



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2012

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2012-08410

Dear Mr. Weir:

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# 455424 (COSA File Nos. W006313 and W006424).

The City of San Antonio and the San Antonio Police Department (collectively, the “city”) received two requests for information. The first requestor seeks thirty-one categories of information pertaining to a specified incident at a golf course, information pertaining to the golf course and adjacent shooting range, safety or emergency procedures or manuals, insurance policies, records pertaining to the city’s knowledge of issues with the shooting range, information pertaining to incidents involving firearm discharges at the shooting range, and a specified management agreement. The second requestor seeks six categories of information pertaining to the specified incident, records of other shooting incidents at the golf course, and all shooting incidents at the adjacent shooting range. You state the city does not possess information responsive to eighteen categories of information of the first request and two categories of the second request.¹ You also state the city has released information responsive to three categories of the first request to the first requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information not held by or on behalf of the governmental body that received the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

the Government Code. We have considered the exceptions you claim and reviewed the submitted information, part of which you state is a representative sample.²

Initially, we note Exhibit VIII, submitted in response to the first request, and Exhibit IV, submitted in response to the second request, consist of completed reports subject to section 552.022(a)(1) of the Government Code. Additionally, Exhibit III, submitted in response to the both requests and Exhibit IV, submitted in response to the first request, constitute a completed investigation. Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or confidential under the Act or other law. Gov't Code § 552.022(a)(1). You raise section 552.108 for both submissions of Exhibit III and Exhibit IV, submitted in response to the first request; therefore, we address your claim for this information. However, you raise section 552.103 of the Government Code for the remaining information subject to section 552.022, which is a discretionary exception that protects a governmental body's interest and may be waived. *See id.* § 552.007; *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential under the Act. Therefore, the city may not withhold any of Exhibit VIII, submitted in response to the first request, or Exhibit IV, submitted in response to the second request, under section 552.103. As you raise no other exceptions against the release of this information, it must be released.

Next, we address your claim under section 552.103 of the Government Code for Exhibits V, VI, and VII, submitted in response to the first request. 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

²We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (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 “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). 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”). 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. 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You assert the city reasonably anticipates litigation pertaining to the information at issue because, simultaneously with the submission of the first request for information, the first requestor, an attorney, submitted a letter alleging negligence on the part of the city. You state the letter, which you have submitted for our review, is from an attorney representing an individual who was shot in the golf course specified in the request. You explain, and our review of the letter shows, the letter alleges the city breached its duty by failing to prevent and warn of possible danger to patrons of the golf course. Furthermore, you state the letter instructs the city to preserve specified evidence related to the incident under a threat of sanctions by a court if the evidence is not properly preserved. Based on your representations and our review, we conclude the city reasonably anticipated litigation when it received the first request for information. Moreover, we agree the information at issue is related to the anticipated litigation. Accordingly, the city may withhold Exhibits V, VI, and VII submitted in response to the first request under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your claim under section 552.108 of the Government Code for the remaining information at issue. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A). You state Exhibit III, submitted in response to both requests, and Exhibit IV, submitted in response to the first request, relate to a closed investigation that did not result in conviction or deferred adjudication. Accordingly, we find section 552.108(a)(2) is applicable to this information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *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). *See* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Accordingly, with the exception of basic information, the city may withhold the remaining information at issue pursuant to section 552.108(a)(2) of the Government Code.

In summary, the city must release Exhibit VIII, submitted in response to the first request and Exhibit IV, submitted in response to the second request, pursuant to section 552.022(a)(1) of the Government Code. The city may withhold Exhibits V, VI, and VII in response to the first request under section 552.103 of the Government Code. Except for basic information, the city may withhold Exhibit III, submitted in response to both requests, and Exhibit IV submitted in response to the first request, under section 552.108(a)(2) 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,

A handwritten signature in black ink, appearing to read 'Ana Carolina Vieira', written over a light blue horizontal line.

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/bhf

Ref: ID# 455424

Enc. Submitted documents

c: Requestor
(w/o enclosures)