



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 18, 2019

Ms. Lisa Hulsey
Assistant County Attorney
Harris County
1019 Congress Avenue, 15th Floor
Houston, Texas 77002-1700

OR2019-29439

Dear Ms. Hulsey:

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# 792093 (ORR# 19PIA0615).

The Harris County Sheriff's Office (the "sheriff's office") received a request for specified information related to an incident. You state you do not have a portion of the requested information.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.130, and 552.139 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹ The 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).

² Although you raise section 552.1175, we note section 552.117 is the correct exception to raise for information the sheriff's office holds in its capacity as employer.

³ 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.

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(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[.]

Gov't Code § 552.022(a)(1). Some of the submitted information, which we marked, consists of completed evaluations. The sheriff's office must release this information 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.* Although you seek to withhold the information at issue under section 552.103 of the Government Code, this section is discretionary and does 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the sheriff's office may not withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. However, we will consider your arguments to withhold this information under sections 552.101, 552.117, 552.130, and 552.139 of the Government Code. *See* Gov't Code § 552.022(a)(1). We will also consider your arguments against disclosure of the information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides, in part:

(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 the section 552.103(a) exception is applicable in a particular situation.

The test for meeting this burden is a showing (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. *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).

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 Open Records Decision No. 452 at 4 (1986). 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 Open Records Decision No. 555 (1990); 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). 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 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 the submitted information not subject to 552.022 of the Government Code pertains to litigation reasonably anticipated by the sheriff’s office. The sheriff’s office informs us, and submits documentation demonstrating, that simultaneously with the instant request for information, the sheriff’s office received a notice of representation and preservation of evidence letter from an attorney representing an individual who was injured in the incident specified in the request. Based on these representations, our review of the information at issue, and the totality of the circumstances, we find the sheriff’s office reasonably anticipated litigation when it received the request for information. You also state, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, the sheriff’s office may withhold the submitted information not subject to 552.022 of the Government Code under section 552.103 of the Government Code.⁴

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

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 anticipated 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).

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal pager and cellular telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Upon review, we find the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.117(a)(2) of the Government Code to the remaining information. Therefore, the sheriff's office may not withhold any of the remaining information under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Upon review, you have failed to demonstrate any of the remaining information at issue is subject to section 552.130. Thus, the sheriff's office may not withhold any of the remaining information under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."⁵ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The remaining information contains Employee Identification Numbers ("EIN"). The sheriff's office states the submitted EINs relate directly to "the transfer of funds from Harris County to its employees and could potentially be used to access a secure [s]heriff's [o]ffice website and employee deposit and retirement accounts." Upon review, we find the sheriff's office must withhold the submitted EINs under section 552.136 of the Government Code.⁶

In summary, the sheriff's office may withhold the submitted information not subject to 552.022 of the Government Code under section 552.103 of the Government Code. The sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code. The sheriff's office must withhold the submitted EINs under section

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶As our ruling is dispositive, we need not address your argument against disclosure of this information.

552.136 of the Government Code. The sheriff's office 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Emily Buchanan
Assistant Attorney General
Open Records Division

EBO/gw

Ref: ID# 792093

Enc. Submitted documents

c: Requestor
(w/o enclosures)