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ATTORNEY GENERAL OF TEXAS

June 30, 2022

Mr. Lee Correa
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OR2022-19007

Dear Mr. Correa:

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# 952408.

The Hopkins County Sheriff's Office (the "sheriff's office"), which you represent, received a request for ten categories of information related to the employment of a named individual, as well as a particular contract and the disciplinary file for a named inmate. We understand the sheriff's office will withhold certain information pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, 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:

¹ Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses pursuant to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

² 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.

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(3). The submitted information includes a contract subject to section 552.022(a)(3). The sheriff's office must release the information subject to section 552.022(a)(3) unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature 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 Nos. 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 of the Government Code. However, we note section 552.101 of the Government Code makes information confidential under the Act or other law; therefore, we will consider the applicability of this exception to the information subject to section 552.022. In addition, we will consider your argument under section 552.103 for the information not subject to section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You assert some of the information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with the federal Freedom of Information Act ("FOIA"), chapter 552 of the United States Code. We note FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue is held by the sheriff's office, which is subject to the laws of the State 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), 124 (1976); *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Open Records Decision No. 561 at 7 n.3 (1990) (noting federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). This office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.,* Attorney General Opinion MW-95; ORD 124 (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under Act when held by Texas governmental body). Therefore, the sheriff's office may not withhold any portion of the information at issue on the basis of FOIA.

Section 552.101 of the Government Code also encompasses section 418.181 and section 418.182 of the Government Code, which were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). These provisions make confidential certain information related to terrorism. Section 418.181 of the Government Code provides the following:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov’t Code § 418.181; *see also id.* § 421.001(2) (defining “critical infrastructure” to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). Section 418.182 provides in part:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. § 418.182(a). The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The sheriff’s office claims some of the submitted information is confidential under section 418.181 of the Governmental Code. The sheriff’s office states some of the information at issue pertains to “the exact personnel and requirements needed to accept a [f]ederal detainee, move a detainee, and release a detainee” within the Hopkins County Jail [the “jail”]. You state release of this information would “make movements, detainees[,] and personnel predictable and vulnerable to those being housed inside the [j]ail and those outside the [j]ail who may be contemplating a crime.” Upon review, we find some of the information at issue relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Accordingly, the sheriff’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.³ However, we find you have failed to demonstrate the remaining information at issue consists of information that is confidential under section 418.181 of

³ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

the Government Code. Therefore, the sheriff's office may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

The sheriff's office also states some of the remaining information pertains to sensitive law enforcement areas in the jail, which constitutes critical infrastructure for purposes of section 418.182. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). You state the surveillance cameras at issue are part of the sheriff's office's security system, and the submitted surveillance camera footage reveals the location, video quality and clarity, camera angles, and video surveillance coverage of the surveillance cameras. You further state the surveillance cameras at issue are used to protect public and private property from possible acts of criminals and terrorists. Based on your representations and our review, we conclude the submitted surveillance camera footage is related to the specifications, operating procedures, or location of a security system used to protect public property from an act of terrorism or related criminal activity. *See Tex. Dep't of Pub. Safety v. Abbott*, 310 S.W.3d 670 (Tex. App.—Austin 2010, no pet.) (recorded images necessarily relate to specifications of security system that recorded them, and thus, are confidential under section 418.182). Accordingly, the sheriff's office must withhold Exhibit L under section 552.101 of the Government Code in conjunction with section 418.182(a) of the Government Code.⁴

Section 552.103 of the Government Code provides, in relevant 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.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990)*. A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the

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

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.); ORD 551 at 4. 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. We note contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the “APA”), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

To establish that 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.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *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 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. *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 that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend the sheriff’s office reasonably anticipates litigation regarding the remaining information that is not subject to section 552.022(a)(3). You state the requestor is the authorized representative of a former sheriff’s office employee regarding an injury sustained during the course of his employment with the sheriff’s office. You further state, prior to receiving the request for information, the sheriff’s office employee filed a worker’s compensation claim for injuries sustained. You state the claim is currently open. We note such contested cases are generally governed by the APA. Labor Code § 410.153. Based on your representations and our review, we determine the sheriff’s office reasonably anticipated litigation when it received the request for information. We also find you have established the information at issue is related to the anticipated litigation for purposes of section 552.103(a).

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Upon review, we find some of the information at issue, which we have marked, was seen by the opposing party and may not be withheld under section 552.103(a). However, the sheriff’s office may withhold the remaining information at issue not seen by

opposing parties under section 552.103 of the Government Code.⁵ Further, we note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The sheriff's office must withhold Exhibit L under section 552.101 of the Government Code in conjunction with section 418.182(a) of the Government Code. The sheriff's office may withhold the remaining information not subject to section 552.022(a)(3) not seen by opposing parties under section 552.103 of the Government Code. The sheriff's office must release the remaining information.⁶

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/jxd

⁵ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

⁶ We note the information being released contains information to which the requestor has a right of access under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a), (b) (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (privacy theories not implicated when individual requests information concerning himself). Accordingly, if the sheriff's office receives another request for this same information from a different requestor, it must again seek a ruling from this office.

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Enc. Submitted documents

c: Requestor
(w/o enclosures)