



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 4, 2022

Ms. Kaitlin Lopez-Cano  
Public Information Officer  
Texas Commission on Jail Standards  
P.O. Box 12985  
Austin, Texas 78711

OR2022-23176

Dear Ms. Lopez-Cano:

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# 963920 (ORR No. 2022-5-2).

The Texas Commission on Jail Standards (the "commission") received a request for certain types of reports and complaints pertaining to two specified units of the Texas Department of Criminal Justice (the "department") that were received by the commission during a stated period of time, excluding certain types of information.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup> You state, and provide documentation demonstrating, the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup> Although you do not raise section 552.103 of the Government Code in your brief, we understand you to raise this exception based on the substance of your arguments.

<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.

Initially, we note the requestor has specifically excluded from his clarified request certain types of information, including medical and mental health records, dates of birth, personal e-mail addresses, and social security numbers. Thus, these types of information are not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request and the commission is not required to release such information in response to the present request.<sup>4</sup>

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 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. *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 parts of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

To establish litigation is reasonably anticipated, a governmental body must provide this office with "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 that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter, prior to its receipt of a request for information, 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.

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<sup>4</sup> As we are able to make this determination, we need not address your arguments against disclosure of this information.

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. 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state, and provide documentation demonstrating, the department objects to disclosure of the responsive information on the basis of section 552.103 of the Government Code. The department states a lawsuit pertaining to Operation Lone Star (“OLS”), styled *Barcenas v. McCraw*, Case No. 1:22-cv-00397, was pending against a department official in his individual capacity in the United States District Court for the Western District of Texas, Austin Division, upon the commission’s receipt of the present request for information. The department also states, prior to the date the commission received the present request, the department received notice of a formal investigation by the United States Department of Justice, Civil Rights Division related to the department’s participation in OLS. The department also represents the information at issue is related to the anticipated litigation for purposes of section 552.103. Based on these representations, our review of the information, and the totality of the circumstances, we find the department reasonably anticipated litigation on the date the commission received the present request for information and the information at issue relates to the anticipated litigation for purposes of section 552.103. Accordingly, the commission may withhold the responsive information under section 552.103(a) of the Government Code on behalf of the department.<sup>5</sup>

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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, 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).

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

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<sup>5</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of the responsive information.

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,

Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/be

Ref: ID# 963920

Enc. Submitted documents

c: Requestor  
(w/o enclosures)