



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2005

Mr. John T. Patterson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76708-2570

OR2005-11517

Dear Mr. Patterson:

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# 238622.

The Waco Police Department (the "department") received a request for the following information related to a specific arrest: (1) all reports and inter-office memos filed by the arresting officers, (2) any documents made in response to the complaint filed by the arrestee against the department, (3) the in-car arrest video, (4) the names and identities of all officers involved, (5) all Taser training materials, (6) any documents establishing how many times each officer involved has used his Taser, (7) the department's policy on the use of force, (8) the operation manuals for the Tasers, (9) any documents reflecting the number of times the arrestee was tasered by members of the department, (10) the number of Tasers used along with the serial number of each Taser, (11) the contact information for any witness at the scene of the arrest, (12) any photographs of the arrestee at the scene of his arrest, and (13) any radio transmissions or transcripts of radio transmissions from any officer involved. You state that you have no responsive information regarding category number two or thirteen.¹ You claim that the submitted information is excepted from disclosure under

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. 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), 563 at 8 (1990), 555 at 1-2 (1990).

sections 552.103, 552.108, 552.117, and 552.130 of the Government Code. Additionally, you contend that a portion of the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you notified Taser International, Inc., the interested third party, of the department's receipt of the request for information and of the company's right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that Exhibits 4 and 5 are subject to section 552.022 of the Government Code. Section 552.022 provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law," and provides in pertinent part:

(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[.]

Gov't Code § 552.022(a)(1). Exhibits 4 and 5 are expressly public under section 552.022(a)(1) and may only be withheld if confidential under other law or excepted from disclosure under section 552.108. Although you argue that the information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure and is not "other law" for purposes of section 552.022.² Thus, Exhibits 4 and 5 may not be withheld under section 552.103. However, you also assert sections 552.108 and 552.130 for this information. Because information subject to section 552.022(a)(1) may be withheld as provided by sections 552.108 and 552.130, we will address your arguments under these exceptions.

Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of

²Discretionary 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 Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general).

crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication [.]” Gov’t Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information in question relates to a concluded case that did not result in a conviction or a deferred adjudication. You inform us that the submitted information in Exhibits 4 and 5 pertains to a criminal investigation that did not result in a conviction or deferred adjudication. Based on your representations and our review, we agree that section 552.108(a)(2) is applicable to this information.

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. *See* Gov’t Code § 552.108(c); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). We believe such basic information refers to the information held to be public in *Houston Chronicle*, including a detailed description of the offense. *See* 531 S.W.2d at 186-87. Thus, the department must release the types of information that are considered to be front page information, even if this information is not actually located on the front page. *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). With the exception of the basic information, the department may withhold Exhibits 4 and 5 pursuant to section 552.108(a)(2). We note that the department has the discretion to release all or part of this information that is not otherwise confidential by law. Gov’t Code § 552.007.

You also contend that portions of the submitted information must be withheld under section 552.130 of the Government Code. This section excepts from disclosure information that relates to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov’t Code § 552.130. Accordingly, we conclude that the department must withhold the information that we have marked in Exhibit 4 under section 552.130.

You claim that the remaining information is subject to section 552.103 of the Government Code. Section 552.103 provides in relevant part 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 department 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, 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, 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 department 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state that the department received a Notice of Claim in compliance with the TTCA, which alleges excessive use of force on the part of the department with respect to the requestor's client. You inform us that the department received the Notice of Claim prior to receiving the present request for information. Therefore, we conclude that the department reasonably anticipated litigation on the date it received the present request for information. We further find that the information at issue relates to the anticipated litigation. Accordingly, the department may withhold the remaining submitted information 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, responsive information to which all of the parties in the anticipated litigation have had access 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 concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

In summary, with the exception of basic information, the department may withhold exhibits 4 and 5 under section 552.108 of the Government Code. The department must withhold motor vehicle information that we have marked in Exhibit 4 under section 552.130. Lastly, the department may withhold the remaining submitted information pursuant to section 552.103.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read 'Michael A. Lehmann', written in a cursive style.

Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/segh

Ref: ID# 238622

Enc. Submitted documents

c: Mr. Truman Simons
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(w/o enclosures)