



June 24, 2002

Mr. Jerry Bruce Cain
Assistant City Attorney
City of Laredo
P.O. Box 579
Laredo, Texas 78042-0579

OR2002-3431

Dear Mr. Cain:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164718.

The Laredo Municipal Housing Corporation (the "LMHC"), an agency of the City of Laredo (the "city"), received a request for records concerning a specified residence owned by the LMHC, including lease agreements, repair work orders, and insurance policies covering the property. The requestor also seeks any and all documents pertaining to a fire at the property occurring January 13, 2002, including correspondence between the LMHC, the city, and insurers, as well as documents, reports, or investigations from the Laredo Fire Department. You have not submitted any information responsive to the request for lease agreements or insurance policies covering the property. Therefore, we assume that, to the extent this information exists, it has been released to the requestor. If not, you must release it immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that the remaining requested 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.

We begin by noting that some of the submitted documents include information that is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). The submitted documents include a completed fire department investigative report and incident report. We note that the fire investigative report indicates that photographs were taken by the investigator. Thus, we consider the referenced photographs to be part of the completed investigative report. As prescribed by section 552.022, the LMHC must release such information unless it is excepted from disclosure under section 552.108 of the Government Code or confidential under other law. You do not contend that the reports are excepted from disclosure under section 552.108. Although you assert that this information is excepted from disclosure pursuant to section 552.103 of the Government Code, section 552.103 is a discretionary exception that protects the governmental body's interests and is not "other law" for the purpose of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); 552 (1989) (discretionary exceptions in general). Accordingly, the submitted fire investigative report and incident report may not be withheld under section 552.103.

We next address your claim under section 552.103 for the remaining submitted information. Section 552.103 provides as follows:

(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.

....

(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.

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

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 at 4 (1986). 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.¹ 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 the tenants of the specified residence whose property was damaged in the fire. You have provided a letter from a claims adjuster notifying the tenants that the city's insurer has denied their claim for damages to their property. You have also provided the requestor's notice of a claim against the city for the loss of property in the fire in which the requestor contends that the city bears legal responsibility for the fire, indicates that the tenants "intend to seek legal redress for the damages they have incurred," and makes a demand for payment. The residential property at issue is owned by the LMHC as an agency of the city. Accordingly, as the city agency with authority over the residential property that is the subject matter of the claim, the LMHC may be a party to the requestor's claim against the city. Upon review of the submitted information, we determine that you have established that litigation is reasonably anticipated. Furthermore, we find you have established that the requested information is related to the anticipated litigation, and that the LMHC is a potential party to the anticipated litigation.

We note, however, that the requestor and his clients have already had access to some of the submitted information. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information to which the requestor has had access may not be withheld under section 552.103. We further note that the work order documents you have submitted for our review contain additional requests for information regarding the residence at issue, including a request dated March 27, 2002, seeking copies of work orders called in since March 2001 for refrigerator repairs or other electrical repairs. It does not appear that you requested a ruling from this office with respect to this request. *See* Gov't Code § 552.301. Accordingly, we must assume that you have released information responsive to this request to the requestor. If not, we determine that the work orders responsive to the March 27, 2002 request cannot be withheld under section 552.103 pursuant to your present request for a ruling and must be released to

¹In 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 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).

the requestor immediately. *See* Open Records Decision No. 664 (2000). We determine that the remaining submitted information may be withheld under section 552.103 of the Government Code. We note, however, that 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).

In summary, the LMHC must release the fire department's completed incident report and investigative report with the attached photographs. Any documents to which the requestor and his clients have had access must be released to the requestor. Work orders responsive to the March 27, 2002 request must be released to the requestor. The remaining submitted information may be withheld pursuant to section 552.103 of the Government Code.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 "Dr. R. Saldivar", with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 164718

Enc: Submitted documents

c: Mr. Derly U. Uribe
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(w/o enclosures)