



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2009

Mr. Stephen D. Henninger
Martin, Disiere, Jefferson & Wisdom, L.L.P.
900 Jackson Street, Suite 710
Dallas, Texas 75202

OR2009-02925

Dear Mr. Henninger:

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# 336558.

The City of Corinth (the "city"), which you represent, received a request for all e-mails or documents of "public record" from five specified individuals which pertain to a specified case and all police reports concerning two named individuals. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your assertion that Exhibit E is not responsive to the request. In part, the request seeks all e-mails or documents of public record from five specified individuals which pertain to a specified case. Although you assert that the information at issue is not "of public record," we note that a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We further note that the Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.022(a)(1); *see*

also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Accordingly, upon review, we conclude Exhibit E consists of public information that is responsive to the request. Thus, we will address the city's arguments against the disclosure of Exhibit E, as well as the remaining submitted information.

Next, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request as it does not relate to the specified case or the named individuals at issue. The city need not release non-responsive information in response to this request, and this ruling will not address that information.

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. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. The present request, in part, seeks unspecified law enforcement records pertaining to specified individuals. This portion of the request requires the city to compile the specified individuals' criminal history. We find this request for unspecified law enforcement records implicates these individuals' right to privacy. Therefore, to the extent the city maintains law enforcement records depicting the individuals at issue as suspects, arrestees, or criminal defendants, the city must withhold such information under section 552.101 in conjunction with common-law privacy. We note that you have submitted information responsive to the request for information pertaining to the specified case. This information does not implicate privacy interests. Thus, we will address your claims for this information.

You assert that the submitted information is excepted from disclosure under section 552.103 of the Government Code, which 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 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 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 was pending or reasonably anticipated on the date the governmental body 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). A governmental body must meet both prongs of this test for information to be excepted 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). 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." *Id.* This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You assert that the city reasonably anticipated litigation pertaining to the subject of the request at the time it received the request. You inform us that, prior to the city's receipt of the instant request, the city received notice from an attorney "asserting a legal claim and potential litigation against the [city]" for an alleged incident involving the city's police department's use of a taser against an individual. You do not affirmatively represent to this office that the claim letter is in compliance with the TTCA. However, we note the claim letter, on its face, states it is in compliance with the TTCA. Upon review, we find that, based on the totality of the circumstances, you have established that litigation was reasonably anticipated when the city received the request at issue. We also find that the submitted information relates to the anticipated litigation. Thus, we conclude that the city may generally withhold the submitted information under section 552.103 of the Government Code.

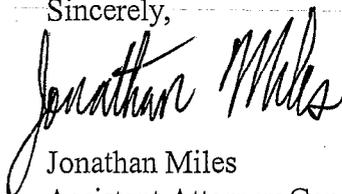
We note, however, the opposing parties appear to have already seen or had access to some of the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing parties have seen or had access to information that is related to the 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). Thus, the information the opposing parties have seen or had access to may not be withheld under section 552.103. Otherwise, the city may withhold the submitted information under section 552.103. 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).¹

In summary, to the extent the city maintains law enforcement records depicting the individuals at issue as suspects, arrestees, or criminal defendants, the city must withhold such information under section 552.101 in conjunction with common-law privacy. The city may generally withhold the submitted information under section 552.103 of the Government Code, but any information that has been previously seen by an opposing party may not be withheld under this exception and must be released to the requestor.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 336558

Enc. Submitted documents

c: Requestor
(w/o enclosures)
