

Velva L. Price
District Clerk
Travis County
D-1-GN-16-006166
Ruben Tamez

D-1-GN-16-006166

CAUSE NO. _____

DALLAS COUNTY, TEXAS	§	IN THE DISTRICT COURT
	§	
	§	353RD
VS.	§	_____ JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY GENERAL, STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS

ORIGINAL PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Dallas County, Texas ("Dallas County") and files its Original Petition for Declaratory Judgment in accordance with Sections 552.324, 552.325 and 552.353 of the Texas Public Information Act ("TPIA").

**I.
Discovery Level**

1.01 Dallas County intends for discovery to be conducted under Level 2 pursuant to TEX. R. CIV. P. 190.1 and 190.3.

1.02 In a suit filed under the TPIA, "the court may order that the information at issue may be discovered only under a protective order until a final determination is made." TEX. GOV'T CODE § 552.322.

**II.
Parties**

2.01 As a governmental entity, Dallas County does not have a driver's license or social security number. TEX. CIV. PRAC. & REM. CODE § 30.014(a).

2.02 Defendant Ken Paxton is the Attorney General of the State of Texas and his central office is located in Travis County, Texas. The TPIA designates the Attorney General as the statutorily mandated defendant. TEX. GOV'T CODE § 552.324(a).

2.03 Citation for the Attorney General may be served on Ken Paxton, Attorney General of the State of Texas, or his designated agent for service, at 209 W. 14th Street, Austin, Texas 78701. TEX. R. CIV. P. 106(a)(2).

2.04 A suit for declaratory judgment against the Attorney General must be filed in Travis County. TEX. GOV'T CODE §§ 552.324 & 552.353(b)(3). Thus, venue in Travis County is proper.

III. Nature of Action

3.01 This is a suit for declaratory judgment to set aside and hold for naught erroneous portions of Open Records Letter Ruling OR2016-27589 ("Letter Ruling") regarding a request for Dallas County Sheriff Department (Sheriff's Department") records concerning the death of Joseph Hutcheson by an attorney who represents the decedent's estate. Exhibit 3 – Letter Ruling OR2016-27589.

3.02 The requestor requests two categories of information: (1) criminal investigation file relating to the incident in which a person fought with officers in the lobby of the Dallas County Jail and subsequently died and (2) standard operating procedures and personnel files regarding the individuals involved in that incident. The Letter Ruling accepts that the request relates to pending litigation but nevertheless calls for the release of certain subcategories of documents within these two broad categories. This approach is incorrect under the TPIA. This dispute provides a classic example of a

misapplication of the litigation exception and permits a party suing a governmental entity to seek civil discovery outside the rules of civil procedure and under the cover of the TPIA.

IV.
Factual Background

4.01 Dallas County expects the factual background of this lawsuit to be undisputed, with the exception of the mixed question of law and fact regarding whether the litigation exception and common law right of privacy applies to preclude disclosure of the information at issue.

4.02 On September 7, 2016, attorney Scott Palmer, who represents the named deceased's estate, submitted an Open Records Request to Dallas County Sheriff Lupe Valdez for the following information:

1. The complete criminal investigation file regarding the death of Joseph Hutcheson, including any all investigative reports, statements, supplements, recordings, findings and conclusions in regards to the death of Joseph Hutcheson;
2. Any and all video surveillance footage of the above-referenced incident that occurred in the Dallas County Jail lobby on or about August 1, 2015;
3. Any and all recorded statements or interviews conducted by the Dallas County Sheriff's Office;
4. The Dallas County Sheriff's Standard Operating Procedures for both patrol and jail personnel, General Orders, policy Manual, training manuals, lesson plans, written directive, training bulletins, regarding "take downs", restraints, control techniques and transportation of restrained subject;
5. The Dallas County Sheriff's Standard Operating Procedures for both patrol and jail personnel, general Orders, written directives, training manuals, lesson plans, an training bulletins, regarding "take downs", restraints, control techniques, regarding the use of force on a subject's back or neck and avoidance of compression asphyxia;

6. All training manuals and lesson plans regarding Critical Incident Training or Mental Illness Training, or like documents that pertain to DCSO deputies and jailer interacting with mentally ill subjects;
7. Personnel files concerning:
 - a. Deputy Fernando Reyes #998
 - b. Deputy Oliver Veasley #829
 - c. Lt. Brian Sherman #553
 - d. DSO Betty Stevens #2596
 - e. DSO Trenton Smith #7606
 - f. DSO Elvin Hayes #7550
8. Training records concerning:
 - a. Deputy Fernando Reyes #998
 - b. Deputy Oliver Veasley #829
 - c. Lt. Brian Sherman #553
 - d. DSO Betty Stevens #2596
 - e. DSO Trenton Smith #7606
 - f. DSO Elvin Hayes #7550

Exhibit 1 - Palmer's Request for Information. Although couched as an Open Records request, the request for information seeks discovery for the previously avowed purpose of filing suit against Dallas County for "a possible civil rights violation" as previously stated by the requestor in correspondence directed to the Dallas County Sheriff's Department. Exhibit 3, p. 6.

