



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2009

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

OR2009-06790

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# 343617 (Fort Worth Request No. 2302-09).

The City of Fort Worth (the "city") received a request for the names of city personnel who have participated in inspections of the requestors' facility, dates of inspections, and reports and related information pertaining to alleged code violations at the facility. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted information includes search warrants subject to disclosure under section 552.022 of the Government Code. Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. See Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Although you seek to withhold the search warrants under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a 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); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). Accordingly, the information subject to section 552.022(a)(17) may not be withheld on the basis of section 552.103. However, we will address your argument under section 552.103 for the remaining information that is not subject to section 552.022.

Section 552.103 of the Government Code 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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

You contend that litigation remains pending against the city in the instant case. You state, and provide documentation showing, that the city was involved in litigation with the requestors that was related to the information at issue. You further state, however, that the requestors have dismissed their lawsuit without prejudice. Therefore, we conclude that the city has not demonstrated that litigation was pending on the date the city received the instant request.

You also contend, in the alternative, that litigation is reasonably anticipated. 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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. See Open Records Decision Nos. 555 (1990); 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). You contend that, based on the requestors' actions and posture as reflected in the submitted documents, the city expects the requestors to refile their lawsuit or to file similar litigation against the city in the near future. However, you do not inform us, nor does the submitted information reflect, that the requestors have taken any objective steps towards renewing litigation with the city. Therefore, we find that the city has not demonstrated that litigation was reasonably anticipated on the date it received the instant request for information. Accordingly, the city may not withhold any of the remaining information under section 552.103 of the Government Code

We note that portions of the information at issue contain Texas motor vehicle record information subject to section 552.130 of the Government Code.¹ This section excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1), (2). Thus, the city must withhold the information we have marked that relates to a Texas motor vehicle license, title, or registration pursuant to section 552.130.²

Next, we note that portions of the information at issue are subject to section 552.137. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses that we have marked are not a type specifically excluded by section 552.137(c). Therefore, unless the city receives consent for their release, the e-mail addresses we have marked must be withheld under section 552.137.³ *See id.* § 552.137(b).

In summary, (1) the city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; and (2) the city must withhold the

¹The Office of the Attorney General will raise mandatory exceptions like sections 552.130 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²We note that because section 552.130 protects personal privacy, the requestors have a right of access to their own Texas motor vehicle record information pursuant to section 552.023 of the Government Code. *See id.* § 552.023 (person or person's authorized representative has a special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interest); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

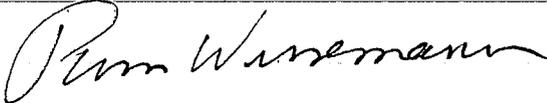
³We note that the requestors have a right to their own e-mail addresses. *See* Gov't Code § 552.023.

e-mail addresses we have marked under section 552.137 of the Government Code, unless the city receives consent for their release. The remaining information must be released.⁴

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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 343617

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code 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. The requestor, however, has a right to her own social security number. See Gov't Code § 552.023.