Office of the Attorney General · State of Texas
John Cornyn

November 26, 2001

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2001-5454

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155204.

The City of Lubbock (the "city") received two requests for any documentation regarding Chief of Police Ken Walker's involvement with the Lubbock Police Department's SWAT Team and his ability or inability to work with other city departments. You advise that the city has released a portion of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

We note at the outset that section 552.022 of the Government Code makes certain information expressly public unless it is confidential under other law. One category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). The submitted information contains completed evaluations, which you seek to withhold from disclosure under section 552.103 of the Government Code. Our office has previously concluded that section 552.103 is a discretionary exception that does not make information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential). Accordingly, you may not withhold the completed evaluations under section 552.103 of the Government Code. You must release this information.

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[1] In your October 1, 2001, brief to this office, there is no explanation as to why the city believes sections 552.101, 552.108, and 552.111 apply to except the requested information. Therefore, you have waived any claim of exception from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code.

We now address your claim under section 552.103 for the remainder of the submitted information. Section 552.103 states in pertinent part:

> (a) Information is excepted from the requirements of Section 552.021 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.
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> c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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 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). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). A governmental body may establish that litigation is reasonably anticipated by showing that 1) it has received a claim letter from an allegedly injured party or his attorney and 2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA"), Chapter 101 of the Texas Civil Practice and Remedies Code, or applicable municipal statute or ordinance. Open Records Decision No. 638 (1996).

You have submitted a formal notice of claim which you state complies with the notice requirements of the TTCA and with the applicable statute of the city charter. We therefore conclude that litigation is reasonably anticipated. After reviewing the submitted information, we conclude that it is related to the anticipated litigation for purposes of section 552.103.

Thus, with the exception of the completed evaluations, you may withhold most of the submitted information from the requestor under section 552.103. However, we note that some of the information has either been obtained from or provided to the opposing party. When the opposing party in the litigation has seen or had access to any of the information

in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). A few of these documents, however, contain information that is confidential under section 552.117. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code.[2] Thus, you may not withhold any information originating from or sent to the opposing party, or information to which the opposing party has otherwise had access under section 552.103, with the exception of the information made confidential pursuant to section 552.117.

We also note that included in the submitted information are printouts of newspaper articles from the internet. Section 552.103 does not authorize the withholding of information which has already been made available to the public. Open Records Decision No. 436 (1986). The newspaper articles must be released to the requestor regardless of whether they relate to the litigation, as they already exist in the public domain by virtue of their publication. In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your argument under section 552.107 for the information to which the opposing party has previously had access. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Upon review of the submitted information, we conclude that some of the documents to which the opposing party has had access are covered by the attorney-client privilege, and are therefore excepted from disclosure under section 552.107(1). We have marked the documents that you must release. You may withhold the remainder of the submitted information, and must withhold the information made confidential pursuant to section 552.117.

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

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[2] Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

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).

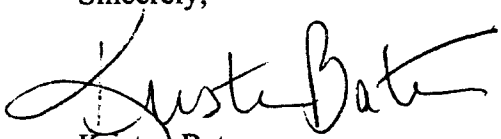
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/sdk

Ref: ID# 155204

Enc: Submitted documents

c: Mr. Steven DeWolf
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(w/o enclosures)