



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 16, 2011

Mr. Dallas Tharpe  
Assistant Criminal District Attorney  
County of Smith  
100 North Broadway, 4<sup>th</sup> Floor  
Tyler, Texas 75702

OR2011-18557

Dear Mr. Tharpe:

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# 440352.

The Smith County Sheriff's Office (the "sheriff") received a request for any in car videos and photos pertaining to an accident which occurred on a specified date and involved a named deputy. 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 the requested in car videos. To the extent such information existed and was maintained by the sheriff on the date the sheriff received the request for information, we presume the sheriff has released it. If not, the sheriff 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).

Section 552.103 of the Government Code provides 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). A 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing 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. *See id.* Concrete evidence to support a claim 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.<sup>1</sup> *See* Open Records Decision No. 555 (1990); *see also* 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). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that

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<sup>1</sup>In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You generally assert the submitted information is subject to section 552.103 and state “the claims arising out of the accident [at issue] are still pending and . . . the sheriff. . . may be subject to civil litigation arising out of this incident.” You also state that based on the fact the claims have not been settled, injuries were sustained, and civil litigation is possible, the sheriff reasonably anticipated litigation on the date the request was received. We note, however, you have not informed us, nor does the submitted information indicate, any party has taken any concrete steps toward the initiation of litigation against the sheriff. *See* Gov’t Code § 552.301(e)(1)(A); ORD 331. Further, you have failed to provide any arguments demonstrating litigation is realistically contemplated by the sheriff. Thus, we find you have not established the sheriff reasonably anticipated litigation when it received the request for information. Accordingly, the sheriff has failed to demonstrate the applicability of section 552.103 of the Government Code to the submitted information, and it may not be withheld on that basis.

We note the submitted information contains motor vehicle record information subject to section 552.130 of the Government Code.<sup>2</sup> Section 552.130 of the Government Code exempts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit or a motor vehicle title or registration issued by an agency of this state or another state or country. *See* Gov’t Code § 552.130. Upon review, we determine the sheriff must withhold the motor vehicle record information we have marked in the submitted photos under section 552.130 of the Government Code.

In summary, the sheriff must withhold the motor vehicle record information we have marked in the submitted photos under section 552.130 of the Government Code. The remaining information 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),

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/ag

Ref: ID# 440352

Enc. Submitted documents

C: Requestor  
(w/o enclosures)