



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2011

Mr. Norman Ray Giles
Chamberlain, Hrdlicka, White, Williams & Martin, P.C.
1200 Smith Street, Suite 1400
Houston, Texas 77002

OR2011-11176

Dear Mr. Giles:

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# 425898.

The City of Richmond (the "city"), which you represent, received a request for information pertaining to the death of a named individual. You claim the submitted information is not subject to the Act and, in the alternative, 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 representative sample of information.¹

Initially, we address your assertion the submitted information consists of grand jury records that are not subject to the Act. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and, therefore, not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the grand jury, and, therefore, are also not subject to the Act. Open Records Decision Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). We understand you to contend the submitted information consists of grand jury records because the city “reasonably anticipates that the [submitted information] will be turned over to a Fort Bend County Grand Jury for further investigation[.]” We note the fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury’s constructive possession when the same information is also held in the other person’s or entity’s own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act’s specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. The submitted information was created and obtained by the city for its own use and is held by the city in its own capacity. Thus, we find the submitted information is held in the city’s own capacity in the course of official city business, and is, therefore, subject to the Act. *See* Gov’t Code § 552.002 (providing that information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is “public information”). As such, we will address your arguments against disclosure of the submitted information.

We note the submitted information includes a city ordinance. As laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body’s public proceedings are among most open of records). Therefore, the submitted city ordinance, which we have marked, must be released.

Next, we note the remaining information also includes an audio recording of an open meeting of the city council. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the “minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body’s chief administrative officer or the officer’s designee.” Gov’t Code § 551.022. Although you raise sections 552.103 and 552.108 of the Government Code as exceptions to disclosure of this information, we note that as a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the submitted recording of the open meeting, which we have marked, must generally be released pursuant to section 551.022 of the Government Code.

The remaining documents also include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that the attorney general shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Code Crim. Proc. art. 49.18(b). The report was revised in May 2006 and now consists of four pages and an attached summary of how

the death occurred. The Office of the Attorney General has determined that the four-page report and summary must be released to the public but that any other documents submitted with the revised report are confidential under article 49.18(b). Although you claim this information is protected by sections 552.103 and 552.108 of the Government Code, as previously noted, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* ORD 623 at 3, 525 at 3. The city must release the submitted custodial death report and summary, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 143.089 of the Local Government Code. The application of chapter 143 of the Local Government Code is delineated in section 143.002 of that code, which provides:

(a) This chapter applies only to a municipality:

(1) that:

(A) has a population of 10,000 or more;

(B) has a paid fire department or police department; and

(C) has voted to adopt this chapter or the law codified by this chapter; or

(2) whose election to adopt this chapter and whose acts subsequent to that election were validated by the law enacted by House Bill 822, Acts of the 73rd Legislature, Regular Session, 1993.

Loc. Gov’t Code § 143.002(a). Thus, chapter 143 of the Local Government Code applies only to civil service municipalities that have voted to adopt the chapter. You claim the remaining information is excepted from disclosure under section 143.089(g). However, you do not inform us that the city is a civil service city as defined under chapter 143 of the Local Government Code. Because you have failed to demonstrate that the city is a civil service city, we find the city may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Next, we note that the remaining documents include a CR-3 accident report form completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 552.101 also encompasses section 550.065(b), which states that, except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *Id.* § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* The requestor has not provided the city with two of the three requisite pieces of information specified by the statute. Accordingly, the city must withhold the submitted CR-3 accident report form under section 550.065(b) of the Transportation Code in conjunction with section 552.101 of the Government Code.²

Section 552.103 of the Government Code provides in 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.

Gov't Code § 552.103(a), (c). The city 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 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 city must meet both prongs of this test for information to be excepted under 552.103(a). The question of whether litigation is

²As we are able to make this determination, we need not address the city's remaining arguments against disclosure of the submitted CR-3 accident report form.

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"). This office has also found litigation was reasonably anticipated where the opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 (1981). 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).

You state, and provide documentation reflecting, that prior to the city's receipt of the request for information, the city received a letter from an attorney containing a specific threat to sue the city on behalf of his clients. You also state, and the letter reflects, that this lawsuit would pertain to the city's potential liability in the death of the named individual while he was in the city's custody. Thus, we agree the city reasonably anticipated litigation on the date it received the instant request for information. Upon review, we also agree the remaining information, which pertains to the named individual's death in custody, relates to this anticipated lawsuit.

However, the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); *see* Open Records Decision No. 127 (1976). This office has stated basic information about a crime may not be withheld under section 552.103 of the Government Code even if it is related to the litigation. Open Records Decision No. 362 (1983). Thus, we find the basic offense information from the submitted information may not be withheld on the basis of section 552.103 of the Government Code. Therefore, with the exception of basic information, the city generally may withhold the remaining information under section 552.103 of the Government Code.³

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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

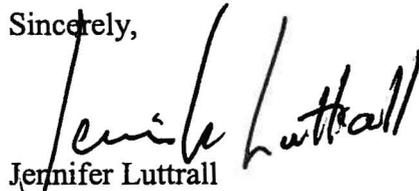
anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 at 3 (1982).

In summary, the city must release: (1) the marked city ordinance; (2) the marked recording of an open city council meeting pursuant to section 551.022 of the Government Code; and (3) the marked custodial death report and summary pursuant to article 49.18(b) of the Code of Criminal Procedure. The city must withhold the submitted CR-3 accident report form under section 550.065(b) of the Transportation Code in conjunction with section 552.101 of the Government Code. Except for basic information, the city may withhold the remaining information 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JLU/dls

Ref: ID# 425898

Enc. Submitted documents

c: Requestor
(w/o enclosures)