



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2013

Ms. Rebecca Hendricks Brewer
Counsel for the City of Frisco Police Department
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2013-06539

Dear Ms. Brewer:

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# 484748 (Frisco PIR2013-0042).

The Frisco Police Department (the "department"), which you represent, received two requests from the same requestor for information pertaining to individuals notified regarding a specified incident involving a downed lashing wire and a different specified lashing wire. 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, you contend some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-03588 (2013) to the City of Frisco (the "city"). Although you seek to withhold information pursuant to this prior ruling, we note the previous request was submitted to the city and not the department. Thus, the department may not rely on our previous ruling to the city as a previous determination for the information at issue. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not

excepted from disclosure). Accordingly, we will consider your argument against disclosure of the submitted information.

Next, we note some of the submitted information is not responsive to the present requests for information. This ruling does not address the public availability of any information that is not responsive to the present requests, and the department need not release this information, which we have marked, in response to these requests.

We note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). The submitted "Post-Run/Call Report," which we have marked, is a completed report subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information subject to section 552.022 under section 552.103. However, we note a portion of this report may be subject to section 552.130 of the Government Code, which does make information confidential under the Act.¹ As such, we will address the applicability of this exception to the information that is subject to section 552.022. Additionally, we will address your arguments under section 552.103 for the remaining responsive information that is not subject to section 552.022.

You claim the information at issue is protected under section 552.103 of the Government Code. Section 552.103 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.

¹The 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).

...

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

To demonstrate that litigation is reasonably anticipated, the 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)*. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *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 No. 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 state the information at issue pertains to litigation reasonably anticipated by the city. You state, and provide supporting documentation from a representative of the city stating, prior to the department’s receipt of the present requests for information the city was contacted by an attorney representing an individual injured in the incident specified in the present requests. The city states the attorney notified the city the individual would “be seeking financial support to cover her medical bills and so forth” for her injuries sustained in the incident. You further state, and provide documentation showing, prior to the dates of the present requests for information, the city received a notice of claim against the city in

which the individual claimed personal and bodily injury in connection with the specified incident. Neither you nor the city affirmatively represent to this office the claim letter complies with the TTCA or an applicable ordinance; therefore, we will only consider the claim letter as a factor in determining whether the city reasonably anticipated litigation over the incident in question. Nevertheless, based on these representations, our review of the submitted information, and the totality of the circumstances, we determine the city has established it reasonably anticipated litigation prior to the dates the department received the present requests for information. However, the department, which received the present requests for information, is not a party to this anticipated litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body whose litigation interests are at stake that it seeks to withhold the information from disclosure under section 552.103, as well as a demonstration of how that exception applies to the requested information. The supporting documentation from the city representative states the city wishes to withhold the information at issue and the information at issue is directly related to the anticipated litigation for purposes of section 552.103. Accordingly, we conclude the department may withhold the responsive information that is not subject to section 552.022 under section 552.103 of the Government Code on behalf of the city.

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). 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).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a). It appears portions of the remaining responsive information may be motor vehicle record information. Thus, if the information we have marked is motor vehicle record information, the department must withhold this information under section 552.130 of the Government Code. If the information we have marked is not motor vehicle record information, the department must release this information.

In summary, the department may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code on behalf of the city. If the information we have marked is motor vehicle record information, the department must withhold this information under section 552.130 of the Government Code. The department must release the remaining responsive information.

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 "Lindsay E. Hale". The signature is written in a cursive style with a large, looped initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 484748

Enc. Submitted documents

c: Requestor
(w/o enclosures)