



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 17, 1996

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR96-0565

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27394.

The City of El Paso (the "city") received a request for the police report relating to the death of Mr. Ivan Garcia. You have submitted the requested information to us for review. You claim that sections 552.103 and 552.108 except all the requested information from required public disclosure. You also claim that section 552.101, in conjunction with section 773.091(b) of the Health and Safety Code, excepts part of the requested information from required public disclosure.

First, we address your assertion that section 552.103(a) of the Government Code excepts the requested information from required public disclosure. To secure the protection of section 552.103(a), a governmental body must demonstrate that litigation is pending or reasonably anticipated and that the requested information relates to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; a governmental body must provide concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5, 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming and when a requestor hires an attorney who then asserts an intent to sue. *See* Open Records Decision Nos. 555 (1990), 551 (1990). On the other hand, the mere fact that a person, on more than one occasion, publicly states an intent to sue does not trigger section

552.103(a). Open Records Decision No. 452 (1986). In this case, you have not shown with sufficient concreteness that litigation is reasonably anticipated. You indicate that Mr. Garcia's family has asked the requestor's office to do a second autopsy. You believe that Mr. Garcia's family is seeking this second autopsy solely for the purposes of gathering evidence to prove that Mr. Garcia's death was, in part, due to the actions of city employees and of instituting litigation against the city. However, you have not provided any evidence to support this belief. Therefore, you may not withhold the requested information under section 552.103.

Next, we address your assertion that section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 excepts from required public disclosure law enforcement records dealing "with the detection, investigation, or prosecution of crime." When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are currently under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. See generally *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 2 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.*

We conclude that section 552.108 of the Government Code does not except the requested information from disclosure. You do not claim that Mr. Garcia's death is still under investigation. Rather, you argue that the requested report should be withheld in connection with possible future investigations. We do not believe that this information is sufficient to establish that the requested report relates to a case currently under active investigation. Furthermore, you have not explained how releasing the specific information requested here would unduly interfere with law enforcement, nor does the information supply this explanation on its face. Therefore, you may not withhold the report under section 552.108.

Finally, we address your assertion that section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code excepts from disclosure two of the statements contained in the report. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 773.091(b) of the Health and Safety Code provides as follows:

Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision *that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider* are confidential and privileged and may not be disclosed except as provided by this chapter. [Emphasis added.]

The two statements you wish to withhold under these provisions were given to the police by the two paramedics who were present during the events covered by the report. However, neither of these paramedics created these statements, nor are the statements maintained by an emergency medical services provider. The paramedics who gave the statements were fact witnesses to the events preceding Mr. Garcia's death, and the statements are police records, not emergency medical service records. Accordingly, you may not withhold the statements under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. You must release the requested report in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 27394

Enclosures: Submitted documents

cc: Mr. Sam Romero
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(w/o enclosures)