



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 12, 1996

Ms. Y. Qiyamah Taylor
Assistant City Attorney
City of Houston
Post Office Box 1562
Houston, Texas 77251-1562

OR96-0929

Dear Ms. Taylor:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 40249.

The City of Houston (the "city") received an open records request for information related to an automobile collision, which you claim is the subject of a civil lawsuit. The city received a request for the following information:

[O]ne certified copy of the YEAR TO DATE VEHICLE ACCIDENT DETAIL LIST BY STREET for December, 1994 and one certified copy of OFFENSE REPORT NUMBER 6053097, WHICH OCCURRED ON THE EAST SIDE OF W. ALABAMA ON JANUARY 27, 1986.

You have submitted a copy of the requestor's letter, a copy of the Plaintiff's Original Petition and a representative sample of the available requested records for our review and contend that section 552.103 of the Government Code exempts them from required public disclosure. Additionally, you have submitted an affidavit from an assistant city attorney in the defense litigation division which attests that the documents sought "are directly related to the subject matter of the litigation against the City."

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). You assert that all of the information submitted is excepted from required public disclosure under section 552.103 of the Government Code based on a lawsuit styled *Clarence Claiborne and Marzanne Claiborne v. City of Houston and Dannenbaum Engineering Corp.* Civil Action 95-23682, in the 165th Judicial District Court of Harris County, Texas. The lawsuit alleges violations of the Texas Traffic Safety Act, among other claims.

Section 552.103(a) excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and,
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation.¹ Attorney General Opinion JM-1048 (1989) at 4. The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 (1990) at 3. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5, 511 (1988) at 3.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation "to which the state or a political subdivision is or may be a party." The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated, and that (2) the information at issue is related to that litigation.

¹The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. See Attorney General Opinion JM-1048 (1989) at 3 ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"); Open Records Decision No. 551 (1990) at 3-4 (discussion of relation of Open Records Act to discovery process).

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 (1990) at 4. The city must meet both prongs of this test for the information to be excepted under section 552.103(a). You have submitted a copy of the "Original Petition" for our review. Accordingly, you have satisfied the first prong by demonstrating that the city is a party to the pending litigation.

In order to secure the protection of the "litigation exception," the second prong of section 552.103(a) requires that a governmental body demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision Nos. 588 (1991), 551 (1990). You assert that section 552.103 applies, because the information sought by the requestor relates to the litigation in which the city is a party, as evidenced by the petition.

We have examined the information and documents submitted to us for review. In this instance you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103(a); therefore, the requested records may be withheld.

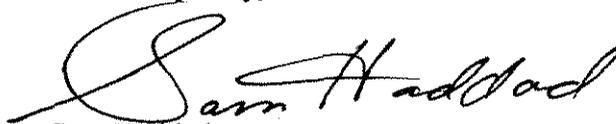
In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Finally, the applicability of section 552.103(a) generally ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Regarding the remaining portions of the open records request, you state that the "City advised the requestor that there are no responsive documents to her request for Offense report 6053097." Since the act only applies to information in existence and does not require a governmental body to prepare new information, and based on your representation that the department has no responsive documents with regard to this request, we conclude that the department need not respond to this aspect of the request. See Open Records Decision No. 605 (1992); Open Records Decision No. 445 (1986) (Open Records Act does not require governmental body to obtain information not in its possession or to prepare new information in response to open records request).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records.² If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/cbh

Ref.: ID# 40249

Enclosures: Submitted documents

cc: Ms. Karri J. Webb
Giessel, Barker & Lyman
2700 Two Houston Center
909 Fannin Street
Houston, Texas 77010-1063
(w/o enclosures)

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.