



October 4, 2002

Mr. Knox W. Askins
City Attorney
City of La Porte
P.O. Box 1218
La Porte, Texas 77572-1218

OR2002-5599

Dear Mr. Askins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170230.

The City of La Porte (the "city") received a request for fourteen categories of information related to the death of a named individual. You state that the city holds no information responsive to items 7 and 9 of the request. 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, some of which consists of representative samples.¹

Initially, we note that a portion of the request is for "tangible evidence." This office has ruled that tangible physical items are not the type of information contemplated under the Public Information Act. *See, e.g.,* Open Records Decision No. 581 (1990). Thus, the tangible physical evidence collected as part of an autopsy is not public information as that term is defined in section 552.002 of the Government Code. We, therefore, determine that

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the tangible physical evidence is not information made public by section 552.021 of the Government Code.

We next note that a portion of the submitted materials includes information subject to section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads

(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;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency[.]

Gov't Code § 552.022(a)(1), (13). The submitted materials include a completed report and city policies. The report is subject to required release under section 552.022(a)(1), while the policies fall within the scope of subsection (13) of section 552.022(a). The submitted information which is within the ambit of section 552.022 is therefore subject to required public disclosure, except to the extent that any of this information is expressly confidential under other law.²

You contend that the completed report and policies are excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes 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); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Accordingly, we do not address your section 552.103 claim with respect to the information subject to the purview of section 552.022(a)(1).

²We note that you have not raised section 552.108 for the completed report. *See* Gov't Code § 552.022(a)(1).

We next address your section 552.103 claim 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.

Gov't Code § 552.103(a), (c). The 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 is pending or reasonably anticipated on the date that 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). The governmental body must meet both prongs of this test for information to be excepted under section 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.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit

³In 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).

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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *Open Records Decision No. 361 (1983)*. Based upon our careful review of your arguments and the submitted information, we find that you have failed to establish that litigation is reasonably anticipated. Thus, we find that 552.103 is inapplicable to the remainder of the submitted information. We therefore conclude that none of the submitted information may be withheld from public disclosure under section 552.103.

However, we note that section 552.117 of the Government Code may be applicable to some of the submitted information. Section 552.117(2) of the Government Code requires the city to withhold all information that relates to the home address, home telephone number, social security number, and family information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. *Open Records Decision No. 488 (1988)*; *see also* *Open Records Decision No. 506 (1988)*. Accordingly, the city must withhold from public disclosure the police officers' home addresses and home telephone numbers pursuant to section 552.117(2).

Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* *Open Records Decision No. 530 at 5 (1989)*. Therefore, the city may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers under section 552.117(1) of the Government Code.

We also note that the submitted information contains individuals' Texas driver's license numbers. Section 552.130(a)(1) of the Government Code requires the department to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Pursuant to section 552.130(a)(1), the city must withhold from public disclosure the Texas driver's license numbers that we have marked.

The submitted records also include an individual's social security number. A social security number or "related record" may be excepted from disclosure in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act,

42 U.S.C. § 405(c)(2)(C)(viii)(I).⁴ See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the city must withhold from public disclosure (1) home addresses and home telephone numbers of "peace officers" pursuant to section 552.117(2); (2) home addresses and telephone numbers for those employees who timely elected to keep their personal information confidential under section 552.117(1); (3) the marked Texas driver's license numbers under section 552.130; and (4) social security number information that is confidential under federal law. The remaining submitted information must be released to the requestor.

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;

⁴Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 170230

Enc. Submitted documents

c: Mr. Jeffery Mundy
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(w/o enclosures)