



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 2, 1997

Mr. John Steiner
Division Chief
City of Austin
Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR97-2224

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your requests were assigned ID#s 109539 and 110098.¹

The City of Austin (the "city") received two requests for a variety of information related to an incident where a police officer shot an individual.² Specifically, the requestor requests "[a]ll investigative reports' results/findings into the investigation of the killing of David Allen Hill," and the internal affairs history of SWAT officer Paul Ford. In response to the request, you submitted to this office for review a copy of the responsive information. You seek to withhold the information responsive to the first request pursuant to sections 552.101, 552.103, and 552.108 of the Government Code. In response to the second request for information, you invoke section 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), known as the litigation exception, excepts from required public disclosure information

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and,

¹We have combined the two related files, because in each case the same requestor seeks information which you contend is related and subject to the same exceptions.

²Since you have not submitted copies of requested press releases, we assume that either the information does not exist or it has been released.

- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (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. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

In this instance, you contend that the litigation exception applies to the entire records. You have supplied to this office a letter from an attorney, representing the heirs of the deceased individual, who states that "[t]he nature of the negligence would be killing David Allen Hill without just cause," and "[t]he damages would be in the approximate amount of \$250,000.00 for the surviving heirs." In this instance, we agree with your assertion that litigation is anticipated, and that the submitted information relates to such litigation. Therefore, we conclude that the requested records may be withheld pursuant to section 552.103 of the Government Code.

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue.⁴ Because 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. Open Records Decision Nos. 349 (1982), 320 (1982). 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). However, you may not release information made confidential by section 552.101 or other law, even after the litigation has concluded.⁵

As we resolve your request under section 552.103, we need not specifically address your other claimed exceptions at this time. 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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

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⁴We note that generally front page incident report information 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 incident report); see also *Houston Chronicle Publ'g 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) (information normally found on front page of offense report is generally considered public).

⁵Specifically, the requested records may contain information that is excepted from disclosure under section 552.117(2). Section 552.117(2) excepts from disclosure peace officers' home addresses and telephone numbers, social security numbers, and any information that reveals whether the officer has family members. Therefore, the city must withhold those portions of the records. See Open Records Decision No. 622 (1994). Additionally, 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 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. If an internal affairs investigation were to result in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a) and is subject to release by the civil service commission under section 143.089(f) of the Local Government Code, *unless* it is excepted from disclosure under the Open Records Act. See Open Records Decision No. 562 (1990) at 6.

Ref.: ID#s 109539 and 110098

Enclosures: Submitted documents

cc: Mr. Steve Gibbins
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(w/o enclosures)