we agree litigation was pending to which the department was a party when the department received the request. We also find the department has established the submitted information is related to the pending litigation for purposes of section 552.103(a) of the Government Code. Therefore, we agree section 552.103(a) is applicable to the submitted information.

However, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). You inform this office the submitted information was exchanged between the parties to the pending litigation pursuant to the discovery process. Therefore, the department may not withhold the submitted information under section 552.103(a) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, 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 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state portions of the submitted information, if released, would interfere with law enforcement or prosecution of crime. You state the information includes diagrams that, if released, could be used for negative purposes, such as organizing a riot, or attacking or disabling a unit. You argue release of the information at issue would compromise the security of department facilities. Based on your representations and our review, we agree the release of the information we have marked would interfere with law enforcement. Accordingly, the department may withhold the information we marked under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated release of any of the remaining information would interfere with law enforcement or crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

The department asserts the remaining information is excepted from release under section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides the following:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding Section . . . 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] is subject to required disclosure under Section 552.021:

(1) the inmate's name, identification number, age, birthplace, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate; [or]

...

(8) basic information regarding the death of an inmate in custody[.]

Id. § 552.029(1), (8). The department seeks to withhold the remaining information under section 552.134. Upon review, we find some of the remaining information, which we have marked, consists of information about inmates for purposes of section 552.134 of the Government Code. However, the information we marked contains information concerning inmates' health and injuries or pertains to the death of an inmate in custody. Basic information about the inmate's death includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding criminal charges or disciplinary actions filed as a result of the incident. Thus, with the exception of basic information contained in the marked documents, the department must withhold the information we marked under section 552.134 of the Government Code.³ We further find the department has failed to establish any of the remaining information relates to department inmates for purposes of section 552.134 of the Government Code, and the department may not withhold any of the remaining information on that basis.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if "a court by order has prohibited disclosure of the information." *Id.* § 552.107(2). You claim the remaining information is the subject of federal litigation and is protected by order of the United States District Court, Southern District of Texas, Houston Division. You have submitted copies of several protective orders that you claim apply to make the remaining information confidential. We note the submitted protective orders state "[d]ocuments produced by [the department] may be designated as 'Confidential' or 'For Counsel Only' (or 'Attorney's Eyes Only') by marking each page" of the documents so designated. However, the protective orders further state "[the department will make such designation only as to the information that they in good faith [believe] contains confidential information, such as information protected by" other confidentiality statutes or concerns.

³As our ruling is dispositive, we do not address the department's remaining arguments against disclosure of this information.

Upon review, we find no portion of the remaining information has been marked as “confidential,” “for counsel only,” or “attorney’s eyes only,” or otherwise designated as classified. Furthermore, we note this ruling has disposed of any applicable confidentiality claims with respect to the submitted information. Therefore, we find the submitted protective orders do not prohibit the department from releasing any of the remaining information. Thus, we conclude you have not established a court has prohibited disclosure of any of the remaining information for purposes of section 552.107(2) of the Government Code, and the department may not withhold any of the remaining information on that basis.

In summary, the department may withhold the information we marked under section 552.108(b)(1) of the Government Code. With the exception of basic information contained in the marked documents, the department must withhold the information we marked under section 552.134 of the Government Code. The department 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 649897

Enc. Submitted documents

c: Requestor
(w/o enclosures)