



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2003

Ms. Michele Austin
Assistant City Attorney
City of Houston - Law Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-5931

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186374.

The City of Houston (the "city") received a written request for "any pictures or recorded statements pertaining to" a certain automobile accident involving a city fire truck. You contend that the requested information is excepted from required disclosure pursuant to sections 552.103, 552.117, and 552.130 of the Government Code.

We note at the outset that two of the documents you submitted to this office are specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

(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 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[.]

Gov't Code § 552.022(a)(1) (emphasis added). Because two of the submitted records consist of completed reports, they are expressly made public under section 552.022. Therefore, the city may withhold those records only to the extent they are made confidential under other law or are excepted from public disclosure pursuant to section 552.108.¹ Although you argue that these two records are excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Consequently, the city may not withhold these reports pursuant to section 552.103. However, because the city is required by law to withhold information coming within the protection of sections 552.117 and 552.130, we will consider the applicability of these two exceptions to the submitted reports.

Section 552.117(a)(1) requires that the city withhold, among other things, an employee's home address and home telephone number, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(a)(1) information from the public, a proper election must be made prior to the receipt of the request for information. We therefore conclude that the city must withhold the information we have marked as being excepted from public disclosure pursuant to section 552.117, but only if the employee made a timely section 552.024 election to make that information confidential.

Section 552.130(a)(1) of the Government Code requires the city to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the city must withhold the city employee's driver's license number pursuant to section 552.130(a)(1) of the Government Code.²

We now address the applicability of section 552.103 to the requested photographs. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation to which the governmental body is a party 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, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted

¹We note that you do not contend that the requested records are excepted from public disclosure pursuant to section 552.108.

²We note that the requestor has a special right of access to his client's driver's license number pursuant to section 552.023 of the Government Code.

under 552.103(a). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). 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. *Id.* 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.³ 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

This office has held that a governmental body reasonably anticipates litigation when it receives a claim letter and affirmatively represents to this office that the claim letter complies with the notice requirements of the Texas Tort Claims Act ("TTCA"), Civil Practices and Remedies Code chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996). Despite the clear and plain language of this decision and numerous other rulings, you have restated the proposition in Open Records Decision No. 638 with the following argument:

the rule requiring a governmental body to represent to your office that a claim letter is in compliance with the notice requirements of the Texas Tort Claims Act or an applicable municipal ordinance might be restated as follows: To satisfy the Litigation Exception, a governmental body must represent to your office that the letter is in compliance . . . *unless the face of the letter clearly states that this is already so. See id.* at 1. In the latter case, when the face of

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).

the letter clearly demonstrates that the letter is meant to serve as notice under the Texas Tort Claims Act or an applicable municipal ordinance, such a representation by a governmental body is not necessary because the letter unmistakably states as much.

(Emphasis in original). Your interpretation of the standard and of Open Records Decision No. 638 is incorrect. Open Records Decision No. 638 concluded that one way a governmental body may meet its burden of showing that it anticipates litigation is to affirmatively represent that the notice of claim it received complies with the notice requirements of the TTCA or an applicable municipal ordinance. This office will not look to the face of the claim letter as contended by the city. A claim letter's assertion that the notice of claim is written pursuant to the TTCA does not necessarily mean that the notice actually complies with the notice requirements of the TTCA. If a governmental body chooses not to make such a representation, it may still meet its burden of showing that it anticipates litigation by presenting this office with other concrete evidence of why it anticipates litigation. Thus, if a governmental body does not represent that the notice of claim complies with the TTCA, and instead relies only on the face of the claim letter to do so without presenting other concrete evidence to show that it anticipates litigation, then the governmental body fails to meet the first prong of section 552.103.

In this instance, the attorney who made the present request for information represents that he "has been retained by [a named individual] to recover from your insured, as a result of an auto accident that occurred on March 19, 2003." You do not affirmatively represent to this office that the requestor's letter is in compliance with the TTCA. You do not state that the attorney has made a specific threat to sue. Furthermore, although you submitted an affidavit to this office stating that the city anticipates litigation regarding this matter "[i]n the event that the City denies this claim," this representation does not establish that the city in fact anticipated litigation on the date it received the records request. Therefore, based on our review of your arguments and the submitted information, we conclude you have not met your burden of establishing that litigation was reasonably anticipated on the date the city received the present request, and the city may not withhold the requested photographs under section 552.103 of the Government Code.

We note, however, that the submitted photographs contain information that must be withheld under section 552.130 of the Government Code. Section 552.130(a)(2) of the Government Code requires the withholding of information relating to "a motor vehicle title or registration issued by an agency of this state." Consequently, the city must withhold all Texas license plate numbers contained in the requested photographs pursuant to section 552.130(a)(2). The remaining submitted information must be released to the requestor, except as discussed above.

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 Dep't of Pub. 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 that reads "Christen Sorrell". The signature is written in a cursive style with a large, looped "O" at the end.

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/RWP/seg

Ref: ID# 186374

Enc: Submitted documents

c: Mr. Noe Moreno
Law Office of Ruben Rendon
7015 Gulf Freeway, Suite 101
Houston, Texas 77087
(w/o enclosures)