



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 17, 2003

Ms. Jan Clark
Assistant City Attorney
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

OR2003-4175

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 182917.

The San Marcos Police Department (the "Department") received a request for "any and all documents or information," including videotapes and audiotapes, concerning an incident that involved a named individual and occurred on a specified date. You assert the requested information is excepted from disclosure under section 552.103 of the Government Code. We have reviewed the information you submitted and we have considered the exception you claim.

Section 552.103 of the Government Code states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 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). To secure the protection of section 552.103(a), the Department must demonstrate the requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991). The Department has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing the applicability of section 552.103(a) requires a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

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"). 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information or investigates the circumstances surrounding a potential claim does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

This office has held that a governmental body reasonably anticipates litigation when it receives a claim letter and affirmatively represents to this office that the claim letter complies with the notice requirements of the Texas Tort Claims Act ("TTCA"), Civil Practices and Remedies Code chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996). Despite the clear and plain language of this decision and numerous other rulings, you have restated the proposition in Open Records Decision No. 638 with the following argument:

the rule requiring a governmental body to represent to your office that a claim letter is in compliance with the notice requirements of the Texas Tort Claims Act or an applicable municipal ordinance might be restated as follows: To satisfy the Litigation Exception, a governmental body must represent to your office that the letter is in compliance . . . **unless the face of the letter clearly**

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).

states that this is already so. *See id.* [sic] at 1. In the latter case, when the face of the letter clearly demonstrates that the letter is meant to serve as notice under the Texas Tort Claims Act or an applicable municipal ordinance, such a representation by a governmental body is not necessary because the letter unmistakably states as much.

(Emphasis in original). Your interpretation of the standard and of Open Records Decision No. 638 is incorrect.

Open Records Decision No. 638 concluded that *one way* a governmental body may meet its burden of showing that it anticipates litigation is to affirmatively represent that the notice of claim it received complies with the notice requirements of the TTCA or an applicable municipal ordinance. This office will not look to the face of the claim letter as contended by the Department. The assertion of the drafter of a purported claim letter that the notice of claim is written pursuant to the TTCA does not necessarily mean that the letter actually complies with the notice requirements of the TTCA. If a governmental body chooses not to make such a representation, it may still meet its burden of showing that it anticipates litigation by presenting this office with other concrete evidence of why it anticipates litigation.² Thus, if a governmental body does not represent that the notice of claim complies with the TTCA, and instead relies only on the face of the claim letter to do so without presenting other concrete evidence to show that it anticipates litigation, then the governmental body fails to meet the first prong of section 552.103.

You do not affirmatively represent to this office that the requestor's letter is in compliance with the TTCA. You do not state that the attorney has made a specific threat to sue. Furthermore, you do not make any other representations to this office regarding the nature or existence of reasonably anticipated litigation. Rather, you state that the City of San Marcos (the "City") received a letter from the requestor, in which the requestor informs the City that a named Department employee has retained the requestor to represent him "in a claim for injuries and damages received by him in an accident at the San Marcos Police Station[.]" Additionally, you explain that the requestor "also states that the letter [received by the City] is provided as notice 'as required by law' and [the requestor] has not yet 'determined' the City's degree, if any, of liability." Thus, the notice of claim shows that the complainant has hired a lawyer who is investigating the merits of the claim. This is insufficient to meet the first prong of section 552.103. *See* Open Records Decision No. 361. Therefore, based on our review of your arguments and the submitted information, we conclude the Department has not met its burden of establishing that litigation was reasonably anticipated on the date the Department received the present request. Accordingly, the Department may not withhold Exhibits 2-a and 2-b from disclosure under section 552.103 of the Government Code.

²*See above.*

We note the submitted documents contain information subject to section 552.117 of the Government Code. Specifically, section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members. "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure. The submitted information contains personal information of a peace officer excepted from disclosure under section 552.117(2). However, in the letter identified as Exhibit B, the requestor claims to represent the subject of the information. Section 552.023 gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest.³ Therefore, the Department must release information subject to section 552.117(2) to the individual's authorized representative.

In summary, the Department must release Exhibits 2-a and 2-b to the requestor. The Department must release section 552.117 information of the peace officer at issue to the requestor because an authorized representative has a right of access to such information under section 552.023 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

³ Because the information to be released under section 552.023 is confidential with respect to the general public, if the Department receives a future request for this information from an individual other than the requestor or his authorized representative, the Department should again seek our decision.

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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 182917

Enc: Submitted documents

c: Mr. Mark Cusack
Law Offices of Mark E. Cusack, P.C.
242 North Guadalupe
San Marcos, Texas 78666
(w/o enclosures)