



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 8, 2010

Mr. John Ohnemiller  
First Assistant City Attorney  
City of Midland  
P.O. Box 1152  
Midland, Texas 79702-1152

OR2010-16877

Dear Mr. Ohnemiller:

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# 399376.

The Midland Police Department (the "department") received a request for: (1) information pertaining to certain department policies or protocols; (2) sustained complaints made against department officers during a certain time period; and (3) e-mails or text messages to or from department officers regarding a specified incident and deceased individual. You claim 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 you have not submitted information responsive to the request for e-mails or text messages to or from department officers regarding the specified incident and deceased individual. Thus, to the extent such information exists, we presume the department has released it. If not, the department must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no

exceptions apply to the requested information, it must release the information as soon as possible). Next, we note the submitted information includes several completed internal affairs investigations and reports, all of which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.” Gov’t Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed investigation is expressly public unless it is either excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects a governmental body’s interests 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 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 purposes of section 552.022. Therefore, the department may not withhold the completed internal affairs investigations or reports under section 552.103 of the Government Code. However, we note sections 552.117 and 552.130, which are “other law” for purposes of section 552.022, may be applicable to the information subject to section 552.022.<sup>1</sup> Therefore, we will address the applicability of these sections for the information subject to section 552.022, along with your argument under section 552.103 for the remaining information not subject to section 552.022.

We first address your argument under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code 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

---

<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 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 is 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. *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).

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). 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. 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).

In this instance, you state the requestor was retained to represent the family and estate of the deceased individual named in the request in pursuing their claims against the City of Midland (the "city") and department officers for excessive force and negligence. You state that, prior to receipt of the present request for information, the city received a demand letter from the requestor seeking damages and stating that he plans to file suit if the claims are not resolved. Based on your representations and our review, we conclude the department reasonably anticipated litigation on the day it received the present request. Furthermore, we find the submitted information pertains to the anticipated litigation. Accordingly, with the exception of the marked information that is subject to section 552.022, the department may generally withhold the remaining information under section 552.103 of the Government Code.

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the department may only withhold the information the opposing party to the anticipated

litigation has not seen or had access to under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends once the litigation has concluded or litigation is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address the information subject to section 552.022 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code.<sup>2</sup> *See* Gov't Code § 552.117(a)(2). Thus, the department must withhold the information we have marked under section 552.117(a)(2).

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's license, driver's license, motor vehicle title, registration, or a personal identification document issued by an agency of this state. *See id.* § 552.130(a). We have marked Texas motor vehicle record information and Texas personal identification information that must be withheld under section 552.130 of the Government Code.<sup>3</sup>

In summary, with the exception of the information that is subject to section 552.022(a)(1) of the Government Code, the department may withhold the submitted information under section 552.103 of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The department must withhold the information we have marked under section 552.130 of the Government Code. The remaining information subject to section 552.022(a)(1) of the Government Code must be released.

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](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

---

<sup>2</sup>Section 552.117(a)(2) applies to a "peace officer" as defined by article 2.12 of the Code of Criminal Procedure.

<sup>3</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers and the portion of a photograph that reveals a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/tp

Ref: ID# 399376

Enc. Submitted documents

c: Requestor  
(w/o enclosures)