



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 18, 2003

Mr. Mark G. Mann  
Assistant City Attorney  
City of Garland  
P. O. Box 469002  
Garland, Texas 75046-9002

OR2003-6565

Dear Mr. Mann:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187880.

The Garland Police Department (the "department") received a request for "written, video, and audio accounts, including any 911 calls made by my mother, police transmissions, etc." pertaining to two specified stops made by department officers. You state that the department has provided the requestor with some responsive information. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.103 and 552.119 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.103 of the Government Code provides in pertinent 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 department maintains 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 is pending or reasonably anticipated on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture," when establishing that litigation is reasonably anticipated. *See* 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.<sup>1</sup> *See* Open Records Decision Nos. 555 (1990), 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You indicate that litigation was reasonably anticipated by the department prior to the time that the department received this request based upon the requestor's threat to sue the City of Garland. After carefully reviewing your arguments and the submitted information, we find in this instance that the requestor's threat alone does not constitute concrete evidence that litigation was reasonably anticipated by the department prior to the time that it received this request. Accordingly, we conclude that the department may not withhold any portion of the submitted information under section 552.103 of the Government Code.

In addition, you claim that portions of the submitted videotape are excepted from disclosure pursuant to section 552.119 of the Government Code. Section 552.119 excepts from

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<sup>1</sup> In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

disclosure a photograph of a peace officer<sup>2</sup> 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. Section 552.119 also provides that a photograph that is excepted from disclosure under this section may be made public only if the peace officer gives written consent to its disclosure. *See* Open Records Decision No. 502 (1988). The submitted videotape includes depictions of peace officers, and it does not appear that any of the exceptions described above are applicable in this instance. You have not informed us that the peace officers who are depicted in the videotape executed any written consent regarding the disclosure of these depictions. Thus, we assume that no such consent has been given in this instance. Accordingly, we conclude that the department must redact the depictions of these officers in the submitted videotape pursuant to section 552.119. However, in the event that the department lacks the technological capability to redact these depictions, the department must withhold the submitted videotape from the requestor in its entirety pursuant to section 552.119 of the Government Code.

In summary, the department must redact the depictions of peace officers that are contained in the submitted videotape pursuant to section 552.119 of the Government Code. However, in the event that the department lacks the technological capability to redact these depictions, the department must withhold the submitted videotape from the requestor in its entirety pursuant to section 552.119. The department must release the remaining submitted information to the requestor.<sup>3</sup>

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.

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<sup>2</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

<sup>3</sup> We note that the submitted videotape contains information that would ordinarily be withheld under section 552.130 of the Government Code. However, because this exception to disclosure is designed to protect an individual's privacy interest, the requestor has a special right of access to his own section 552.130 information. *See* Gov't Code §§ 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles), .130. Should the department receive a request for this information from an individual other than the requestor, it must seek another ruling from this office.

*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).

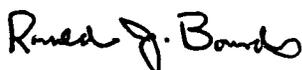
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 187880

Enc. Submitted videotape and audiotape

c: Ms. Peggy Brock  
c/o Mark G. Mann  
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(w/o enclosures)

Mr. David Brock  
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