



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 12, 2009

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

OR2009-00426

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# 332325 (PIR #0297-09).

The Fort Worth Police Department (the "department") received a request for information related to a specified incident and certain information from a specified officer's personnel file. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information consists of a completed report and completed performance evaluations that are subject to section 552.022(a)(1) of the Government Code. Therefore, the department may withhold this information only if it is confidential under "other law." You raise section 552.103 of the Government Code, but this section is a discretionary exception to disclosure that protects the governmental body's interests and which 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold

the completed report and completed performance evaluations that are subject to section 552.022(a)(1) under section 552.103.

We also note that you have redacted certain Texas motor vehicle record information from the submitted completed report, presumably under section 552.130 of the Government Code pursuant to 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). We note that the requestor is an attorney representing the person whose information you have redacted. The requestor has a right of access to his own motor vehicle information pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Therefore, the department may not withhold the Texas motor vehicle record information you have redacted from the submitted completed report, but must instead release it to the requestor.<sup>1</sup>

We next consider your arguments regarding the information that is not subject to section 552.022(a)(1). Section 552.103 of the Government Code provides in relevant 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 department 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 department received the request for information, 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>1</sup>Should the department receive another request for these same records from a person who would not have a right of access to the requestor's private information, the department should resubmit these records and request another decision from this office. *See* Gov't Code §§ 552.301, .302.

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 department must meet both prongs of this test for information to be exempted under section 552.103(a).

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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter 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’s attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).

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.” 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>2</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).

In this instance, the prospective plaintiff has alleged that the officer named in the request used excessive force during a traffic stop. The prospective plaintiff has retained counsel, filed a claim against the City of Fort Worth (the “city”), and sent a demand letter to the city seeking damages and stating that he plans to file suit against the city if his claim is not resolved. Based on these facts and our review of the submitted demand letter, we conclude that the department reasonably anticipated litigation on the day it received the present request. Furthermore, we find that submitted information pertains to the officer and incident stipulated in the request and accompanying demand letter and, therefore, is related to the anticipated litigation. Accordingly, the department may withhold the portion of the

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<sup>2</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).

submitted information that is not subject to section 552.022(a)(1) under section 552.103 of the Government Code.<sup>3</sup>

Normally, 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 must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must release the information we have marked pursuant to section 552.022(a)(1) of the Government Code, including the sections thereof that you have redacted under section 552.130 of the Government Code. The department may withhold the remainder of the submitted information under section 552.103 of the Government 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 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 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,

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<sup>3</sup>In light of this conclusion, we need not consider your section 552.117 claim.

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,



Ryan T. Mitchell  
Assistant Attorney General  
Open Records Division

RTM/jb

Ref: ID# 332325

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)