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ATTORNEY GENERAL OF TEXAS

May 25, 2017

Mr. Eric K. Miller
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Mr. John C. West
General Counsel
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Texas Department of Criminal Justice
4616 West Howard Lane, Suite 250
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OR2017-11480

Dear Mr. Miller and Mr. West:

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# 659424.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to a specified death. The department's Office of the General Counsel (the "OGC") and Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OGC states it will release some information to the requestor. The OIG states it does not have some of the requested information.¹ The OGC claims the information it submitted is excepted from disclosure under sections 552.103, 552.108, and 552.134 of the Government Code. The OIG

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

claims the information it submitted is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, 552.130, 552.134, and 552.147 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note the information submitted by the OIG includes custodial death reports. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report the Office of the Attorney General (“OAG”) determines is privileged, the OAG shall make the report public. *See* Crim. Proc. Code art. 49.18(b). Although the OIG seeks to withhold the reports under sections 552.103, 552.108, and 552.134 of the Government Code, the exceptions to disclosure found in the Act generally do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the department must release the submitted custodial death reports, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

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(a)(1) must 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 OIG states the information it submitted pertains to an active criminal investigation. Based on the OIG’s representations, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, we conclude section 552.108(a)(1) is applicable to the remaining information submitted by the OIG.

However, we note, and the OIG acknowledges, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the department may withhold the remaining information submitted by the OIG under section 552.108(a)(1) of the Government Code.²

²As our ruling is dispositive, we need not address the OIG’s remaining arguments against disclosure of this information, except to note basic information described in *Houston Chronicle* does not include information subject to section 552.130 of the Government Code and basic information is generally not excepted from disclosure under section 552.103 or section 552.134 of the Government Code. *See* Open Records Decision No. 597 (1991); *see also* Gov’t Code § 552.029(8) (basic information regarding the death of an inmate in custody is not excepted under section 552.134).

Section 552.134 of the Government Code encompasses information relating to inmates of the department and provides:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] is excepted from the requirements of Section 552.021 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). However, section 552.029 of the Government Code provides:

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:

...

(8) basic information regarding . . . an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(8). Thus, section 552.134 is explicitly made subject to section 552.029. Although one of the inmates to whom the submitted information pertains is deceased, section 552.134 is applicable to information that relates to the decedent as an inmate. Thus, we find section 552.134 is generally applicable to the information submitted by the OGC. We note, however, the information in question is related to the death of an inmate in custody and an alleged crime involving inmates. Therefore, the department must release basic information about the incident pursuant to section 552.029(8). The basic information that must be released includes the time and place of the incident, the names of inmates and of department employees who were directly involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident.³ Accordingly, with the exception of basic information subject to section 552.029(8) of the Government Code, the department must withhold the information submitted by the OGC under section 552.134 of the Government Code.⁴

The OGC claims section 552.103 of the Government Code for the information subject to section 552.029(8) of the Government Code. Section 552.103 provides, in relevant part, the following:

³We note basic information for the purposes of section 552.029(8) does not include the identities of witnesses.

⁴As we are able to make these determinations, we need not address the remaining arguments against disclosure of this information.

(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.

Id. § 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, 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 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.⁵ 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). In the context of

⁵In 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).

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”).

The OGC states, prior to the date the department received the instant request for information, the department reasonably anticipated civil litigation to which the department would be a party. The OGC states the requestor is an attorney who has been retained by the deceased inmate’s family and the request for information is related to the death of that inmate. However, upon review, we find the OGC has not demonstrated any party had taken concrete steps toward filing civil litigation when the department received the request for information. Thus, we conclude the OGC has failed to demonstrate the department reasonably anticipated civil litigation when it received the request for information. The OGC further asserts the remaining information it submitted pertains to anticipated criminal litigation because “the assailant . . . may be charged with and prosecuted for felony murder.” However, we note the department is not a party to the anticipated criminal litigation and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov’t Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. Because the OGC has not provided such a representation, the department may not withhold the information at issue under section 552.103 of the Government Code. Therefore, the department may not withhold any of the remaining information submitted by the OGC under section 552.103(a) of the Government Code.

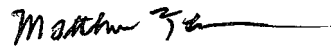
In summary, the department must release the submitted custodial death reports, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure. With the exception of the basic information, which must be released, the department may withhold the remaining information submitted by the OIG under section 552.108(a)(1) of the Government Code. With the exception of basic information subject to section 552.029(8) of the Government Code, which must be released, the department must withhold the information submitted by the OGC under section 552.134 of the Government Code.

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,

A handwritten signature in black ink that reads "Matthew Taylor" followed by a horizontal line.

Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/bw

Ref: ID# 659424

Enc. Submitted documents

c: Requestor
(w/o enclosures)