



December 8, 2000

Ms. Jan Clark
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2000-4628

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141975.

The City of Houston (the “city”) received a written request for documents pertaining to an incident where a named individual was shot and killed by a city police officer. Specifically, the requestor seeks “any investigation in your possession, including reports from the Department’s Homicide and Internal Affairs Divisions, the Harris County District Attorney’s Office Civil Rights Section, and any witness statements.” You inform us that the city does not possess any records for any section of the Harris County District Attorney’s Office. You have submitted to this office as responsive to the request an investigation by the city’s Homicide Division, an internal affairs investigation, a videotape of the scene of the shooting, an audio tape of the police dispatch, and photographs from the crime scene and autopsy. You contend that these documents are excepted from disclosure pursuant to, among other exceptions, section 552.103 of the Government Code.¹

A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body

¹Because we resolve your request under section 552.103 of the Government Code, we need not address the applicability of the other exceptions you raise except to note that some of the information at issue may be deemed confidential by law for purposes of section 552.101 of the Government Code.

is pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas 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.

You contend that the requested information relates to reasonably anticipated civil litigation against the city. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). 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." *Id.* 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").

In this instance, the requestor is an attorney representing a family member of the decedent. In his written request for the documents at issue, the requestor states as follows:

Our client is amenable to a negotiated settlement if possible. However, if this fails, we will have no recourse than to bring a Wrongful Death Action against the City of Houston

Given this threat of litigation from an attorney and the totality of the circumstances, we conclude that you have established that litigation against the city regarding the fatal shooting was reasonably anticipated at the time the city received the request for information. Furthermore, after reviewing the records at issue, we conclude that the requested information "relates" to the anticipated litigation for purposes of section 552.103. Based on your representations that neither the criminal investigation nor the internal affairs investigation has been completed, we conclude that the city may withhold most of the requested information pursuant to section 552.103 of the Government Code. *But see* Gov't Code § 552.022(a)(1) (completed investigations must be released to public unless subject to section 552.108). The city must release, however, all "basic information" about the shooting incident to the requestor. *See* Open Records Decision No. 597 (1991) ("front page information" not protected from public disclosure under section 552.103).

In reaching this conclusion, we assume that the opposing party to the anticipated litigation has not previously had access to any of the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing party in the anticipated litigation has 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. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

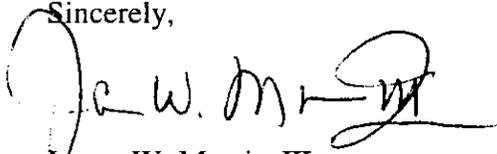
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/seg

Ref: ID# 141975

Encl. Submitted documents, audio and video tapes

cc: Ms. Sebastine Uzoma
Emmanuel & Associates
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Houston, Texas 77036
(w/o enclosures)