



August 23, 2001

Mr. J. David Dodd III
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2001-3742

Dear Mr. Dodd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151100.

The City of Runaway Bay (the "city"), which you represent, received a request for six categories of information, relating either to a named individual or to a city police officer.¹ You claim that the requested information is excepted from disclosure under section 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the requestor. *See* Gov't Code § 552.304.

Initially, we note that the information that we have marked in both of the city's Exhibits B and C is dated on or after June 7, 2001. You inform us that the city received the request for information on June 6, 2001. Because this information did not exist at the time the city received the request for information, it is not subject to disclosure in response to this request. *See* Open Records Decision No. 452 (1986); *see also* Open Records Decision No. 362 (1983) (chapter 552 does not require governmental body to make available information which did not exist at time request was received). Accordingly, we do not address the applicability of the marked information in Exhibits B and C in this decision.

¹The requestor seeks 1) all city police department records and reports regarding or pertaining to the arrest of Frank Cardone on or about April 27, 2001 by officers of the city police department; 2) all reports and notes of the arresting officer or officers who arrested Frank Cardone on or about April 27, 2001; 3) all notes, reports, and records of city police officer Rex Richie pertaining to the detainment or questioning of Frank Cardone on or about May 21, 2001; 4) All reports and records kept or maintained by the city police department or by employees of the city that pertain to Frank Cardone; 5) the complaint file maintained by the city police department and by the city on police officer Rex Richie; and 6) the personnel file maintained by the city police department and by the city on police officer Rex Richie.

Next, we note that some of the information in Exhibits B and C is subject to section 552.022 of the Government Code, which states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

....

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

....

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). We have marked in Exhibit B documents that appear to be filed of record in a municipal court, and are thus subject to section 552.022(a)(17). The Exhibit B police incident report 2001-051, as a completed report made for the city, is subject to section 552.022(a)(1). With respect to the court-filed documents, this office has previously concluded that sections 552.103 and 552.108 are discretionary exceptions, and do not constitute "other law" that makes information "expressly confidential."² Accordingly, the court-filed documents subject to section 552.022(a)(17) must be released to the requestor pursuant to that section. However, section 552.022(a)(1) provides an express exception to public disclosure for information excepted under section 552.108, which you assert for the incident report, and which we next address.

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert that "the documents dated June 7, 2001 constitute a report for a pending criminal case." However, the offense report 2001-051 is dated April 27, 2001. You do not address the status of the case involving offense report 2001-051,

²Discretionary exceptions are intended to protect the interest of the governmental body, as opposed to exceptions which are intended to protect information deemed confidential by law or the interest of third parties. See Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 177 (1977) (Section 552.108 is discretionary exception to disclosure that protects governmental body's interests and may be waived), 522 at 4 (1989) (discretionary exceptions in general).

nor do you explain how or why the release of the report 2001-051 would interfere with law enforcement. Accordingly, we conclude that you have not demonstrated the applicability of section 552.108 to this offense report, and it must therefore be released to the requestor.

We next address your claim under section 552.103 for the remainder of the submitted information. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing 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 (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.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

In order 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 at 4 (1986). 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*. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (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 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You initially informed us that the requestor had threatened suit; however, in response to the requestor's commentary, you supported the requestor's assertion that he had not done so. Thus, the circumstances supporting your contention that litigation is reasonably anticipated are that the client has threatened suit in the past, and is represented by counsel who has made a request for information under the Act. After reviewing your arguments, we conclude that you have not demonstrated that a potential opposing party has taken any

concrete steps toward litigation. Therefore, you have not demonstrated that the district reasonably anticipates litigation. Accordingly, the city may not withhold the remaining submitted information under section 552.103 of the Government Code.

The information in Exhibit B contains license plate numbers. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(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 withhold the Texas license plate numbers that we have marked under section 552.130.

Finally, we note that the submitted documents contain certain information that may be confidential under laws intended to protect a person's privacy interests. Because you inform us that that person is the requestor's client, a fact uncontroverted in the requestor's commentary, we conclude that a special right of access prevents the information from being withheld under such laws. *See* Gov't Code §§ 552.023(a), (b).

In summary, the city must withhold the license plate numbers we have marked in Exhibit B under section 552.130 of the Government Code. The city must release the court records we have marked in Exhibit B pursuant to section 552.022(a)(17). With the exception of the information we have marked as non-responsive to this request, the remainder of the submitted information must be released to the requestor.

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).

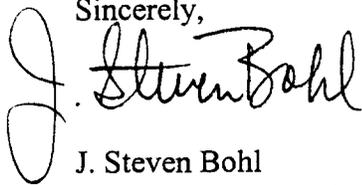
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 151100

Enc: Submitted documents

c: Mr. Michael J. McEntire
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(w/o enclosures)