



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 9, 2003

Ms. Michele Austin  
Assistant City Attorney  
City of Houston - Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR2003-6330

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187339.

The City of Houston (the "city") received a written request from an attorney for "any statements of any type [that] have been taken of or from my client." You have submitted to this office as responsive to the request a "Houston Fire Department EMS Basic Response & Patient Evaluation Record," which you contend is excepted from required disclosure pursuant to sections 552.101 and 552.103 of the Government Code.

Because section 552.103 is generally more inclusive, we will address it first. 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 to which the governmental body is a party is pending or reasonably anticipated, 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). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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.<sup>1</sup> 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 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 states that this is already so.* *See id.* 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.

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<sup>1</sup>In 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).

(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 city. A claim letter's assertion that the notice of claim is written pursuant to the TTCA does not necessarily mean that the notice 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. 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.

In this instance, the attorney who made the present request for information represents that his law firm "has been retained by our client . . . to investigate and pursue all claims for damages arising out of events occurring on the above date, when our client was injured due to the negligence of the City of Houston and its employee." 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, although you submitted an affidavit to this office stating that the city anticipates litigation regarding this matter "[i]n the event that the City denies this claim," this representation does not establish that the city in fact anticipated litigation on the date it received the records request. Therefore, based on our review of your arguments and the submitted information, we conclude you have not met your burden of establishing that litigation was reasonably anticipated on the date the city received the present request, and the city may not withhold the requested information under section 552.103 of the Government Code.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The document you submitted to this office as being responsive to the request consists of an EMS record made confidential under section 773.091 of the Health and Safety Code, which provides in pertinent part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Confidential EMS records may be released to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf.” Health & Safety Code § 773.092(e)(4). Consequently, if the city receives a consent from the requestor’s client to release that specifies 1) the information or records to be covered by the release, 2) the reasons or purpose of the release, and 3) the person to whom the information is to be released, the city must release the EMS record in accordance with section 773.093 of the Health and Safety Code. Otherwise, the city must withhold the submitted EMS record except for that information listed under section 773.093(g), which must be released.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CMN/RWP/seg

Ref: ID# 187339

Enc: Submitted document

c: Mr. Joel M. Grossman  
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(w/o enclosures)