



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2005

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2005-10001

Dear Mr. Weir:

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# 235573.

The City of San Antonio (the "city") received a request for seven categories of information related to an incident involving the requestor's clients and officers of the San Antonio Police Department (the "department"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. The submitted information includes emergency medical service ("EMS") records, access to which is governed by the provisions of the Emergency Medical Services Act, Health and Safety Code sections 773.091-.173. *See* Open Records Decision No. 598 (1991). Section 773.091 of the Emergency Medical Services Act provides in part:

(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.

...

(g) The 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[.]

Health & Safety Code § 773.091(b), (g). Thus, except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091 and, therefore, may only be released in accordance with chapter 773 of the Health and Safety Code. *See* Health & Safety Code §§ 773.091-.094. We note, however, that records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information.” Health & Safety Code §§ 773.092(e)(4), .093. Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. If section 773.092 applies in this instance, the city must release this information to the requestor. *See* Health & Safety Code §§ 773.092, .093; *see also* Open Records Decision No. 632 (1995). Otherwise, the city must withhold the submitted EMS records pursuant to section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except for the information in these records that is not confidential under section 773.091(g).

We now turn to your arguments under section 552.103 of the Government Code. 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 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 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, 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 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).

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, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing 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.

You contend that the remaining information pertains to reasonably anticipated litigation. You inform us that, prior to the date the city received this request for information, the city received a notice of claim letter from the requestor regarding the incident at issue. We note, however, that you have not represented that this notice of claim letter meets the requirements of the TTCA. Therefore, we will only consider the claim letter as a factor in determining whether the city reasonably anticipated litigation over the incident at issue. Based on your representations and our review of the notice of claim letter and submitted information, we agree that litigation was reasonably anticipated on the date the request was received. Furthermore, we find that the remaining submitted information relates to the anticipated litigation for purposes of section 552.103(a).

We note, however, that even where litigation is reasonably anticipated, basic factual information about a crime must be released. Open Records Decision No. 362 (1983). Information normally found on the front page of an offense report is generally considered public, and must be released. *Houston Chronicle Pub'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex Civ. App.—Houston [14th Dist. 1975, writ ref'd n.r.e.); see Open Records Decision No. 127 (1976). Thus, the city may not withhold basic information pursuant to section 552.103.

We further note that a portion of the information at issue reflects on its face that it was obtained from the attorney representing the opposing parties in the anticipated litigation.

Once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Therefore, to the extent that the remaining information has either been obtained from or provided to the opposing parties in the anticipated litigation, it is not excepted from disclosure under section 552.103(a). However, to the extent that the remaining information has not been obtained from or provided to the opposing parties in the anticipated litigation and does not consist of basic information, it may be withheld under section 552.103(a).¹ Furthermore, the applicability of this exception under section 552.103 ends when the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now address your claim under section 552.107 of the Government Code for the information that was obtained from the attorney representing the opposing parties in the anticipated litigation. Section 552.107(1) excepts from disclosure information protected by the attorney-client privilege. When asserting the attorney-client privilege under section 552.107(1) of the Government Code, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.² TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

¹As we are able to make this determination, we need not address your remaining arguments for this information, except to note that basic information is generally not excepted from disclosure under section 552.108 of the Government Code. *See* Gov’t Code § 552.108(c).

²Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

We understand you to represent that the information at issue constitutes confidential attorney-client communications made between privileged parties in the furtherance of the rendition of legal services. Accordingly, we find that the city may withhold this information under section 552.107(1).

In summary, if section 773.092 of the Health and Safety Code applies, the city must release the EMS records to the requestor. Otherwise, the city must withhold the EMS records pursuant to section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except for the information in these records that is not confidential under section 773.091(g) of the Health and Safety Code. The marked information may be withheld under section 552.107 of the Government Code. Except for basic information, the city may withhold the remaining information under section 552.103 of the Government Code, including the information in the EMS records that is not confidential under section 773.091(g) of the Health and Safety Code.

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 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 235573

Enc. Submitted documents

c: Mr. James W. Myart, Jr., P.C.
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(w/o enclosures)