



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 14, 2003

Ms. J. Middlebrooks
Assistant City Attorney
Dallas Police Department
1400 South Lamar Street, #300A
Dallas, Texas 75215-1801

OR2003-2494

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179340.

The Dallas Police Department (the "department") received a request for: (1) all reports and affidavits related to the shooting of two named individuals; (2) a list of all officer involved shootings and deaths in 2001 and 2002 and any departmental analysis of officer involved shootings; and (3) a list of all police officers fired and later reinstated from 1998 to 2003. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the representative sample of information submitted.

Initially, we note that you did not submit any departmental analyses of officer involved shootings other than the specific shootings mentioned in the request, or a list of all police officers fired and later reinstated from 1998 to 2003. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. We therefore assume that you have released this information, to the extent that such information existed on the date of the department's receipt of the request. If not, then the department must release any such information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). Chapter 552 of the Government Code does not require the authority to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

We next note that some of the information at issue is subject to a previous ruling. In Open Records Letter No. 2003-2345 (2003), this office considered a request to the city for “any and all files, records, and any other documents in the possession of the Dallas Police Department” pertaining to one of the individuals listed in the present request. In that instance we ruled that the department must withhold certain information that we marked under section 773.091(b) of the Health and Safety Code, except for information in those documents pertaining to the presence, nature of injury or illness, age, sex, occupation, and city of residence of the patient. We also held that the department must release to the requestor the information that we marked pursuant to section 552.022(a)(1) of the Government Code, and may withhold the remaining submitted information pursuant to section 552.103 of the Government Code. In regard to information responsive to the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the facts and circumstances on which the prior ruling was based have changed, you may continue to rely on Open Records Letter No. 2003-2345 as a previous determination and release or withhold the requested information pertaining to Keenan Forge in accordance with Open Records Letter No. 2003-2345. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure).

We also note that the department submitted to this office a Custodial Death Report as part of the responsive information. Article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the Office of the Attorney General, who “shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party.” In Open Records Decision No. 521 at 5 (1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, Part I of custodial death reports filed with this office is public information. All remaining portions of the custodial death report, i.e., Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. *Id.* Thus, the department must release to the requestor Part I of the submitted custodial death report and must withhold the remainder, Parts II - V, under article 49.18(b).

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov’t Code § 552.022(a). One category of public information under section 552.022 is “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). A portion of the submitted information, which we have marked, constitutes a completed report made of, for, or by the department that is subject to section 552.022(a)(1) and must be released, unless it is confidential under “other law” or

is excepted from disclosure under section 552.108 of the Government Code. You do not claim that any portion of the marked report is excepted from disclosure under section 552.108. Although the department claims that the report is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Public Information Act that does not constitute "other law" that makes information confidential.¹ Accordingly, we conclude that the department may not withhold any portion of the marked report pursuant to section 552.103 of the Government Code. As such, the report, which we have marked, must be released to the requestor in its entirety.

We now address your section 552.103 claim with respect to the remaining submitted information. Section 552.103 provides in pertinent part:

- (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 department maintains 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 receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997,

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

no pet.); *see also 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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture,” when establishing that litigation is reasonably anticipated. *See* 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.² *See* Open Records Decision Nos. 555 (1990), 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 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

Based on our review of your arguments and the submitted information, we find that the department has established through concrete evidence that litigation was reasonably anticipated by the department on the date that it received the request. In addition, we find that the department has established that the remaining submitted information is related to that reasonably anticipated litigation for purposes of section 552.103. Accordingly, we conclude that the department may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

However, we note that 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. Further, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the department must release Part I of the Custodial Death Report and must withhold Parts II - V of the Custodial Death Report under article 49.18(b) of the Code of

² In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

Criminal Procedure. The department must also release to the requestor the information that we have marked pursuant to section 552.022(a)(1) of the Government Code. The department may withhold the remaining submitted information 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 Dep't of Pub. 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 179340

Enc: Submitted documents

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