



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2012

Mr. Bryan P. Fowler
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OR2012-05928

Dear Mr. Fowler:

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# 451587.

The City of Montgomery (the "city"), which you represent, received a request for (1) notes or correspondence between city officials and law enforcement officials, the video recording, and the final incident report pertaining to a specified criminal incident involving a named individual and a former officer of the city's police department; (2) notes or correspondence between city officials and law enforcement officials pertaining to the termination of the former officer; and (3) performance reviews, evaluations, or personnel notes associated with the former officer that were created during a specified time period. You state the city does not have information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the applicability of section 552.007 of the Government Code to the submitted information. Section 552.007 provides that if a governmental body voluntarily

¹We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). The submitted documents reveal portions of the submitted information, which we have marked, were released to a member of the public in response to a request for information sent to the city on December 2, 2011. Further, the documents indicate the remaining information may also have been released pursuant to the December 2, 2011, request for information. You seek to withhold the submitted information under sections 552.103 and 552.108 of the Government Code. However, pursuant to section 552.007, the city may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Sections 552.103 and 552.108 do not prohibit the release of information or make information confidential. *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 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), 663 at 5 (1999) (waiver of discretionary exceptions), 586 (1991) (governmental body may waive section 552.108). Accordingly, the city may not now withhold the information we have marked for release under section 552.103 or section 552.108. Thus, the city must release this information pursuant to section 552.007. Further, to the extent any of the remaining information was released, the city may not now withhold such information under section 552.103 or section 552.108. You claim some of the remaining information is subject to sections 552.117 and 552.130 of the Government Code, which make information confidential under the Act. We note some of the remaining information is subject to section 552.101 of the Government Code, which also makes information confidential under the Act.² Accordingly, to the extent the remaining information was previously released, we will address whether any of this information must now be withheld pursuant to sections 552.101, 552.117, and 552.130. To the extent the remaining information was not previously released, we will address your arguments against its disclosure under sections 552.103 and 552.108.

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 section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides:

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

(a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The remaining information includes an F-5 Separation of Licensee form submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. In this instance, the submitted F-5 form does not reflect the former officer to whom this form applies was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold the F-5 form we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.³

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.⁴ *See* Gov't Code § 552.117(a)(2). Upon review, we find none of the remaining information consists of a currently licensed peace officer's home addresses, home telephone number, emergency contact information, social security number, or family member information. Accordingly, none of the remaining information may be withheld under section 552.117(a)(2).

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country. *See id.* § 552.130(a)(1)-(2). Upon review, we find the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

To the extent the remaining information was not previously released, we will address your claim under section 552.103 of the Government Code. 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

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

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

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 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 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 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.⁵ *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).

You assert the city reasonably anticipated litigation pertaining to the termination of the former police officer on the date it received the instant request. You explain the former

⁵In 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).

police officer hired an attorney to represent him in regard to his termination. You state the former officer's attorney, in verbal discussions with the city, threatened to file a lawsuit against the city if his client's demands were not met. Further, you state, and provide documentation showing, that prior to the date of the request for information, the city received a settlement offer from the former officer's attorney stating his client will agree to settle his claims regarding his termination in exchange for certain actions on the part of the city. Upon review of your representations and the submitted documents, we find the city reasonably anticipated litigation when it received the instant request for information. You explain the remaining information not previously released pertains to the former officer's work conduct and forms the basis of the termination at issue. Accordingly, to the extent the remaining information was not previously released, we find the remaining information is generally subject to section 552.103.

We note, however, basic factual information about a crime must be released. Open Records Decision No. 362 (1983). Information normally found on the front page of an offense report is generally considered public, and must be released. *See 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 made public by *Houston Chronicle*). Basic information includes, but is not limited to, an identification of the complainant; the vehicles, property and premises involved; the location of the crime; a detailed description of the offense; and the names of the arresting and investigating officers. *See* ORD 127. A portion of the information at issue consists of the report of the criminal incident the requestor seeks. Thus, the city may not withhold the basic information from the incident report under section 552.103 of the Government Code.

We also note the opposing party in the anticipated litigation has seen or had access to some of the information at issue. 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, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information we have marked is not protected by section 552.103 and may not be withheld on that basis. We also 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). Accordingly, to the extent the remaining information was not previously released, then, with the exception of the basic information from the incident report and the information we have marked, the city may withhold the remaining submitted information under section 552.103 of the Government Code.⁶

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

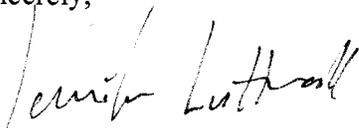
We note some of the information the opposing party has seen or accessed is excepted from disclosure under section 552.137 of the Government Code. This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure.

In summary, the city must release the information we have marked pursuant to section 552.007 of the Government Code. To the extent the remaining information is subject to section 552.007 of the Government Code, it must be released. However, in releasing this information the city must withhold the marked F-5 form under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code and the marked motor vehicle record information under section 552.130 of the Government Code. To the extent the remaining information was not previously released, then, with the exception of the basic information from the incident report and the information we have marked, the city may withhold the remaining submitted information under section 552.103 of the Government Code. The city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure. 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, 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

JL/som

Ref: ID# 451587

Enc. Submitted documents

c: Requestor
(w/o enclosures)