ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2009

Mr. C. Patrick Phillips
Assistant City Attorney
The City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2009-00991

Dear Mr. Phillips:

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# 333007.

The City of Fort Worth (the "city") received a request for information related to a specified incident involving the requestor's client. You claim some of the requested information is not subject to the Act. You also claim portions of the requested information are excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you state that some of the submitted information was obtained pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of

the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD No. 513. You state the city holds Exhibit D as an agent of the grand jury. Based on your representation, we find Exhibit D is in the grand jury's constructive possession and is not subject to the Act. Therefore, this decision does not address the public availability of Exhibit D.

Next, we note the remaining information includes court-filed documents that are subject to section 552.022 of the Government Code. Documents filed with a court are generally a matter of public record under section 552.022(a)(17) of the Government Code and may not be withheld from disclosure unless confidential under other law. *See* Gov't Code § 552.022(a)(17); *see also Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992) (documents filed with court are public documents and must be released). Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.[1] Thus, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. As you raise no other exceptions against the disclosure of this information, it must be released.

We address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 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.
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> . . .
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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

[1]Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (litigation exception may be waived). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

> 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 on the date that the city 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 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 section 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. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice of claim letter that is in compliance with the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code. 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 state, and provide documentation showing, the city received a notice of claim letter from the requestor. You do not affirmatively represent to this office that the claim letter is in compliance with the TTCA; therefore, we will only consider the claim as a factor in determining whether the city reasonably anticipated litigation over the incident in question. We note the submitted notice of claim letter states the requestor was hired by his client to assert a claim against the city and that if the city does not pay the requestor's demand to resolve the claim, the requestor will file suit against the city. After reviewing your arguments and the information at issue, and based on the totality of the circumstances, we find that you have established litigation was reasonably anticipated when the city received the request for information. We further find the information at issue relates to the anticipated litigation. Therefore, the city may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.[2]

Generally, 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

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[2]As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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, Exhibit D is in the grand jury's constructive possession and is not subject to the Act. The city must release the court-filed documents we have marked pursuant to section of the Government Code. The remaining information may be withheld under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Jordan Hale

Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 333007

Enc. Submitted documents

cc: Requestor
(w/o enclosures)