



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 19, 2007

Ms. Teresa Special  
Assistant City Attorney  
City of San Angelo  
P.O. Box 1751  
San Angelo, Texas 76902

OR2007-16811

Dear Ms. Special:

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# 296512.

The City of San Angelo (the "city") received a request for eight categories of information pertaining to an incident that involved injuries to a named individual, who subsequently died.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.119 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that you have failed to fully comply with section 552.301 of the Government Code. Under section 552.301(b), a governmental body that receives a request for information that it wishes to withhold from public disclosure must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. The city received this request on September 14, 2007. Therefore, you were required to submit your request for a decision, stating the exceptions that apply, by September 28, 2007. Although you timely submitted your initial request for a decision to this office, you did not raise section 552.108 of the Government Code until you filed your brief of October 5, 2007. Section 552.108 is a discretionary exception that protects the

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<sup>1</sup>We note that the requestor made an additional request for ambulance run sheets and fire department run sheets in a request dated September 28, 2007, and stamped "received" by the city on October 1, 2007, which you also submitted to this office for a ruling. This office assigned that request for a ruling identification number 297836. Because the information submitted pursuant to identification number 297836 is identical to the information you submitted in the instant ruling request as Exhibit A, we are combining your two ruling requests and will address this information in the instant ruling under identification number 296512.

<sup>2</sup>We note that you also raise section 552.107 of the Government Code as an exception to disclosure. However, you have submitted no arguments in support of the applicability of this exception. Accordingly, we find that the city has waived section 552.107. *See* Gov't Code §§ 552.301, .302.

governmental body's interests and may be waived. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive law enforcement exception), 522 at 4 (1989) (discretionary exceptions in general). In this instance, we find that you did not timely raise section 552.108 and have therefore waived this exception.

We additionally note that, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. In response to the request for "information/reports concerning each instance that a taser has been charged/used by a police officer of the San Angelo Police Department since . . . 2004," we note that the city has submitted Exhibits L and M. Exhibit L consists of responsive information for which this office will address your arguments. However, Exhibit M consists only of what you describe as a list of 694 numbers corresponding to police reports which contain references to taser use.<sup>3</sup> You have not, however, submitted copies of these actual reports or representative samples of them. Thus, the city failed to comply with the procedural requirements mandated by section 552.301 with regard to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating that it is confidential by law or that third-party interests are at stake.

With regard to these 694 reports, you state only that "the City would have to search each report individually to determine if a taser was actually used during that incident or whether the officer merely mentioned thinking about using it in his report or mentioned it for some other reason. In addition, the City would have to determine if there is other confidential information within each such report that would have to be withheld pursuant to the Act." However, we note that a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). If the information requested is not clear, or if a large amount of information is requested, a governmental body may communicate with the requestor for the purpose of clarifying or narrowing a request. *See* Gov't Code § 552.222(b); Open Records Decision No. 663 at 2-5 (1999). But a governmental body may not refuse to comply with a request

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<sup>3</sup>Exhibit M also contains a series of e-mails between you and the city's technology manager related to the list. We find that these e-mails are not responsive to the request and need not be released.

on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (cost or difficulty in complying with predecessor of Act does not determine availability of information); Open Records Decision No. 497 (1988). Therefore, upon review of your comments, we find you have failed to demonstrate a compelling interest to overcome the presumption of openness under section 552.302. Thus, we have no choice but to order you to release any responsive reports listed in Exhibit M.

Next, as you note, this office has ruled on much of the responsive information in previous open records letter rulings. In Open Records Letter Ruling No. 2007-12235 (2007), this office ruled that the information you have submitted as Exhibit A, consisting of ambulance and fire department run sheets, is confidential under section 773.091 of the Health and Safety Code in conjunction with section 552.101 of the Government Code, except as specified by section 773.091(g), and that the city must release the EMS records on receipt of proper consent under section 773.093. Accordingly, the city must withhold or release the information in Exhibit A under section 773.091 of the Health and Safety Code in conjunction with section 552.101 in accordance with our ruling in Open Records Letter Ruling No. 2007-12235, except as specified by section 773.091(g). *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note, however, that in that ruling, this office also ruled that the information subject to section 773.091(g) was excepted from disclosure under section 552.108(a)(1). As you inform us that the criminal investigation upon which our section 552.108(a)(1) ruling was based has concluded, we find that the circumstances have changed concerning that ruling's application of section 552.108(a)(1). Accordingly, the city may not withhold any information subject to section 773.091(g) under section 552.108(a)(1), in accordance with Open Records Letter Ruling No. 2007-12235. For that information in Exhibit A, we will address your raised exceptions to disclosure.

You also inform us that responsive internal affairs reports from the Office of Professional Standards were ruled upon by this office in Open Records Letter Ruling No. 2007-11896 (2007). As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the city must continue to rely on that ruling as a previous determination and withhold this information in accordance with Open Records Letter No. 2007-11896.

However, with regard to the remaining submitted information that you say was previously ruled upon by this office, we again note that you inform us that the pending criminal investigation upon which these rulings were based has ended. Accordingly, we find that the circumstances surrounding these rulings has changed, and thus, we find that you may not rely

on any of our previous rulings to withhold this information. We will therefore address your arguments with regard to the remaining submitted information.

We note that most of the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). We find that the information you have submitted as Exhibits A through K consists of completed reports and investigations made for or by the city. The city must release information subject to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. You claim that this information is subject to sections 552.101, 552.103, and 552.119 of the Government Code. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See 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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the department may not withhold the completed reports and investigations pursuant to section 552.103 of the Government Code. However, as information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.117, 552.119, and 552.130,<sup>4</sup> we will consider the applicability of these exceptions for the information in Exhibits A through K.

