



## Office of the Attorney General

State of Texas

January 24, 1997

DAN MORALES  
ATTORNEY GENERAL

Mr. John Steiner  
Division Chief  
City of Austin  
Law Department  
P. O. Box 1088  
Austin, Texas 78767-1088

OR97-0162

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103193.

The City of Austin (the "city") received an open records request, from an attorney, for a variety of information regarding a particular police officer, who was involved in an incident where the requestor's client was charged with a crime. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You also assert that section 143.089 of the Local Government Code is applicable to the requested records. We have considered the exception you claim and reviewed the submitted information.<sup>1</sup>

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>2</sup> 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).

---

<sup>1</sup>The act places on the custodian of records the burden of proving that records are excepted from public disclosure. See Gov't Code §552.301(b)(1); see also Attorney General Opinion JM-672 (1987). We note that some of the submitted records have been redacted without explanation. Although all of the submitted information may be withheld, at this time, under section 552.103, it is not clear why some of the information has been redacted. We advise you to always explain the basis for withholding information, even if the information appears to be confidential pursuant to the act.

<sup>2</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.

You assert that all of the information submitted is excepted from required public disclosure under section 552.103, because the requestor's client has been "charged with resisting arrest, a Class A misdemeanor, which is currently pending in Cause No. 045828 in the County Court of Travis County." You have submitted a document evidencing that litigation is still pending regarding this matter. In this instance you have made the requisite showing that the requested information relates to reasonably pending litigation for purposes of section 552.103(a); therefore, the requested records may 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>3</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). 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).

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,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/cbh

---

<sup>3</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 143.089 of the Local Government Code, in conjunction with section 552.101. 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). 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 city must withhold those records, even after litigation has concluded, 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).

Mr. John Steiner -- Page 3

Ref.: ID# 103193

Enclosures: Submitted documents

cc: Ms. Suzanne M. Spencer  
Attorney at Law  
1300 Guadalupe, Suite 202  
Austin, Texas 78701  
(w/o enclosures)