4.03 On September 28, 2015, the Dallas County Sheriff's Department requested a ruling from the Open Records Division of the Attorney General Office under the TPIA. TEX. GOV'T CODE § 552.301(b) (ten business days to request AG decision).

4.04 In its request, the Sheriff's Department made four arguments against disclosure of the requested documents.

1. that all information requested is subject to the civil "litigation exception" pursuant to Texas Government Code § 552.103(a) as the requestor had previously notified the Sheriff's Department that he had been retained "to

pursue a possible civil rights violation claim against member(s) of the Dallas County Sheriff's Office for the use of excessive force against Joseph Hutcheson”;

2. that an email between counsel for the Sheriff's Department and her clients was protected by the attorney-client privilege pursuant to Texas Government Code § 552.107;
3. that criminal history record information was confidential by law and could not be disclosed under Texas Government Code § 552.101; and
4. that intelligence reports regarding the investigation of various Sheriff's Department personnel were protected by the law enforcement exception under Texas Government Code § 552.108.

Exhibit 2, pp. 3-5. Counsel for the Sheriff's Department timely submitted the documents at issue for review by the Attorney General.

4.05 Dallas County received the Attorney General's Open Records Letter Ruling OR2016-27589 on December 16, 2016. Exhibit 3, p. 3. The Letter Ruling properly concluded that any grand jury records, body camera recordings, TCOLE identification numbers, mental health record, medical records, criminal history record information, EMS records, dates of birth, home address, home telephone number, emergency contact information, social security numbers, family member information, personal cell number information, motor vehicle records, personal email addresses, and materials subject to copyright law were not subject to disclosure under the Texas Public Information Act (“TPIA”). Exhibit 3, pp. 1-3, 7-14. The Letter Ruling also concluded that various information was protected under the common law right of privacy and constitutional right of privacy, although any such privacy did not extend to information regarding the deceased, as the requestor represents the deceased's estate. Exhibit 3, pp.

9-12. Further, the requestor was entitled to the deceased's motor vehicle records.
Exhibit 3, p. 13

4.06 The Letter Ruling agreed that the litigation exception applied as the requestor had previously sent a letter to the Sheriff's Department stating he had been retained "to pursue a possible civil rights violation claim against member(s) of the Dallas County Sheriff's Office for the use of excessive force against Joseph Hutcheson."

Based on your representations and our review, we find you have demonstrated the information at issue is related to litigation reasonably anticipated at the time the department received the request for information. Therefore, we find the department may withhold this information, which we have marked, under section 552.103 of the Government Code.

Exhibit 3, p. 6.

4.07 Nonetheless, the Letter Ruling went on to inexplicably order disclosure of the following information:

- Custodial Death Report pursuant to Tex. Code Crim. Proc. art. 49.18(b);
- CR-3 Accident Report pursuant to Tex. Transp. Code § 550.065(c);
- Completed investigations and evaluations subject to Tex. Gov't Code § 552.022(a)(1);
- All other information.

Exhibit 3, pp. 3-15.

V. Grounds for Declaratory Judgment

5.01 The TPIA provides that a governmental body may file suit against the Attorney General seeking declaratory relief from compliance with a decision by the attorney general issued under Subchapter G of the Act. TEX. GOV'T CODE § 552.324.

A. The Letter Ruling Ignores the Litigation Exception in Ordering the Sheriff's Department to Disclose Any Information.

5.02 The Letter Ruling also improperly directed the Sheriff's Department to disclose information although the entirety of the records are subject to the litigation exception. The litigation exception excepts from required public disclosure:

(a) Information is excepted from [required public disclosure] if it 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, in 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.

Tex. Gov't Code §§ 552.103(a), (c). It is undisputed that the requestor is seeking the Sheriff Department's investigative files, personnel files, and standard operating procedures for the sole purpose of filing suit against Dallas County. The Letter Ruling accepts that the litigation exception applies yet ordered the Sheriff's Department to turn over the entirety of their file to the requestor to prepare for filing suit against Dallas County.

5.03 Accordingly, Dallas County seeks declaratory relief that the Letter Ruling order directing Dallas County to disclose confidential records to the requestor, an attorney retained to represent the decedent's estate in litigation against Dallas County, notwithstanding the finding that the litigation exception applied, exceeded the scope of a

proper Open Records Letter Ruling pursuant to Section 552.306 of the Texas Government Code.

