



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 17, 2022

Mr. Nico Arias
Assistant City Attorney
City of Fort Worth
200 Texas Street, 3rd Floor
Fort Worth, Texas 76102

OR2022-04972

Dear Mr. Arias:

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# 927589 (Ref. No. P000409).

The City of Fort Worth (the "city") received a request for specified communications and memorandums. Although you take no position as to whether the submitted information is excepted under the Act, you state, and provide documentation demonstrating, you notified the United States Drug Enforcement Administration (the "DEA") of this request. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have received comments from the DEA. We have considered the submitted arguments and reviewed the submitted information.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" *Id.* § 552.022(a)(1). The submitted information includes reports completed by the city's police department, which are subject to section 552.022(a)(1) and must be released unless the information is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. *Id.* Although the DEA asserts this information is excepted from disclosure 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 section 552.103);

Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information subject to section 552.022 under section 552.103. The DEA also raises section 552.101 of the Government Code, which protects information made confidential under law, and section 552.108 of the Government Code. As previously noted, section 552.022(a)(1) states information subject to that section may be withheld under section 552.108. Accordingly, we will address the DEA's arguments under sections 552.101 and 552.108 for the information subject to section 552.022. We will also address the DEA's argument under section 552.103 for the information that is not subject to section 552.022.

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 made confidential by other statutes. The DEA asserts the submitted information is protected by section 552 of title 5 of the United States Code, the federal Freedom of Information Act ("FOIA"). This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. *See* Attorney General Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that FOIA applies to only federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded, "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7.

The DEA asserts the information at issue is confidential under the provisions found in section 552(b)(7)(F) of FOIA. *See* 5 U.S.C. § 552(b)(7)(F) (agency may withhold information compiled for law enforcement purposes, but only to extent production of such law enforcement information could reasonably be expected to endanger the life of physical safety of any individual). The information reflects some of the submitted information consists of records of the DEA. Therefore, we conclude the city must withhold the information we marked under section 552.101 in conjunction with federal law. Upon review, however, we find the remaining information is contained in records of the city, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988); *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); ORD 561 at 7 n.3 (noting federal authorities may apply confidentiality principles found in FOIA differently from way in which such

principles are applied under Texas open records law). Accordingly, the city may not withhold the remaining information under section 552.101 in conjunction with FOIA.

Section 552.103 of the Government Code provides 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 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).

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 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." *Id.* 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).

The DEA asserts the information at issue is protected under section 552.103. However, the DEA makes only conclusory statements the information is subject to section 552.103. Upon our review, we determine the DEA has failed to demonstrate the applicability of section 552.103 to the information at issue. Thus, we conclude the city may not withhold the remaining information at issue under section 552.103.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). 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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (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.*, ORDs 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).

The DEA explains the information at issue exposes the manner, place, and methods used by the DEA in its operations and release of the information would “allow a criminal to act in a manner detrimental to DEA enforcement activities[.]” Based on these representations and our review of the information, we agree release of the information we marked would interfere with law enforcement. Accordingly, the city may withhold the information we marked under section 552.108(b)(1). However, we find the DEA failed to demonstrate the remaining information would interfere with law enforcement or crime prevention. Consequently, the city may not withhold the remaining information under section 552.108(b)(1).

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 release of the requested

information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to records that are purely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). The DEA does not inform us the remaining information at issue pertains to a specific ongoing criminal investigation or prosecution, nor has it explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, the DEA failed to demonstrate the applicability of section 552.108(a)(1) to the remaining information. Therefore, the city may not withhold the remaining information under section 552.108(a)(1).

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with federal law. The city may withhold the information we marked under section 552.108(b)(1) of the Government Code. The city 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,

Chase D. Young
Assistant Attorney General
Open Records Division

CDY/jm

Ref: ID# 927589

Enc. Submitted documents

c: Requestor
(w/o enclosures)