



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 15, 2011

Ms. Judith N. Benton
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2011-03558

Dear Ms. Benton:

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# 411857 (Waco LGL-10-1816)

The City of Waco (the "city") received a request for seven categories of information pertaining to a specified incident involving the requestor's client, including statements regarding the incident, photographs of the requestor's client's injuries and property involved, property damage estimates, property repairs and work orders, the city's insurance policy coverage, and medical records obtained by authorization from the requestor's client. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted any information pertaining to property damage estimates, the city's insurance policy coverage, or medical records obtained by authorization from the requestor's client. Thus, to the extent such information existed and was maintained by the city on the date the city received the request for information, we presume the city has released it. If not, the city must do so at this time. *See* Gov't Code §§ 552.301, .302; 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).

We note you have submitted information that is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) 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). The submitted information contains a computer-assisted dispatch ("CAD") report and a police report with corresponding photographs, which are part of the completed police investigation that falls within the purview of section 552.022(a)(1). The city may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* Although you raise section 552.103 of the Government Code for these documents, this section is discretionary in nature and thus may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 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). As such, section 552.103 does not constitute other law that make information expressly confidential for the purposes of section 552.022 and the city may not withhold the submitted CAD report or police report under section 552.103. However, you assert portions of the CAD report are subject to section 552.101 of the Government Code, which constitutes "other law" for purposes of section 552.022, and the police report with photographs is subject to section 552.108, which is an exception to section 552.022(a)(1). Thus, we will consider your arguments under these exceptions for this information. We will also consider your arguments under section 552.103 for the remaining information not subject to section 552.022.

You claim portions of the CAD report, which you have marked, are excepted under section 772.318 of the Health and Safety Code. 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 information protected by other statutes, such as chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communications districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a 9-1-1 service supplier confidential. *Id.* at 2. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000. Health & Safety Code § 772.304.

You state the city is part of an emergency communication district established under chapter 772. You do not inform us, however, whether the information at issue was furnished by a service supplier. Accordingly, we will rule conditionally. Thus, if the 9-1-1 caller's telephone number and address you have marked were furnished by a 9-1-1 service supplier,

then this marked information must be withheld under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code. But if the marked information was not furnished by a 9-1-1 service supplier, then it may not be withheld under section 552.101 on the basis of section 772.318 and must be released.

Section 552.108(a)(2) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state that case number 10-9885 pertains to the detection, investigation, or prosecution of crime that concluded in a result other than conviction or deferred adjudication. Thus, we agree that section 552.108(a)(2) is applicable to the submitted police report and corresponding photographs for case 10-9885.

We note, however, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 186-88 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). You have highlighted the name of the victim in the report. We note basic information does not include the identity of a victim, unless the victim is also the complainant, which is not the case in this instance. *Houston Chronicle*, 521 S.W.2d at 4. Therefore, with the exception of the basic front page offense and arrest information, the city may withhold the information you have marked under section 552.108(a)(2) of the Government Code.

Next, we address your arguments for the 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (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 the pending or anticipated litigation. *See 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 from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a 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.* We note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). In Open Records Decision 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You state the city has received a notice of claim letter from the requestor, who represents an individual in a claim of negligence against the city for the incident at issue. You further state the letter complies with the notice requirements of the TTCA. Thus, we agree the city reasonably anticipated litigation when it received the present request for information. We conclude the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the city may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code.

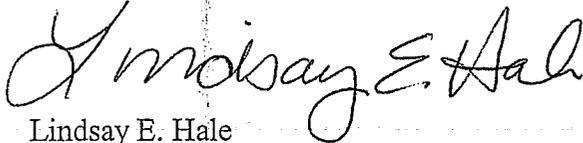
We note that once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary: (1) to the extent the 9-1-1 caller's telephone number and address you have marked in the CAD report were furnished by a 9-1-1 service supplier, the city must withhold this marked information under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code; (2) with the exception of basic information, the city may withhold the submitted police report and corresponding photographs under section 552.108(a)(2) of the Government Code; and (3) the city may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code. The city must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 411857

Enc. Submitted documents

c: Requestor
(w/o enclosures)