



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 6, 2003

Ms. Betsy Elam
Taylor, Olson, Adkins, Sralla & Elam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2003-3038

Dear Ms. Elam:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180565.

The City of Azle (the "city"), which you represent, received a request for information regarding the operation of the Azle Jail. In particular, the requestor seeks:

1. Copies of any and all documentation regarding the training, supervision, and operational policies and procedures of the Azle Jail or the Azle Police Department regarding the care and treatment of persons in the custody of the Azle jail who exhibited suicidal tendencies; and
2. Copies of any and all correspondence, reports, investigations, statements, video or other recorded materials, memorandums, police department memorandums or "PDM", transcripts of any recorded radio channels, photographs, e-mails, or any other documentation or communications regarding attempted or actual suicides at the Azle Jail from January 1, 1999 to the present;
3. Copies of any and all records from the City of Azle's fire department and/or emergency medical response team and/or ambulance service and/or its personnel regarding responses and car [sic] and treatment of persons who attempted to commit or who did commit suicide at the

Azle Jail, including, but not limited to all reports, correspondence, memos, policies and procedures, recorded video, audio, or radio traffic, investigations, photographs, transportation logs or records, or any other documentation related to the response, care and treatment of persons who attempted or did commit suicide at the Azle Jail.

4. Copies of any and all construction, maintenance and/or inspection records regarding the design, construction, and maintenance of the Azle Jail.

You state that some responsive information will be released to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that most of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

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[.]

The submitted documents include a completed investigation. Therefore, as prescribed by section 552.022, the city must release the investigation unless it is excepted from disclosure under section 552.108 or confidential under other law. You do not argue that section 552.108 applies to the completed investigation. Although you raise section 552.103 of the Government Code with respect to the investigation, section 552.103 is a discretionary exception 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). Therefore, the city may not withhold the completed investigation we have marked pursuant to section 552.103 of the Government Code.

We will, however, address the applicability of section 552.101 of the Government Code to the information in the submitted investigation.¹ Criminal history record information

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal law and subchapter F of chapter 411 of the Government Code. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. §20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. *See* Gov't Code §411.083(a); *see also id.* §§ 411.106(b), .082(2) (defining criminal history record information). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. *See id.* §411.084; *see also id.* §411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Pursuant to section 552.101 of the Government Code, the city must withhold any CHRI in the submitted investigation that falls within the ambit of these state and federal regulations.

We also note that the submitted investigation contains information that may be excepted from disclosure under section 552.130 of the Government Code. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

This office has determined that section 552.130 does not encompass motor vehicle information that pertains exclusively to a deceased individual. *See* Open Records Decision No. 272 (1981). However, the submitted investigation contains motor vehicle license and registration information that pertains to individuals other than the deceased individual who is the subject of the investigation. We are unable to determine whether the driver's license and motor vehicle title and registration information we have marked pertains to licenses, titles, and registrations issued by an agency of this state. Accordingly, if the city determines that the marked driver's license, license plate, and vehicle identification numbers pertain to motor vehicle licenses, titles, and registrations issued by an agency of this state, the city must withhold the marked information pursuant to section 552.130 of the Government Code.

Next, we note that the submitted investigation records include a videotape that contains images of several peace officers. Section 552.119 of the Government Code excepts from

public disclosure a photograph of a peace officer, that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that any of the peace officers depicted in the videotape executed a written consent to disclosure of their images. Thus, the city must withhold any portion of the submitted videotape that includes the image of a peace officer under section 552.119, unless the department obtains written consent from the peace officers for their disclosure. The remaining portions of the videotape are not protected under section 552.119 of the Government Code and must be released to the requestor. If, however, the city is unable to obscure the faces of peace officers on the videotape, or otherwise remove the portions of the videotape that include the images of peace officers, then the city must withhold the videotape in its entirety under section 552.119.

We next address whether the remaining information that is not subject to section 552.022 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.

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.² 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 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). In this case, you state, and the documents reflect, that the requestor contacted the city prior to the date of the present request and verbally represented that he intended to file suit regarding a jail suicide. Upon review, we agree that city reasonably anticipated litigation on the date the city received the present request. Furthermore, we find that the requested information relates to the anticipated litigation. We therefore determine that the city may withhold the remainder of the submitted documents, which we have marked, pursuant to section 552.103 of the Government Code.³

We note, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, any criminal history record information in the submitted investigation obtained from the NCIC and TCIC networks must be withheld pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal

²In 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).

³Based on this finding, we do not reach your other claimed exceptions to disclosure.

regulations. The marked driver's license, license plate, and vehicle identification numbers must be withheld under section 552.130 of the Government Code if they relate to a license, title, or registration issued by an agency of this state. We have marked the information that the city may withhold pursuant to section 552.103 of the Government Code. The remainder of the 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; 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 180565

Enc: Submitted documents

c: Mr. Mark A. Haney
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(w/o enclosures)