



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 13, 1996

Ms. Tracy Calabrese  
Assistant City Attorney  
City of Houston  
P. O. Box 1562  
Houston, Texas 77251-1562

OR96-1431

Dear Ms. Calabrese:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 100013.

The City of Houston (the "city") received an open records request for information related to an investigation of an alleged rape. Specifically, the city received a request for the following information:

[A]ll offense reports, supplemental reports, witness statements, scientific tests, witness lists with addresses and phone numbers, Internal Affairs investigations, video tapes, audiotapes, photographs or any other documents pertaining to the investigation of the above referenced incident.

You state that you have released a copy of the complainant's complaint and affidavit regarding the incident. You submitted to this office for review the requested records and a representative sample of the requested audio tapes and assert that the information is excepted from disclosure under sections 552.101 and 552.103(a) of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation "to which the state or a political subdivision is or may be a party."<sup>1</sup>

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<sup>1</sup>Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 (1989) at 4.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated and that (2) the information at issue is related to that litigation. *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 (1990) at 4. The city must meet both prongs of this test for the information to be excepted under section 552.103(a).

You assert that all of the information submitted is excepted from required public disclosure under section 552.103, based on the anticipated litigation related to the investigation of an alleged rape by a police officer. Additionally, you have submitted an affidavit from an assistant city attorney in the Claims/Subrogation division which attests that the documents sought "[are] directly related to the subject matter of the anticipated litigation" against the city. In this instance you have made the requisite showing that the requested information relates to reasonably anticipated litigation for purposes of section 552.103(a); the requested records may, therefore, be withheld.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.<sup>2</sup> Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). In particular, front page offense report information that has been seen may not be withheld from disclosure under section 552.103. *See* Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation). Finally, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>3</sup>

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<sup>2</sup>Because we find that you may withhold the requested information under section 552.103, we do not determine whether specific information may be withheld under section 552.101. However, we note that medical records are confidential under section 552.101 of the Government Code in conjunction with the Medical Practice Act, V.T.C.S. article 4495b. Included among the documents that you submitted to this office for review are certain medical records. These medical records are governed by the Medical Practice Act ("MPA"), V.T.C.S. article 4495b and may only be released in accordance with the MPA. You state that you have notified the requestor that the city will release the medical records, subject to the MPA, after a release is obtained from his client, the complainant. Accordingly, even after the litigation has concluded, medical records may be released only in accordance with the provisions of the Medical Practice Act.

<sup>3</sup>However, information deemed confidential by law may not be waived and should continue to be withheld once the litigation has concluded. Open Records Decision Nos. 490 (1988), 463 (1987). For your convenience, we have included for your review a sampling of common types of information deemed confidential. Specifically, we note that if any of the records you submitted to us for review are part of the files maintained by the police department under section 143.089(g) of the Local Government Code, the

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 may 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,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/cbh

Ref.: ID# 100013

Enclosures: Submitted documents  
List of Confidential Information

cc: Mr. Jim L. Peacock  
Attorney at Law  
808 Travis, 23rd Floor  
Houston, Texas 77002  
(w/o enclosures)

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(Footnote continued)

city must withhold those records from disclosure under section 552.101 as information deemed confidential by statute, except as provided by section 143.089(a). See Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6. Additionally, the requested records contain information that may be excepted from disclosure under section 552.117(2), therefore, the city must withhold those portions of the records. See Open Records Decision No. 622 (1994). We caution that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. See Gov't Code § 552.352 (providing penalties for improper release of confidential information).