



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 10, 2008

Ms. Cheryl K. Byles  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street, 3<sup>rd</sup> Floor  
Fort Worth, Texas 76102

OR2008-09431

Dear Ms. Byles:

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# 315161.

The City of Fort Worth (the "city") received a request for the following information pertaining to a specified business: (1) all arrest or incident reports and all officers' notations relating to any alleged criminal activity during a specified period of time, and (2) all documents, photographs, and audiotapes submitted by the Fort Worth Police Department and its representatives to the Texas Alcoholic Beverage Commission during a specified period of time. You state that no audio records pertaining to this property exist.<sup>1</sup> You state that you have redacted Texas motor vehicle record information under section 552.130 of the Government Code pursuant to the previous determinations issued to the city in Open Records Letter Nos. 2006-14726 (2006) and 2007-00198 (2007). See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You also state that you are withholding social security numbers under section 552.147 of the Government Code.<sup>2</sup> You claim that the requested information is excepted from disclosure under sections 552.101

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the specified period of time at issue in the request. The city need not release non-responsive information in response to this request, and this ruling will not address that information. *See Bustamante*, 562 S.W.2d at 267-268.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides 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). In this instance, the submitted information contains completed reports made for or by the city. The city must release the completed reports in Exhibit C-2 under section 552.022(a)(1) of the Government Code unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly confidential under other law. You claim that submitted information is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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 of the Government Code); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 of the Government Code is not other law that makes information confidential for the purposes of section 552.022 of the Government Code. Therefore, the city may not withhold Exhibit C-2 under section 552.103 of the Government Code. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address the applicability of section 552.101 to the information in Exhibit C-2.

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

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<sup>3</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Code § 552.101. Section 552.101 encompasses information made confidential by other statutes such as section 58.007 of the Family Code. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). However, section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender.

We note that you have submitted three reports in Exhibit C-2 for which you claim section 58.007 applies. We note that in reports 07-147896 and 07-52439, the listed suspects were seventeen years of age at the time of the offense. We further note that report 06-75649 lists the juvenile as a victim. As discussed above, section 58.007(c) only applies to suspects or offenders who were ten years of age or older and under seventeen years of age at the time of the conduct at issue. Thus, none of the reports in Exhibit C-2 involve juvenile delinquent conduct subject to section 58.007 of the Family Code. We therefore conclude that the city may not withhold any information in Exhibit C-2 under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

You claim the remaining information not subject to section 552.022 is protected under section 552.103 of the Government Code, which 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* ORD 551 at 4.

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective prosecutor or plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). But this office considers a contested case under the Texas Administrative Procedure Act (the “APA”), Government Code chapter 2001, to constitute “litigation” for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991), 301 (1982).

You state that the property at issue is a club where alcohol is served. You state that, on February 10, 2008, the city asked the Texas Alcohol and Beverage Commission (“TABC”) to deny the owner’s liquor license. You also state, and provide documentation showing, that on March 4, 2008, the TABC set this case to be heard on March 25, 2008. Further, you provide documentation showing that on May 1, 2008, Tanya Cooper, the Administrative Law Judge presiding over the matter, granted a Motion for Continuance. This matter will now be heard on July 9, 2008. Based on these representations, and our review of the information at issue, we conclude that the city anticipated litigation when it received the request for information on April 18, 2008. Our review of Exhibit C-1 shows that it is related to the anticipated litigation for purposes of section 552.103. Accordingly, the city may withhold Exhibit C-1 under section 552.103 of the Government Code.

We note, however, that once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information that has either been obtained from or provided to all other parties 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 litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Finally, we note that the submitted documents contain unredacted information subject to section 552.130 of the Government Code.<sup>4</sup> Section 552.130 of the Government Code excepts from disclosure information that "relates to ... a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). The city must withhold the Texas motor vehicle information we have marked in Exhibit C-2 under section 552.130 of the Government Code.

In summary, the city may withhold Exhibit C-1 under section 552.103 of the Government Code. The city must withhold the Texas motor vehicle information we have marked in Exhibit C-2 under section 552.130 of the Government Code. The remaining information must be released.

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 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). If the governmental body does not file suit over 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

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

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,



Benjamin A. Diener  
Assistant Attorney General  
Open Records Division

BAD/jh

Ref: ID# 315161

Enc. Submitted documents

c: Mr. B.C. Cornish  
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(w/o enclosures)