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OR2019-18923

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# 774876.

The Henderson County Sheriff's Office (the "sheriff's office"), which you represent, received a request for information related to a specified incident and a named individual, specified policies and procedures, and lawsuits or audits involving the Henderson County Jail during a specified time period. The sheriff's office states it does not maintain some of the requested information.¹ The sheriff's office claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code, as well as privileged under Texas Rule of Evidence 503.² We have considered the submitted arguments and reviewed the submitted information.

Initially, the sheriff's office states it sought clarification of a portion of the request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). The sheriff's office

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).

²Although the sheriff's office also raises section 552.111 of the Government Code, the sheriff's office has not provided any arguments to support this exception. Therefore, we assume the sheriff's office has withdrawn its claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

states it has not received a response to its request for clarification. Accordingly, the sheriff's office has no obligation at this time to release any information that might be responsive to this portion of the request. However, if the sheriff's office receives clarification and wishes to withhold any of the information encompassed by the clarified request, the sheriff's office must request another decision from this office at that time. *See id.* §§ 552.301, .302; *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The submitted information includes a completed investigation that is subject to section 552.022(a)(1). The sheriff's office must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also includes court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). The sheriff's office seeks to withhold the information subject to section 552.022(a)(17) under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the sheriff's office may not withhold the information subject to section 552.022 under section 552.103 or section 552.107 of the Government Code. However, as section 552.101 of the Government Code applies to confidential information, we will consider the applicability of this exception to the information at issue. Further, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of*

Georgetown, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider the sheriff's office's assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Moreover, as information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider the sheriff's office's argument under section 552.108 for the information at issue. We will also consider the sheriff's office's arguments against disclosure of the remaining information.

Section 552.108(b)(2) of the Government Code excepts from disclosure an internal record or notation of a law enforcement agency or prosecutor if "the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate the information at issue relates to a criminal investigation that concluded in a final result other than conviction or deferred adjudication. *See id.* §§ 552.108(b)(2), .301(e)(1)(A). The sheriff's office states the information subject to section 552.022(a)(1) consists of an internal investigation file relating to a closed criminal investigation that did not result in a conviction or deferred adjudication. Based on this representation, we agree section 552.108(b)(2) of the Government Code is applicable to the information at issue.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information related to case number C18-17556, the sheriff's office may withhold the information subject to section 552.022(a)(1) under section 552.108(b)(2) of the Government Code.

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 has the burden of providing relevant facts and documents to show section 552.103(a) 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. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* ORD 452 at 4. 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. *See* ORD 555; *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101. 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). Further, the fact that 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).

The sheriff's office states prior to the date it received the instant request for information, the sheriff's office received a notice of representation and preservation of evidence from the requestor, an attorney whose client was harmed in an incident in the Henderson County Jail. In addition, the sheriff's office informs us, and provides supporting documentation demonstrating, prior to the date it received the instant request for information, the requestor's client made multiple threats to sue the sheriff's office. The sheriff's office does not affirmatively state the notice of claim meets the requirements of the TTCA. Therefore, we will only consider the claim as a factor in determining whether the sheriff's office reasonably anticipated litigation when it received the request for information. Based on the representations of the sheriff's office, our review of the submitted documents, and the totality of circumstances, we find the sheriff's office has demonstrated the sheriff's office reasonably anticipated litigation when it received the request for information. We also find the sheriff's office has established the remaining information is related to the anticipated litigation for

purposes of section 552.103(a). Therefore, with the exception of the court-filed documents subject to section 552.022(a)(17) of the Government Code, the sheriff's office may withhold the remaining information under section 552.103(a) of the Government Code.³

Further, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by

³As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure, except to note basic information may not generally be withheld under section 552.103. *See* Open Records Decision No. 597 (1991).

explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The sheriff's office asserts the information it noted subject to section 552.022(a)(17) of the Government Code should be withheld under rule 503. The sheriff's office states the information at issue was communicated between the sheriff's office's attorneys and sheriff's office officials and staff in their capacities as clients. The sheriff's office informs us the information was communicated for the purpose of the rendition of legal services to the sheriff's office. The sheriff's office states the communications were intended to be confidential. Based on these representations and our review, we find the sheriff's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the sheriff's office may withhold the information subject to section 552.022(a)(17) it noted pursuant to rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code excepts from public 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 section 261.201 of the Family Code, which provides, in part, as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The remaining information subject to section 552.022(a)(17) of the Government Code was used or developed in an investigation of alleged or suspected child abuse or neglect conducted by the sheriff's office. *See id.* §§ 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining "abuse" and "neglect" for purposes of chapter 261 of the Family Code). Accordingly, we find this information is subject to chapter 261 of the Family Code. The sheriff's office does not indicate it has adopted a rule that governs the release of this type of information and therefore we assume no such regulation exists. Given that assumption,

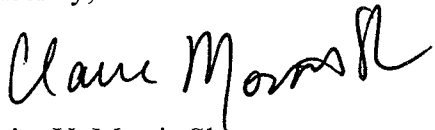
we conclude the sheriff's office must withhold the remaining information subject to section 552.022(a)(17) of the Government Code under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

In summary, with the exception of the basic information related to case number C18-17556, the sheriff's office may withhold the information subject to section 552.022(a)(1) under section 552.108(b)(2) of the Government Code. With the exception of the court-filed documents subject to section 552.022(a)(17) of the Government Code, the sheriff's office may withhold the remaining information under section 552.103 of the Government Code. The sheriff's office may withhold the information it noted subject to section 552.022(a)(17) pursuant to rule 503 of the Texas Rules of Evidence. The sheriff's office must withhold the remaining information subject to section 552.022(a)(17) under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The sheriff's office must release the basic information related to case number C18-17556.

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/jxd

Ref: ID# 774876

c: Requestor