



February 22, 2001

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

OR2001-0657

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144473.

The City of El Paso (the "city") received a request for all information introduced into evidence at the appeals hearing of two specified city police officers. The request includes a nonexclusive list of one hundred and seventeen categories of information. The city states that it is unsure of the information requested in several of these categories. As the request unambiguously seeks the information which was introduced into evidence, the categories are merely illustrative. Only information which was entered into evidence at the specified hearing is responsive to this request.

The city indicates that it does not object to the release of a portion of the requested information. We assume that the city has released this information to this requestor. The city asserts that a portion of the requested information was presented to an arbitrator, who destroyed the information, and that the city has no copy of that portion of the responsive information. The city relates that information responsive to several of the enumerated categories "never existed or no longer exists." The city also relates that portions of the responsive information were the subjects of Open Records Letter Nos. 2000-0491, 99-2173, 99-0733, 91-519, and 2000-3794.¹ The city claims that the information that it has submitted to this office as responsive to the current request is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.119 and 552.130 of the Government Code. We have considered the exceptions claimed and reviewed the submitted information.²

¹The city refers to its request assigned ID# 139932; this office responded to that request in Open Records Decision Letter No. 2000-3794.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first note that the Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to an open records request. Open Records Decision No. 445 (1986). Therefore, the city need respond to this request only to the degree that it possesses or has a right of access to information that was in existence at the time that it received the request for information.

The city wishes to rely on Open Records Decision Letter Nos. 2000-3794, 2000-0491, 99-2173, 99-0733, and 91-519 to withhold information found to be excepted from disclosure in those decisions. We note that a governmental body is not required to submit information to this office in response to a request for the exact same information previously held by this office to be excepted from disclosure by an exception that is not temporal in nature. See Gov't Code § 552.301(a). Where a governmental body wishes to withhold information previously found to be excepted from disclosure for a specified time period, the governmental body must provide comment in support of its position that the exception continues to apply. We note that requested information was excepted from disclosure in ORD 99-2173 under section 552.103 of the Government Code. This section of the Government Code excepts information from disclosure during the pendency of litigation related to that information, and is therefore temporal in nature. In ORD 99-2173 we found that related litigation was reasonably anticipated at the time of that request, based on a letter which the city acknowledged to be in compliance with the notice requirements of the Tort Claims Act. The city now indicates that it has subsequently received additional notices of claims related to the incident that is the subject of this information. Therefore, we find that the city has demonstrated that section 552.103 continues to apply to this information. The other decisions relied on held that information was excepted from disclosure by section 552.108(b)(1) of the Government Code. This exception is not temporal. Therefore, the information found to be excepted by section 552.108(b)(1) may continue to be withheld with no requirement to submit the information or further comment to this office. We conclude that the city may withhold the portion of the responsive information which was found to be excepted from disclosure in ORD's 2000-3794, 2000-0491, 99-2173, 99-0733 and 91-519.

We now turn to the exceptions to disclosure argued in relation to newly submitted information.

You assert section 552.103 of the Government Code for the information which you have submitted as exhibits C, G and J. 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. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code § 552.103(c). To demonstrate that litigation is reasonably

anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986). You have supplied a copy of a claim from an attorney who represents an individual killed by city police officers. You acknowledge that this claim complies with the notice requirements of Chapter 1 of the Civil Practices and Remedy Code, the Texas Tort Claims Act. You have also stated that you have received other such notice letters related to the incident at issue, prior to receipt of the current request for information. We conclude that you have demonstrated that litigation was reasonably anticipated at the time that you received the request for information. See Open Records Decision No. 638 (1996). We have reviewed the submitted information and conclude that it relates to this anticipated litigation. However, absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, you may withhold all of the information in exhibits C, G, and J that the opposing party in the anticipated litigation has not had access to. Note also that 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).

Exhibit D consists of records from city personnel files. You assert no exception for this exhibit, generally, but we note that this exhibit contains information, which is excepted from disclosure by section 552.117 of the Government Code. Section 552.117(2) requires you to withhold information pertaining to a peace officer if the information relates to the home address, home telephone number, social security number, or reveals whether the peace officer has family members. We have marked the type of information that is subject to section 552.117. This information must be released.

Exhibit E consists of law enforcement records of an incident reported on December 12, 1998, involving an individual, age fifteen years at that time. Section 552.101 of the Government code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 58.007 of the Family Code makes law enforcement records of juvenile conduct that occurred after September 1, 1997 confidential. This section protects the records of a child. "Child" is defined as a person who is ten years of age or older and under 17 years of age or a person who is older than seventeen years of age and younger than 18 years of age and is found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. Fam Code § 51.02(1). Thus, section 58.007 deems confidential law enforcement records of all cases after September 1, 1997 that involve the delinquent conduct, or conduct indicating the need for supervision, engaged in by an individual who was between ten and seventeen years of age at the time of the commission of the act. We conclude that exhibit E must be withheld in its entirety, under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Exhibit F consists of Emergency Medical Service (“EMS”) records. Access to EMS records is governed by the provisions of section 773.091 of the Health and Safety Code. Open Records Decision No. 598 (1991). Section 773.091 of the Health and Safety Code (the Emergency Medical Services Act), provides in part:

(b) 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.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Section 773.091(b) thus protects from disclosure the submitted EMS records to the extent that they supply information as to the identity, evaluation, or treatment of patients. However, information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient is not confidential. We note that the EMS Act governs access to these records rather than the Open Records. *Id.* at 4. (statutes governing access to information held by governmental body prevail over generally applicable exceptions).

Exhibit H consists of photographs of police officers. Section 552.119 excepts from public disclosure a photograph of a peace officer,³ that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. The photographs at issue were apparently entered into evidence at a police civil service hearing or a case in arbitration. Therefore, we conclude that section 552.119 does not apply to these photographs. *See* Gov’t Code § 552.119(a)(2).

Exhibit I consists of photographs which include vehicle identification numbers and Texas license plate numbers. Section 552.130 of the Government Code governs the release and use of information obtained from motor vehicle records, and provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if the information relates to:

³“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must redact vehicle identification numbers, and Texas license plate numbers from the photographs submitted as exhibit I, and release the remaining photographic information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

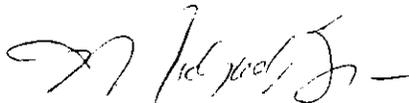
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns". The signature is stylized and cursive.

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 144473

Encl: Submitted documents

cc: Mr. William A. Elias
Attorney at Law
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(w/o enclosures)