



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2012

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2012-12218

Dear Ms. Cost:

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# 461259 (ORR# 12-1590).

The Texas Department of Public Safety (the "department") received a request for video and audio recordings from each patrol car involved in a specified traffic stop. 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. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor contends the department failed to comply with the requirements of the Act in requesting this decision. The requestor states he verbally requested the information at issue on an unspecified date prior to the date he submitted his written request for the information. Section 552.301 states, in relevant part,

(a) A governmental body that receives a *written request* for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if

there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

See id. § 552.301(a), (b) (emphasis added). The duty to request a decision from this office as to whether information may properly be withheld under the Act does not arise until the governmental body receives a written request for the information. *See id.* Consequently, the requestor's verbal request for the information at issue did not trigger the requirements of section 552.301 of the Government Code. The department states, and submits documentation showing, it received the requestor's written request on May 16, 2012. We also note the requestor acknowledges he first submitted a written request for the information at issue on May 16, 2012. The department informs us it was closed on May 28, 2012. Thus, the department's ten business-day deadline to request a ruling was May 31, 2012. The department requested a ruling from this office by hand delivery on May 31, 2012. Therefore, we consider the department to have timely submitted its request for this decision. Therefore, we conclude the department complied with the requirements of section 552.301 of the Government Code.

Next, the requestor states the requested information has been previously released to him and may not now be withheld under section 552.103 of the Government Code. Section 552.007 provides if a governmental body voluntarily 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. *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). *But see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108). In this instance, the requestor informs us prior to submitting his written request for the information, "the [department] pulled the video tapes and reviewed them with [him] on the telephone pursuant to [his] personnel complaint[.]" The department has informed this office that, although the department did discuss the information at issue with the requestor on the telephone, and verbally reviewed its contents, the requestor has not had access to the information itself. Section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. Therefore, because the department informs us it has not previously released the information, we find section 552.007 is inapplicable to the submitted

information, and we will consider the department's argument under section 552.103 of the Government Code against its disclosure.

Section 552.103 of the Government Code 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 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 section 552.103(a) 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. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

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." *See* Open Records Decision No. 452 at 4 (1986). 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is

in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code. On the other hand, this office has determined 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, prior to the date the department received the instant request for information, the requestor filed a claim against the department for personal injuries and property damage allegedly sustained by the requestor during the specified traffic stop and made a demand for payment. You do not affirmatively represent to this office the requestor's claim complies with the TTCA; therefore, we will only consider the claim as a factor in determining whether the department reasonably anticipated litigation over the incident in question. You further state the requestor has e-mailed the Office of the Attorney General's Tort Litigation Division (the "division") notifying the division he intends to file suit in the United States District Court for the Eastern District of New York. Thus, you state litigation is reasonably anticipated in this case. We note in his e-mails to the division, the requestor informs the division he "intend[s] to sue for abuse of process;" he "also intend[s] to sue for invasion of privacy; and he "intend[s] to sue for infliction of emotional distress," and the requestor provides legal grounds for each of these various bases for filing suit. The requestor also states he "hope[s] that we can settle this matter out of court." Based on your representations, the submitted documentation, our review, and the totality of the circumstances, we determine the department has established it reasonably anticipated litigation on the date it received the request for information. Upon review, we also find the information at issue pertains to the substance of the claims. Accordingly, the department may withhold the submitted information under section 552.103 of the Government Code.

Generally, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending or 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 or is no longer 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 black ink that reads "Claire Morris Sloan". The signature is written in a cursive style with a large, stylized initial "C".

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 461259

Enc. Submitted documents

c: Requestor
(w/o enclosures)