



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 6, 2011

Mr. B. Chase Griffith
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2011-04754

Dear Mr. Griffith:

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# 413805.

The McKinney Police Department (the "department"), which you represent, received a request for nine categories of information pertaining to a specified incident and two named officers. You claim that the requested information is excepted from disclosure under sections 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant 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). In this instance, some of the submitted information consists of a completed investigation, which is expressly public under section 552.022(a)(1). Accordingly, the completed investigation must be released under section 552.022(a)(1) of the Government Code, unless it is excepted from disclosure under section 552.108 of the

Government Code or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest 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.); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* 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 department may not withhold the completed investigation, which we have marked, under section 552.103 of the Government Code. Because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your arguments under that section for the completed investigations. Further, since section 552.130 of the Government Code is "other law" for purposes of section 552.022, we will also consider your argument under this exception for the information at issue.

Section 552.108 of the Government Code provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

....

(2) 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;

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

....

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). A governmental body claiming section 552.108(a)(2) or section 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state the case described in the requested records "has been closed and no further action has been taken." You further state "because the investigation has been closed

and the investigation did not result in a conviction or deferred adjudication” the department believes the submitted information should be withheld under section 552.108(a)(2) of the Government Code. Based on these representations, we agree section 552.108(a)(2) is generally applicable to the information pertaining to the criminal investigation.

We note, however, as a general rule, section 552.108 is not applicable to a law enforcement agency’s personnel records. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) not applicable to documents obtained by police department for purpose of evaluating applicant’s fitness for employment); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) not applicable to employment information in police officer’s file). Thus, we find that the department has not reasonably explained how the submitted personnel records relate to a concluded criminal investigation. We, therefore, determine that you have failed to establish that section 552.108 is applicable to the personnel records, and the department may not withhold any portion of the personnel records pursuant to section 552.108. *See Gov’t Code* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706; Open Records Decision No. 434 at 2-3 (1986).

Section 552.108 does not except from disclosure basic information. *Id.* § 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 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Accordingly, with the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(2) of the Government Code.¹ We address your claim under section 552.103 for the personnel records.

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.

¹As our ruling is dispositive, we need not address your remaining argument for this 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 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. *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.

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). Further, 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. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state the department anticipates a lawsuit from the requestor, who is an attorney. You assert the department reasonably anticipates this litigation because the requestor "has alleged that the [department's] acts or omissions damaged him." You also state the requestor demands a monetary settlement in his Public Information Request and threatens declaratory and/or class action lawsuits should his demands not be met. Based on your representations and our review, we agree the department reasonably anticipated litigation on the date the instant request was received. Based on your representations and our review, we find the personnel records relate to the anticipated litigation for purposes of section 552.103. Thus, the department may withhold the personnel records under section 552.103 of the Government Code.²

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. See Open Records Decision No. 349 at 2 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has

²As our ruling is dispositive, we need not address your remaining argument.

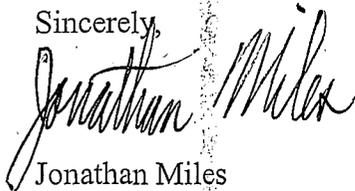
concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 at 3 (1982).

In summary, with the exception of basic information, which must be released, the department may withhold the information we have marked under section 552.108(a)(2) of the Government Code. The personnel records may be withheld 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 413805

Enc. Submitted documents

c: Requestor
(w/o enclosures)