



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2022

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

OR2022-24792

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# 963916 (ORR 2022-5-1).

The Texas Commission on Jail Standards (the "commission") received a request for seven categories of information pertaining to a particular subject or pertaining to specified facilities of the Texas Department of Criminal Justice (the "department") from a stated period of time.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.130, 552.136, and 552.147 of the Government Code. You also state you notified the Office of the Governor (the "governor's office") and the department of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have

¹ 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).

² As of the date of this letter, we have not received comments from the governor's office explaining why any of the submitted information should not be released.

received comments from the department. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note the submitted information contains court-filed documents that are subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record[,]” unless it is “made confidential under [the Act] or other law[.]” *Id.* § 552.022(a)(17). The commission must release the court-filed documents we marked unless the information is made confidential under the Act or other law. *Id.* Although the department raises section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022(a)(17) may be withheld under section 552.103. Further, although you also seek to withhold portions of the court-filed documents under section 552.101 of the Government Code in conjunction with common-law privacy, we note common-law privacy is not applicable to information contained in public records. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). Therefore, the court-filed documents we have marked may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. As no further arguments are raised for the information at issue, the commission must release the information we have marked pursuant to section 552.022(a)(17) of the Government Code. However, we will consider the department’s argument under section 552.103 for the information not subject to section 552.022(a)(17) of the Government Code. We will also consider the submitted arguments for the information that is not subject to section 552.022.

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

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.

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. 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.

The departments states, and provide documentation demonstrating, the department objects to disclosure of the remaining 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 remaining information under section 552.103(a) of the Government Code on behalf of the department.⁴

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

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).

In summary, the commission must release the information we have marked pursuant to section 552.022(a)(17) of the Government Code. The commission may withhold the remaining information under section 552.103(a) of the Government Code on behalf of the department.

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/jm

Ref: ID# 963916

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)