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. Section 552.101 encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. You argue that certain information contained in Exhibit E and all of the information in Exhibit L is confidential under common law privacy because it relates to attempted suicide. We note, however, that the individual who you describe as threatening suicide in Exhibit E is deceased. Because “the right of privacy is purely personal,” that right “terminates upon the death of the person whose privacy is invaded.” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.–Texarkana 1979, writ ref’d n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); See Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, you may not withhold any of the information in Exhibit E on the basis of common law privacy. In addition, although the reports in Exhibit L reference suicidal subjects, these subjects are not identified. Therefore, we find that the information in Exhibit L is not protected by common law privacy, and it may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses information made confidential by other statutes. Included among the photographs submitted to this office as Exhibit D are autopsy photographs. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. You state that “Mr. Lopez had not been taken into custody at the time of this incident nor did he die in the custody of law enforcement.” Thus, pursuant to section 11 of article 49.25, the autopsy photographs are confidential and must be withheld under section 552.101.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers that we have marked in Exhibit J. The city may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

You also argue that some of the submitted information in Exhibits B, D, and G is excepted from disclosure under section 552.119, which provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer.<sup>5</sup> Furthermore, a photograph of a peace officer cannot be withheld under section 552.119 if (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a civil service hearing or a case in arbitration; (3) the photograph is introduced as evidence in a judicial proceeding; or (4) the officer gives written consent to the disclosure.

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<sup>5</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs or videos at issue would endanger the life or physical safety of most of the peace officers depicted. However, we find that you have demonstrated that release of the portions of the photographs and videos in Exhibits B, D, and G that reveal the identities of members of the city's Special Weapons and Tactical ("SWAT") team would place these SWAT team members in danger. Accordingly, as you inform us that none of the officers at issue have consented to release of this information, we therefore determine that, pursuant to section 552.119 of the Government Code, the city must withhold the portions of the photographs and videos in Exhibits B, D, and G that depict members of the city's SWAT team, but only to the extent that the officer is depicted in a manner that he or she could be identified. We note, however, that if the city lacks the technical capability to redact the information that is subject to sections 552.119 from the videos, you must withhold the videos in their entireties. The remaining portions of photographs and videos that depict other city police officers may not be withheld under section 552.119.

We next note that the photographs and videos in Exhibits B, D, and G contain legible Texas license plate numbers. Section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Accordingly, the city must withhold the legible Texas license plate numbers of vehicles in the submitted photographs and videos pursuant to section 552.130, other than those that belong to the deceased individual or his family members.<sup>6</sup> We note, however, that if the city lacks the technical capability to redact the information that is subject to sections 552.130 from the videos, you must withhold the videos in their entireties. *See* Open Records Decision No. 364 (1983). We have also marked license plate numbers within the documents submitted as Exhibit I that must be withheld under section 552.130, unless they pertain to vehicles belonging to family members of the deceased individual.

Finally, we will address your arguments under section 552.103 for the information in Exhibit L. 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

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<sup>6</sup>Section 552.130 protects personal privacy interests. Because, as noted, privacy is a personal right that lapses at death, section 552.130 is not applicable to a deceased individual's Texas motor vehicle record or driver's license information. To the extent that the license plate numbers pertain to vehicles owned by family members of the deceased individual, we note that the requestor, as the attorney representing the family and estate of the deceased individual, has a special right of access to this information. Gov't Code § 552.023. Because the license plate numbers pertaining to family members may be confidential with respect to the general public, however, if the department receives a future request for this information from an individual other than the requestor or his clients, the department should again seek our decision.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

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(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, 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).

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). 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>7</sup> Open Records Decision No. 555 (1990); *see* 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. Open Records Decision No. 361 (1983).

Upon review of the submitted information and your arguments, we conclude that the city has demonstrated that it reasonably anticipated litigation on the date it received the instant request, and that the information in Exhibit L relates to that litigation. Accordingly, the department may withhold the information in Exhibit L under section 552.103. Generally,

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<sup>7</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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).

however, 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. 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 it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must withhold or release the information in Exhibit A under section 773.091 of the Health and Safety Code in conjunction with section 552.101 in accordance with our ruling in Open Records Letter Ruling No. 2007-12235, except the information specified by section 773.091(g), which must be released. The city must continue to rely on Open Records Letter No. 2007-11896 (2007) as a previous determination and withhold responsive internal affairs reports from the Office of Professional Standards in accordance with that ruling. The city must withhold the submitted autopsy photographs under section 552.101 of the Government Code in conjunction with article 49.25 of the Code of Criminal Procedure. The city may withhold the information in Exhibit L under section 552.103. The city must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employees to which such information pertains timely elected confidentiality in accordance with section 552.024. The city must withhold the portions of the photographs and videos in Exhibits B, D, and G that depict members of the city's SWAT team pursuant to section 552.119, but only to the extent that the officer is depicted in a manner that he or she could be identified. The city must withhold the legible license plate numbers of vehicles other than that of the deceased individual or his family members in the submitted videotapes and photographs under section 552.130, as well as license plate numbers of vehicles other than that of the deceased individual or his family members we have marked in Exhibit I. The remaining submitted information must be released to the requestor.<sup>8</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

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<sup>8</sup>We note that a portion of the information to be released to the requestor consists of photographs of the deceased individual, found in Exhibit D, as well as other confidential information pertaining to family members of the deceased. Although the family of the deceased individual may have a privacy interest in these photographs, the requestor has a special right of access to this and the other confidential family member information as the attorney representing the family and estate of the deceased individual. Gov't Code § 552.023. Because this information may be confidential with respect to the general public, however, if the department receives a future request for this information from an individual other than the requestor or his clients, the department should again seek our decision.

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jb

Ref: ID# 296512

Enc. Submitted documents

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