B. Information Contained in Investigative Files that Did Not Result in a Criminal Conviction Cannot be Disclosed as Such Information is Confidential by Law.

5.04 In the alternative, information contained in the investigation files, which did not result in criminal convictions, cannot be disclosed as such information is confidential as a matter of law. Dallas County may at any time raise an exception based on a requirement of federal law or one involving the property or privacy interests of another person. TEX. GOV'T CODE § 552.326; *See City of Dallas v. Abbott*, 304 S.W.3d 380, 392 (Tex. 2010) and *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 340 (Tex. 2010).

5.05 Accordingly, Dallas County seeks declaratory relief that all information that is confidential by law cannot be disclosed to the requestor.

C. In the Alternative, the Investigative Files also Cannot Be Disclosed as They Are Subject to the Law Enforcement Exception.

5.06 In the alternative, the Letter Ruling also requires that the criminal investigative files be disclosed because the Sheriff's Department had failed to show that release of the investigation files would interfere with the law enforcement exception. Exhibit 3, p. 12. This evidence cannot be disclosed as to do so would interfere with law enforcement or prosecution. TEX. GOV'T CODE § 552.108(b)(1).

5.07 Accordingly, Dallas County seeks declaratory relief that the investigative files are confidential by law and cannot be disclosed to the requestor.

VI.
Notice to Requestor

6.01 The undersigned attorney for Dallas County certifies, pursuant to Section 552.325 of the Texas Government Code, that a copy of this petition will be sent to the requestor, Scott Palmer, via certified mail, return receipt requested, along with notification of:

1. the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;
2. the requester's right to intervene in the suit or to choose not to participate in the suit;
3. the fact that the suit is against the Attorney General in Travis County district court; and
4. the address and phone number of the Office of the Attorney

General as follows: **Mr. Ken Paxton, Attorney General of Texas**

Mailing address: Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Physical address: Office of the Attorney General
300 W. 15th Street
Austin, Texas 78701

Phone number: (877) 673-6839 or (512) 478-6736

VII.
Conclusion and Prayer

- 7.01 Plaintiff, Dallas County, Texas, prays for the following relief:
1. Declaratory judgment that the portion of the Attorney General's Open Records Letter Ruling concluding that the litigation exception applies was correct;
 2. Declaratory judgment that the Open Records Letter Ruling's order that the Sheriff's Department disclose the Custodial Death Report, CR-3 Accident Report, all completed investigations and evaluations; and all other information was incorrect because the litigation exception applies to the entirety of the requested information;
 3. Declaratory judgment that the Sheriff's Department cannot disclose any information contained in investigation files that did not result in criminal conviction, as such files are privileged under the law;
 4. Declaratory judgment that the investigation files and evaluations are confidential and cannot be disclosed under the law enforcement exception;
 5. Declaratory judgment that Dallas County does not need to comply with the Open Records Letter Ruling's directive that the Sheriff's Department provide the requestor with any of the requested information at issue because the litigation exception applies; and

6. Declaratory judgment that the Dallas County Sheriff's Department also need not comply with the Open Records Letter Rulings directive that the Sheriff's Department provide the requestor with information contained in investigative files that did not result in a criminal conviction as such information is confidential by law.
7. In the alternative, declaratory judgment that the Dallas County Sheriff's Department also need not comply with the Open Records Letter Rulings directive that the Sheriff's Department provide the requestor with the investigation files and evaluations, which are protected the law enforcement exception.

Respectfully submitted,

SUSAN HAWK
CRIMINAL DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

/s/ Tammy J. Ardolf
TAMMY J. ARDOLF
ASSISTANT DISTRICT ATTORNEY
TEXAS BAR NO. 90001536
Tammy.Ardolf@dallascounty.org

FRANK WAITE
ASSISTANT DISTRICT ATTORNEY
TEXAS BAR NO. 20667300
Frank.Waite@dallascounty.org

CIVIL DIVISION
411 ELM STREET, FIFTH FLOOR
DALLAS, TEXAS 75202
PHONE: (214) 653-7358
FAX: (214) 653-6134

ATTORNEYS FOR PLAINTIFF
DALLAS COUNTY, TEXAS

CERTIFICATE OF SERVICE

Pursuant to Rule 21a of the Texas Rules of Civil Procedure, I certify that a true and correct copy of foregoing document was mailed via certified mail, return receipt requested # 7015 0640 0004 8377 5375 to the following:

Ken Paxton, Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

DATED: December 27, 2016

/s/ Tammy J. Ardolf