



October 22, 2002

Mr. J. Andrew Bench
Greenville Assistant City Attorney
Scott, Walker & Bench
P.O. Box 1353
Greenville, Texas 75403-1353

OR2002-5960

Dear Mr. Bench:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171060.

The City of Greenville (the "city"), which you represent, received two requests for information relating to a drowning or to municipal swimming pools. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that chapter 552 of the Government Code does not require a governmental body to release information that did not exist when a request for information was received or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). In this instance, several of the submitted documents were created after the city received these requests for information. The city is not required to release information that did not exist when these requests were received. We have marked the documents that the city need not release to the requestor.

The city claims that the rest of the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in part:

- (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.

...

(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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state that the requested information relates to a drowning at a municipal swimming pool. You inform us that a relative of the drowning victim has expressed her intention to sue the city police department. You also point out that the requestor is an employee of a personal injury law firm that represents the drowning victim. You assert that these facts and circumstances make it reasonable for the city to anticipate litigation. We note, however, that mere isolated threats of litigation do not trigger the applicability of section 552.103. *See* Open Records Decision Nos. 452 at 5 (1986), 351 at 2-3 (1982), 331 at 1-2 (1982). Likewise, the mere fact that a request for information was made by an attorney for an aggrieved party is not sufficient to invoke section 552.103. *See* Open Records Decision No. 361 at 2 (1983). Thus, having considered your representations, we conclude that you have not demonstrated that litigation was reasonably anticipated when the city received these requests for information. Therefore, the city may not withhold the requested information under section 552.103.

The city also raises section 552.107 of the Government Code. Section 552.107(1) excepts from public disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov't Code § 552.107(1). Section 552.107(1) protects information that comes within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's communications made in confidence to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege under section 552.107(1).

The city claims that Exhibit C-1 is excepted from disclosure under section 552.107(1). You state that this information was created in connection with a consultation with the city's attorney and contains client confidences and legal advice. Based on your representations and our review of Exhibit C-1, we conclude that the city has shown that this information is excepted from disclosure under section 552.107(1) of the Government Code.

We note that section 552.101 of the Government Code is applicable to some of the remaining information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. Chapter 773 of the Health and Safety Code is applicable to records that relate to emergency medical services. Section 773.091 provides in part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(a)-(c). Section 773.091 further provides, however, that

[t]he 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.

Id. § 773.091(g). We have marked the information that section 773.091 makes confidential. We note that the requestors may have a right of access to this information. *See id.* §§ 773.092(e)(4), .093. Otherwise, except for the information specified by section 773.091(g), the city must withhold the marked information under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

We also note that one of the remaining documents contains a social security number. Section 552.117(1) of the Government Code excepts from public disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the person has family members, if the current or former employee requested that this information be kept confidential under section 552.024. *See Open Records Decision Nos. 622 at 5-6 (1994), 455 at 2-3 (1987).* This information may not be withheld, however, if the current or former employee made the request for confidentiality under section 552.024 after the requests for information were made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* We have marked the social security number that the city may be required to withhold under section 552.117.

The city may also be required to withhold this social security number under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 at 2-4 (1994).* It is not apparent to this office that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the city to obtain or maintain a social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution the city, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See Gov't Code §§ 552.007, .352.* Therefore, before releasing a social security number, the city should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, chapter 552 of the Government Code does not require the city to release the submitted information that was created after these requests for information were received. The city may withhold Exhibit C-1 under section 552.107(1) of the Government Code. Some of the remaining information is confidential under section 773.091 of the Health and

Safety Code. Unless the requestors have a right of access to that information, it must be withheld from disclosure under section 552.101 of the Government Code. The marked social security number may be excepted from disclosure under section 552.117(1) of the Government Code or under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The rest of the submitted information is not excepted from disclosure and must be released.

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).

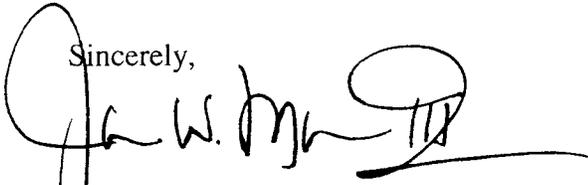
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a prominent "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 171060

Enc: Submitted documents

c: Mr. Greg A. Robinson
Van Wey & Johnson
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Dallas, Texas 75206
(w/o enclosures)