



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2012

Mr. Gerald A. Calderon
Assistant Criminal District Attorney
Bexar County Criminal District Attorney's Office
300 Dolarosa, Fifth Floor
San Antonio, Texas 78205

OR2012-07575

Dear Mr. Calderon:

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# 454322.

The Bexar County Sheriff's Office (the "sheriff's office") received a request for the procedure policy for a fatality accident, new or updated witness statements regarding a specified accident, and a copy of the policy regarding motorcycle or vehicle pursuit. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.

We first note the submitted information does not include witness statements pertaining to the specified accident. Thus, although you state the sheriff's office has submitted a representative sample of the requested information, we find the submitted information is not representative of all the information to which the requestor seeks access. Please be advised this open records letter ruling applies only to the types of information you have submitted for our review. This ruling does not authorize the sheriff's office to withhold any types of information that are substantially different from the types of information you submitted to

¹Although you also raise sections 552.101 and 552.108 of the Government Code, you have not submitted arguments in support of those exceptions; therefore, we assume you have withdrawn them. See Gov't Code §§ 552.301, .302.

this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). We therefore presume the sheriff's office has released any witness statements pertaining to the specified accident, to the extent such information existed when the sheriff's office received this request for information. If not, then the sheriff's office must release any such information immediately.² *See id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Section 552.103 of the Government Code provides in pertinent 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). 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. *See 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). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986).

litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* We note that 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. *See* Open Records Decision No. 361 (1983). In Open Records Decision 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 and Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You inform us, and provide documentation showing, that prior to the date the sheriff's office received the instant request for information, Bexar County received a notice of claim for personal injuries and wrongful death arising from the specified accident. You do not affirmatively represent to this office that the notice of claim complies with the TTCA or an applicable ordinance; therefore, we will only consider the claim as a factor in determining whether the sheriff's office reasonably anticipated litigation over the incident in question. Nevertheless, based on your representations, our review of the submitted information, and the totality of the circumstances, we determine the sheriff's office has established it reasonably anticipated litigation on the date it received the request for information. We also find the submitted information is related to the anticipated litigation for purposes of section 552.103. Accordingly, the sheriff's office may withhold the submitted information under section 552.103 of the Government Code.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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 cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned above the printed name.

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 454322

Enc. Submitted documents

c: Requestor
(w/o enclosures)