



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 22, 1997

Mr. Ron M. Pigott
Assistant General Counsel
Texas Department of Public Safety
P. O. Box 4087
Austin, Texas 78773-0001

OR97-0109

Dear Mr. Pigott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103073.

The Texas Department of Public Safety (the "department") received an open records request for information "regarding an incident that occurred in Cuney, Texas on December 15, 1995, in which an individual has alleged excessive force used against him in his arrest." You submitted to this office for review the requested records and assert that the information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

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 department 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. *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 department must meet both prongs of this test for the information to be excepted under section 552.103(a).

You assert that all of the information submitted is excepted from required public disclosure under section 552.103, based on anticipated litigation related to the alleged use of excessive force. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming. *Id.*; see also Open Records Decision Nos. 555 (1990), 346 (1982).

The department has submitted a copy of a notice letter, that states it is "in compliance with the Texas Tort Claims Act," regarding the incident which is the subject of the request for information. The notice of claim letter further advises the department that an attorney has been retained, who will "seek full redress in behalf of [a certain named individual] in the event that this case is not amicably resolved." Additionally, you assert that the "requested information relates to potential litigation which may be filed against the [department] . . . and must therefore, be exempt from disclosure." In this instance, based on this evidence and review of the submitted documents, our office concludes that the department has established that litigation is reasonably anticipated and that the requested information relates to the anticipated litigation.¹ Therefore, you may withhold the requested information under section 552.103.

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.² Open Records Decision Nos. 349 (1982), 320 (1982). We also note that within the documents submitted to this office for review are records filed with the court. Although it is unclear whether the department contends that these records are excepted from disclosure under section 552.103, we believe that the department may not withhold those documents that are part of the public court record. Finally, the applicability of section 552.103(a) ends once the litigation has been concluded.³ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

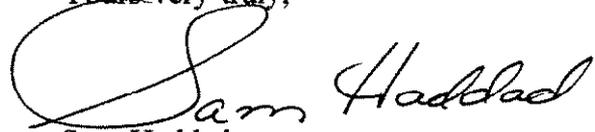
¹The department did not make an affirmative representation that the notice of claim letter complies with the requirements of the TTCA, and thus has not met one of the tests set forth in Open Records Decision No. 638 (1996) to determine that litigation is reasonably anticipated. Nonetheless, this office finds that based on the specific facts in this situation, the department has provided sufficient evidence to establish that litigation is reasonably anticipated under section 552.103 of the Government Code. We note that if in the future you wish to assert that section 552.103(a) is applicable on the basis of the department's receipt of a notice of claim letter, you should affirmatively represent to this office that the letter complies with the requirements of the TTCA.

²In particular, we note that front page offense report information that has been seen may not be withheld from disclosure under section 552.103. See Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation). We also note that within the documents submitted to this office for review are documents which appear to have originated from the requestor.

³However, some of the information is confidential and should continue to be withheld once the litigation has concluded. Open Records Decision Nos. 490 (1988), 463 (1987); see Gov't Code § 552.352 (the distribution of confidential information is a criminal offense). Specifically, any CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is deemed confidential by federal and state law. See 28 C.F.R. § 20.1; Open Records Decision No. 565 (1990) at 10-12.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁴ This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/cbh

Ref.: ID# 103073

Enclosures: Submitted documents

cc: Mr. Chuck McCool, AIC
Supervising Adjuster
GAB Robins North America
1820 Shiloh Road, Suite 1303
Tyler, Texas 75703
(w/o enclosures)

⁴Because we resolve this matter pursuant to section 552.103 of the Government Code, we need not address your stated exception under section 552.108.