



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2011

Ms. Tiffany Bull
Assistant City Attorney
City of Arlington
Mail Stop 04-0200
P.O. Box 1065
Arlington, Texas 76004-1065

OR2011-12244

Dear Ms. Bull:

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# 429707 (PD Reference 4451).

The City of Arlington (the "city") received a request for specified video and audio recordings and statements pertaining to a specified accident. You claim that 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.

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 was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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)*. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *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”). In *Open Records Decision No. 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 & Remedies Code, chapter 101, or an applicable municipal ordinance. 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)*. 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)*.

You assert the city reasonably anticipates litigation relating to the subject of the present request. You state, and provide documentation showing, that prior to the date of the present request, the city received a notice of claim letter relating to the accident at issue. You state the notice is in compliance with the TTCA. Based on your representations and our review of the submitted information, we find you have demonstrated the city reasonably anticipated litigation on the date it received the instant request. Furthermore, we find the submitted information is related to the anticipated litigation for purposes of section 552.103 of the Government Code. Accordingly, the city may generally withhold the submitted information under section 552.103 of the Government Code.

We note, however, the opposing party has seen or had access to some of the information at issue, which we have marked. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information related to the litigation, there is no interest in withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, you may withhold the portions of the information at issue that the opposing party has not seen or had access to under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, the information we have marked may not be withheld under section 552.103.

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,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', with a stylized flourish at the end.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eb

Ref: ID# 429707

Enc. Submitted documents

c: Requestor
(w/o enclosures)