



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 14, 2005

Mr. Alan T. Ozuna  
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Attorneys and Counselors  
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OR2005-08368

Dear Mr. Ozuna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 232243.

The City of Weslaco (the "city"), which you represent, received two requests from the same requestor for audio and video tapes pertaining to the questioning of a former city police officer and the costs of a specified lawsuit and arbitration. You inform us that the city does not maintain the requested video tapes.<sup>1</sup> You indicate that the city has provided some of the remaining requested information to the requestor but claim that the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.117 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>2</sup>Although you also cite section 552.101 of the Government Code in your brief to this office, you have not submitted arguments explaining how this exception applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

We begin with your claim under section 552.108. You contend that the audio recording submitted as Exhibit B is excepted from disclosure based on section 552.108(a)(1). This provision 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.” Gov’t Code § 552.108(a)(1). 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 id.* §§ 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 this audio recording pertains to an ongoing criminal investigation for which “information is still being gathered . . . and a final disposition has not been reached.” Based upon this representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. *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). Therefore, the city may withhold the audio recording submitted as Exhibit B pursuant to section 552.108(a)(1) of the Government Code.<sup>3</sup>

We next address your claim under section 552.103 of the Government Code with respect to the remaining submitted information. This section provides in relevant part 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 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). A governmental body 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 request for information is received; and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post*

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<sup>3</sup>Because we reach this conclusion, we need not address the applicability of section 552.103 of the Government Code to this information.

*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). A government body must meet both prongs of this test for information to be excepted under section 552.103(a).

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. *See id.* 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. *See* Open Records Decision No. 555 (1990); *see also* 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. *See* Open Records Decision No. 361 (1983).

You inform us that the information at issue relates to the indefinite suspension of the named police officer for violations of civil services rules. The submitted information indicates that, prior to the city’s receipt of the requests for information, the police officer made a formal written request to the city for an appeal before a third party hearing examiner to challenge his indefinite suspension. We note that municipal civil service appeals, such as the one requested here by the named police officer, are governed by chapter 143 of the Local Government Code. *See* Local Gov’t Code §§ 143.057, 143.127-143.131. This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. *Cf.* Open Records Decision No. 588 (1991). As such, we conclude that litigation was reasonably anticipated by the city on the date it received the requests for information. We also find that the remaining submitted information is related to the anticipated litigation.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. 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, and it must be disclosed. It appears that some of the information you claim is excepted from release under section 552.103 has been provided to or obtained from the named police officer who is the opposing party in the anticipated litigation; this information may therefore not be withheld under section 552.103. You may withhold the remaining information under section 552.103 to the extent it has not been provided to the opposing party in the pending litigation. We also note that the applicability of section 552.103 ends once the litigation has been concluded.

Lastly, we note that Exhibit G contains information that is subject to section 552.117 of the Government Code. We therefore address this exception to the extent section 552.103 is not applicable to Exhibit G. In this regard, section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality under section 552.024 or 552.1175.<sup>4</sup> We have marked the information in Exhibit G that must be withheld pursuant to section 552.117(a)(2).

In summary: (1) the city may withhold the audio recording submitted as Exhibit B under section 552.108(a)(1) of the Government Code; (2) to the extent it has not been provided to or obtained from the named police officer who is the opposing party in the anticipated litigation, the city may withhold the remaining submitted information pursuant to section 552.103 of the Government Code; (3) to the extent section 552.103 is inapplicable to the information submitted as Exhibit G, the city must withhold the information we have marked in that exhibit under section 552.117(a)(2) of the Government Code; and (4) the city must release the remaining submitted information that has already been provided to or obtained from the named police officer.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

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<sup>4</sup>“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

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 Office of the Attorney General 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,



Robert B. Rapfogel  
Assistant Attorney General  
Open Records Division

RBR/krl

Ref: ID# 232243

Enc. Submitted documents

c: Mr. John Handy  
Mid Valley Town Crier  
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(w/o enclosures)