



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 17, 1997

Chief John A. Walton
Chief of Police
Nacogdoches Police Department
P.O. Drawer 630648
Nacogdoches, Texas 75963-0648

OR97-2071

Dear Chief Walton:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108645.

The Nacogdoches Police Department (the "department") received a request for the following information:

- 1) Any correspondence from the office of Curtis Stuckey regarding the June 12 incident at the Fredonia Hotel involving the alleged assault of Steffan Hardeman;
- 2) Records of any complaints or disciplinary action taken against Officer Scott Kelly; and,
- 3) Any information subject to the open records act pertaining to the incident at the Fredonia and subsequent investigation.

In response to the request, you submitted to this office for review the information you assert is responsive. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You further contend that the information requested by Item 3 of the request "is in fact an overly broad request in that it does not ask for specific information." We have considered the exception and arguments you have raised and reviewed the submitted information.

Initially, we address your contention that the department is not required to respond to an overly broad request. We note that when a governmental body is presented with a broad request for information rather than for specific records, it should advise the requestor of the types of information available so that he may narrow or clarify his request. Open Records Decision Nos. 563 (1990), 561 (1990). Furthermore, a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision Nos. 561 (1990), 555 (1990), 379 (1983), 347 (1982).¹

Section 552.103(a), known as the litigation exception, 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

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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.

To establish that 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 (1986) at 4. 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.² Open Records Decision

¹We note that Chapter 552 of the Government Code does not apply to information that does not exist. *See* Open Records Decision No. 555 (1990). Nor does chapter 552 require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio, 1978, writ dismiss'd); *see also* Open Records Decision No. 87 (1975).

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who

No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (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. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

In this instance, you contend that the litigation exception applies to the responsive information. You have supplied to this office a letter from an attorney, representing the alleged victim of the assault, who requests a “prompt public pronouncement condemning this outrageous incident,” and seeks “to amicably resolve this case before filing suit.” We agree with your assertion that the requested information relates to anticipated litigation, and that the submitted information relates to such litigation. Therefore, we conclude that the requested records may be withheld pursuant to section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue. Because 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). Therefore, any information responsive to item 1 of the request, for “[a]ny correspondence from the office of Curtis Stuckey,” the alleged victim’s attorney, may not be withheld pursuant to section 552.103. Specifically, we also note that front page incident report information may not be withheld from disclosure under section 552.103.³ *See* Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in incident report); *see also Houston Chronicle Publ’g 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); Open Records Decision No. 127 (1976) (information normally found on front page of offense report is generally considered public). Finally, 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). However, you may not release information made confidential by section 552.101 or other law, even after the litigation has concluded.

made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

³We note, however, that section 552.117(2) excepts from disclosure peace officers’ home addresses and telephone numbers, social security numbers, and any information that reveals whether the officer has family members.

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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref: ID# 108645

Enclosures: Submitted documents

cc: Mr. Curtis Howell
The Dallas Morning News
Communications Center
P.O. Box 655237
Dallas, Texas 75266
(w/o enclosures)