



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 7, 2019

Mr. Matthew L. Grove  
Assistant County Attorney  
Fort Bend County Attorney's Office  
401 Jackson Street, 3rd Floor  
Richmond, Texas 77469

OR2019-06330

Dear Mr. Grove:

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# 753852.

The Fort Bend County Attorney's Office (the "county attorney's office") received a request for specified information about the Fort Bend employees responsible for the care and supervision of the requestor's client during detention, as well as medical records and audio, photographic, and video surveillance footage during the periods of detention. You state you will release some information to the requestor. We understand the county attorney's office does not maintain information responsive to a portion of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 107 of the

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<sup>1</sup>The 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).

Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it does not pertain to the identified individuals or the requested information. This ruling does not address the public availability of any information that is not responsive to the request and the county attorney's office is not required to release such information in response to this request.

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 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated 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 prongs of this test for information to be excepted from disclosure under section 552.103(a).

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<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, we note section 552.101 does not encompass exceptions found within the Act.

<sup>3</sup>We 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.

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 that 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. 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 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). Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated").

You state the county attorney's office reasonably anticipates litigation involving the requestor's client because, prior to the date on which the county attorney's office received the request for information, the county attorney's office received two demand letters from the requestor. The letters at issue allege tortious conduct and civil rights violations by the county "jail, its policy makers, employees and contractors." You also inform us the requestor's client has filed a claim with the county's legal defense insurer. Based on your representations, our review of the submitted documentation, and the totality of the circumstances, we find you established the county attorney's office reasonably anticipated litigation at the time it received the instant request. You indicate the information at issue relates to the litigation because it pertains to the communications that are the basis of the anticipated litigation. Accordingly, we find the submitted information is subject to section 552.103 of the Government Code. Therefore, the county attorney's office may withhold the submitted information under section 552.103(a) of the Government Code.

Generally, 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 parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>4</sup>

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.

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<sup>4</sup>As our ruling is dispositive, we need not address the county attorney's office's remaining argument against disclosure of this information.

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](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,



Lecelle Clarke  
Attorney  
Open Records Division

LC/eb

Ref: ID# 753852

Enc. Submitted documents

c: Requestor  
(w/o enclosures)