



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2006

Mr. Charles K. Eldred
Barney Knight & Associates
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2006-00946

Dear Mr. Eldred:

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# 241116.

The City of Bertram (the "city"), which you represent, received a request for information pertaining to (1) tasing, use of force, or transport involving a named individual on a specified date; (2) city policies and procedures concerning tasing for disciplinary purposes and responding to a request for assistance from a neighboring law enforcement agency in administering disciplinary action; and (3) the duty schedule of officers on duty and dispatched to the Burnet County Jail on a specified date. You assert, under section 552.028 of the Government Code, that the city is not required to comply with this request for information. In the alternative, you have submitted information that you claim is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and have reviewed the submitted information.¹

First, we address your representations with regard to the request for city policies and procedures. You state that the city has no policy on responding to calls for disciplinary

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

assistance.² You also assert that the city has no policy regarding the use of tasers for disciplinary purposes. Nevertheless, you have submitted information that relates to the use of taser technology by the city police department. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, a governmental body need not take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds information on behalf of the governmental body that received the request for it. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). As you have identified and submitted information relating to the use of tasers, we will determine whether you must release that information to the requestor.

Next, we address your arguments under section 552.028 of the Government Code. This section provides as follows:

(a) A governmental body is not required to accept or comply with a request for information from:

(1) an individual who is imprisoned or confined in a correctional facility; or

(2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

Gov't Code § 552.028(a)-(b). The present request for information was made by a representative of the Texas Civil Rights Project (the "TCRP"). An attached "records release," signed by the individual named in the request, states that he has asked the TCRP and its staff to represent him in connection with his confinement in the Burnet County jail. You state that the individual in question (the "incarcerated individual") is imprisoned or confined in a state correctional facility. You also state that neither the TCRP nor the

²We note that the Act does not require the city to release information that did not exist when it received this request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

individual who signed the request is an attorney for the incarcerated individual. Relying on section 552.028, you assert that the city is not required to comply with this request. *See id.* § 552.028(a). It is not clear to this office, however, whether an attorney for the TCRP is providing legal representation to the incarcerated individual. *See id.* § 552.028(a)(2). Accordingly, we are unable to determine whether the city must comply with this request. Therefore, we will dispose of this issue in the alternative. If the TCRP is merely an agent for the incarcerated individual, then we agree that the city may decline to comply with this request for information under section 552.028. But if this request was made on behalf of an attorney for the incarcerated individual, then the city may not decline to comply with this request under section 552.028.

As we are unable to make a determination under section 552.028, we must also consider your claim under section 552.103 of the Government Code. We first note, however, that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” Gov’t Code § 552.022(a)(1). Thus, the submitted report that we have marked must be released under section 552.022(a)(1), unless it contains information that is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. *Id.* You do not claim an exception to disclosure under section 552.108. Although you do claim an exception under section 552.103, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; *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 Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the marked information that is subject to section 552.022(a)(1) under section 552.103. As you claim no other exception to the disclosure of that information, it must be released.

With respect to the rest of the submitted information, we next address section 552.103. This exception provides in 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 governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.”³ *Id.* You inform us that Burnet County has received a notice of claim from the incarcerated individual. You have submitted a copy of the notice, which asserts that the individual suffered physical injuries and civil rights violations in a tasing incident at the Burnet County jail. You also state that, although no claim has been submitted to the city, city police officers were involved in the tasing incident. You assert that if the officers are sued in connection with that incident, they would be parties to the litigation as a consequence of their office or employment. *See Gov't Code § 552.103(a).* Based on your representations and the totality of the relevant circumstances, we find that the city reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the rest of the submitted information is related to the anticipated litigation. We therefore conclude that the rest of the submitted information is excepted from disclosure under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain that relates to litigation through discovery procedures. *See Open Records*

³Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see Open Records Decision No. 336 (1982)*; (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, if the TCRP is merely an agent for the incarcerated individual, then the city may decline to comply with this request for information under section 552.028 of the Government Code. If the city is not excused under section 552.028 from complying with this request, then (1) the city must release the information that is subject to section 552.022(a)(1); and (2) the city may withhold the rest of the submitted information 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).

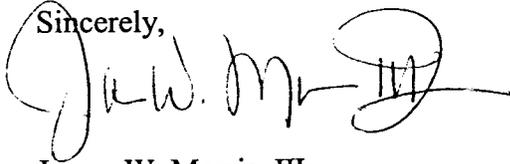
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with the first name "J.W." being particularly prominent.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 241116

Enc: Submitted documents

c: Ms. Patsy Lopez
Texas Civil Rights Project
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(w/o enclosures)