



October 3, 2002

Mr. Brendan Hall
City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551

OR2002-5591

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170146.

The City of Harlingen (the "city") received a request for "copies of any and all correspondence between itself or its employees, agents, or attorneys and it's [sic] insurer(s) related to the claims made by the individuals who made claims due to the death of two border patrol agents." The requestor clarified this request by stating that he is "only seeking correspondence which relates to the [city] making demand on the insurer to pay the policy limits, otherwise known as a 'Stowers' letter" and "all correspondence from the insurance carrier in response for such demand." You claim that the requested information is not public information subject to the Public Information Act (the "Act") or, in the alternative, that the information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, Rule 192.5 of the Texas Rules of Civil Procedure, Rule 26(b)(3) of the Federal Rules of Civil Procedure, Rule 503 of the Texas Rules of Evidence, Rule 501 of the Federal Rules of Evidence, Rule 1.05(b) of the Texas Disciplinary Rules of Professional Conduct, and Southern District of Texas Local Rule 16.5.1. We have considered your arguments and reviewed the submitted information.

Initially, we note that in part, the requestor specifically seeks correspondence from the city's insurance carrier to the city in response to any demand made for the payment of the policy limits. You have not submitted any such information for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See Gov't Code §§ 552.301(a), .302.*

You state that the city does not have correspondence fitting the exact description provided by the requestor. You have, however, submitted a copy of correspondence sent by the city to its insurance carrier that you indicate "might" be responsive to the present request. Thus, as you have submitted this piece of correspondence for our review, we will address the applicability of your claimed exceptions to the submitted document.

However, we first address whether the submitted information is considered public information. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Further, the holding in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), makes clear that almost all information in the physical possession of a governmental body is "public information" subject to the Act. The submitted document is in the city's possession, and you have not explained your contention that it does not constitute public information. Therefore, we conclude that the document is public information pursuant to section 552.002, and is subject to disclosure under the Act.

You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code 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.

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. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives 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). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You state that a shooting incident took place on July 7, 1998, resulting in the deaths of two border patrol agents. You inform this office that the families of the deceased border patrol agents sued the city in Civil Action No. B-98-162. You state that on June 28, 2002, and July 11, 2002, the federal district court entered a judgment against the city and in favor of the plaintiffs. You state, however, that the city has filed a motion for new trial and that the city intends to file an appeal. Based on your arguments and our review of the submitted information, we conclude that you have shown that litigation was pending on the date the city received the present request for information and that the requested information relates to the anticipated litigation. Therefore, the city may withhold the submitted information under section 552.103 of the Government Code.¹

Generally, however, 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). Further, 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).

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

¹As we are able to make this determination, we need not address your remaining arguments against disclosure.

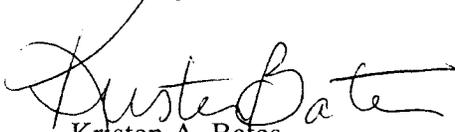
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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,


Kristen A. Bates
Assistant Attorney General
Open Records Division

KAB/KAE/sdk

Ref: ID# 170146

Enc: Submitted documents

c: Mr. Ruben R. Pena
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(w/o enclosures)