



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2004

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

OR2004-3620

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# 199781.

The City of Garland (the "city") received three requests from the same requestor for information pertaining to an incident that occurred on February 2, 2004. The first request, which you state was received by the city on February 3, 2004, sought "a copy of police report # 2004R003306 and any other information involving this case." You state that the city has released certain information responsive to this request. The next two requests, received by the city on March 22, 2004, sought additional information pertaining to report # 2004R003306 as well as to report # 2004R003303, to include a copy of the original 911 call relating to this matter, all pictures and video recordings, and all documents pertaining to a specified vehicle. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note your statement that the city has released a redacted copy of the Warrant of Arrest and Detention, the Affidavit for Arrest Warrant or Capias, and certain other responsive information pertaining to report # 2004R003306. We also note that you have submitted a copy of the Warrant of Arrest and Detention and the Affidavit for Arrest Warrant or Capias pertaining to report # 2004R003303. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim Proc. Code art. 15.26 (emphasis added). Thus, the warrants and supporting affidavits are public under article 15.26. The exceptions found in the Public Information Act (the "Act") do not apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, you must release unredacted copies of the warrants and supporting affidavits to the requestor.

We next note that a portion of the information you submitted as responsive to both the February 3, 2004 request and the March 22, 2004 requests includes completed reports made of, for, or by the city. Section 552.022 of the Government Code provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" constitutes "public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). We also note that the information submitted as responsive to the March 22, 2004 requests includes court-filed documents that are expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022(a)(17). You raise section 552.103 as an exception to disclosure of this information. Section 552.103 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, we do not consider your claims under section 552.103 for this information, which we have marked. As you raise no other exceptions to disclosure of this information, it must be released to the requestor. However, because information subject to section 552.022(a)(1) may be withheld as provided by sections 552.101, 552.108 and section 552.130, we will address these exceptions for this information.

You contend that the information you have highlighted in yellow may be withheld pursuant to section 552.108 of the Government Code. 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 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 state that the information highlighted in yellow relates to a pending criminal case. Based upon this representation, we conclude that release of this information would interfere with the

detection, investigation, or prosecution of crime, and therefore, it may be withheld under section 552.108(a)(1).¹ See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We next note that the submitted information subject to section 552.022 includes the arrestees' social security numbers. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), that make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *Open Records Decision No. 622* (1994). We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that such information is not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

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[.]

Pursuant to section 552.130, you must withhold the Texas driver's license numbers you have marked in the documents subject to section 552.022 that are responsive to the March 22, 2004 requests.

We now address the remaining submitted information not subject to section 552.022. First, we note that section 552.101 also encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric

¹As we are able to make this determination, we need not address your argument under section 552.130 with regard to the information submitted as responsive to the February 3, 2004 request.

treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The information you have submitted as responsive to the February 3, 2004 request contains information that is confidential pursuant to common-law privacy. We have marked the information that must be withheld pursuant to section 552.101 and common law privacy.

You also assert that a portion of the requested information is confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

We agree that the medical records you seek to withhold under the MPA are subject to this statute. The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The submitted medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked this information.

Finally, we address your argument under section 552.103 for the information responsive to the March 22, 2004 requests that is not subject to section 552.022.² Section 552.103 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.

....

(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.

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 is pending or reasonably anticipated on the date the governmental body received the request for information, 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 under 552.103(a).

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents

²Because the city did not raise section 552.103 as an exception to disclosure of the information responsive to the February 3, 2004 request until its letter postmarked April 5, 2004, we find that the city failed to comply with sections 552.301(a), (b) and (e) with respect to this information, and therefore, the city has waived its claim under section 552.103 for this information. See Gov't Code §§ 552.301, .302; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 (1989) (discretionary exceptions in general).

that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

In this instance, you inform us that, on February 20, 2004, the city received a notice of claim concerning the incident that is the subject of the request. However, you do not state that the notice of claim complies with the notice requirements of the TTCA or an applicable municipal ordinance or statute. Nevertheless, based on the totality of the circumstances presented here, we conclude that litigation is reasonably anticipated and that the information at issue is related to the reasonably anticipated litigation for the purposes of section 552.103. Therefore, the city may generally withhold the remaining information subject to the March 22, 2004 requests pursuant to section 552.103 of the Government Code.

We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the anticipated litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). As we are able to make this determination under section 552.103, we need not address your other arguments for the remaining information responsive to the March 22, 2004 requests.

In summary, first, with regard to the information you have submitted as responsive to the February 3, 2004 request, you must release an unredacted copy of the arrest warrant and supporting affidavit. Pursuant to section 552.108(a)(1), the city may withhold the yellow-highlighted information in the documents subject to section 552.022. The arrestee's social security number may be confidential under federal law. In addition, we have marked information that the city must withhold under section 552.101 and common law privacy. Medical records may only be released in accordance with the MPA. The remaining submitted information responsive to the February 3, 2004 request must be released to the requestor.

To summarize with regard to the information submitted as responsive to the March 22, 2004 requests, including audiotapes and videotapes, you must release unredacted copies of the arrest warrants and supporting affidavits. Medical records may only be released in accordance with the MPA. Pursuant to section 552.108(a)(1), the city may withhold the yellow-highlighted information in the documents subject to section 552.022. The arrestee's social security number contained in the documents subject to section 552.022 may be confidential under federal law. The city must also withhold the driver's license information in the documents subject to section 552.022 under section 552.130. The remaining

information subject to section 552.022 must be released to the requestor. The information submitted as responsive to the March 22, 2004 requests that is not subject to section 552.022 may be withheld under section 552.103.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 199781

Enc. Submitted documents

c: Ms. Traci Luchini
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(w/o enclosures)