



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2010

Mr. Charles E. Zech
Denton, Navarro, Rocha & Bernal, P.C.
For City of Copperas Cove
2517 North Main Avenue
San Antonio, Texas 78212

OR2010-13701A

Dear Mr. Zech:

This office issued Open Records Letter No. 2010-13701 (2010) on September 9, 2010. Since that date, you have provided new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on September 9, 2010. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 404301.

The City of Copperas Cove (the "city"), which you represent, received a request for eight categories of information related to a specified investigation, including information related to a named officer. We understand you have redacted Texas license plate numbers under section 552.130 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the requested 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.

¹This office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Initially, we note some of the submitted records were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-07909 (2010). In that ruling, we determined that the city must release the submitted CR-3 accident report form under section 552.101 in conjunction with section 550.065(c) of the Transportation Code, withhold the information we marked under section 552.130 of the Government Code, and must release the remaining records. We note that information that has been previously released to the public may not be withheld from a subsequent requestor unless the governmental body is able to demonstrate that the information is confidential by law or that release is prohibited by law. *See* Gov't Code § 552.007. You now raise section 552.103 for the submitted information we previously ordered released. Section 552.103 does not prohibit the release of information or make information confidential. *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). Further, the city does not raise any additional arguments to withhold the portions of the submitted information that were previously ordered to be released. Thus, with regard to the submitted information that was previously requested and ruled on by this office, we conclude that the city must continue to withhold or release that information in accordance with Open Records Letter No. 2010-07909. To the extent the submitted information was not encompassed by this prior ruling, we will consider your argument against disclosure.

Next, we note that some of the remaining information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body.” Gov't Code § 552.022(a)(1). Thus, because the information we have marked consists of records of a completed investigation, it must be released, unless the information is excepted from disclosure under section 552.108 or is expressly confidential under other law. *Id.* Although you raise section 552.103 of the Government Code, this exception is discretionary and may be waived. *See id.* § 552.007; *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 confidential for the purposes of section 552.022. Therefore, the city may not withhold the information we have marked as subject to section 552.022 under this exception. However, because information subject to section 552.022(a)(1) may be withheld under section 552.130 of the Government Code we will consider the applicability of this exception to the information that is subject to section 552.022(a)(1), as well as the remaining information.² We will also consider the city's claim under section 552.103 with respect to the remaining information that is not subject to section 552.022(a)(1).

²The 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).

Some of the submitted video recordings, which are subject to section 552.022, contain information subject to section 552.130 of the Government Code. Section 552.130 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. Upon review, we find portions of the submitted video recordings are subject to section 552.130. You inform us the city does not have the technical capability to redact the information from these video recordings. Therefore, the city must withhold the submitted video recordings in their entirety under section 552.130 of the Government Code. The remaining information subject to section 552.022 of the Government Code must be released.

Next, we will address your argument under section 552.103 of the Government Code for the information not previously released and not subject to section 552.022 of the Government Code. 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.

...

(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.

Id. § 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To establish 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). 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. 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. Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

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 (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then 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 the city reasonably anticipates litigation involving the requestor’s client pertaining to a motor vehicle accident. You state, and provide documentation showing, that the requestor sent the city a notice of claim in accordance with the TTCA prior to the city’s receipt of the request at issue. You also assert that the submitted information directly relates to the requestor’s stated claims for property damage related to the accident. Based on your representations and our review of the information at issue, we find that the remaining information not subject to Open Records Letter 2010-07909 or section 552.022 of the Government Code is related to litigation that the city reasonably anticipated when it received the instant request for information. We therefore conclude that the city may withhold this information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the anticipated 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). 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, to the extent this office previously ruled upon the submitted records, the city must continue to rely on Open Records Letter No. 2010-07909 and withhold or release the submitted information in accordance with that ruling. The city must withhold the submitted video recordings under section 552.130 of the Government Code and release the remaining information subject to section 552.022 of the Government Code. The city may withhold the remaining information, which we have marked, 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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 404301

Enc. Submitted documents

c: Requestor
(w/o enclosures)