



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2006

Mr. Jason L. Mathis
Cowles & Thompson
Attorneys and Counselors
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2006-11556

Dear Mr. Mathis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 262500.

The Town of Little Elm (the "town"), which you represent, received a request for copies of the service calls and written reports from police and fire department/EMS personnel regarding an incident that occurred at a particular address on January 2, 2005. You claim that the requested information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note that most of the submitted information is 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). Portions of the submitted information, which we have marked, constitute completed reports that are subject to section 552.022(a)(1) and must be released, unless they are confidential under "other law" or are excepted from disclosure under section 552.108 of the Government Code. You do not claim that any portion of these marked reports is excepted from disclosure under section 552.108. Although you claim that these reports are 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 (the "Act") that does not constitute "other law" that makes information

confidential.¹ Accordingly, we conclude that the town may not withhold any portion of these reports pursuant to section 552.103 of the Government Code. However, since a portion of this information is excepted from disclosure pursuant to sections 552.101 of the Government Code, we will address the applicability of this exception with respect to these reports.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes. Section 773.091 of the Health and Safety Code provides:

- (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.

Health & Safety Code § 773.091(b). This confidentiality provision "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(g). Accordingly, we conclude that the information that we have marked under section 773.091(b) of the Health and Safety Code is confidential and, thus, excepted from disclosure pursuant to section 552.101 of the Government Code, except for information in these documents pertaining to the presence, nature of injury or illness, age, sex, occupation, and city of residence of the patient.

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.

....

¹Discretionary 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. 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), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

- (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 town 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, 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 town must meet both prongs of this test for information to be excepted under section 552.103(a).

You argue that the submitted information is the subject of pending criminal litigation. You state that “[i]n this case, the information requested is directly related to and the subject of the arrest and pending criminal matter and prosecution brought *by the state and/or the [town].*” [Italics added]. We note, however, that you have not provided this office with any documentation to establish that the town is in fact a party to the pending litigation. *See Gov't Code § 552.103(a)*; Open Records Decision No. 575 at 2 (1990). Further, to the extent the town is not a party to the pending litigation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the submitted information withheld from disclosure under section 552.103. You have not provided an affirmative representation from the state that it wants the submitted information withheld from disclosure under section 552.103. Accordingly, we conclude that the town has failed to demonstrate that section 552.103 of the Government Code applies to the remaining submitted information at issue, and it may not be withheld on that basis. As you raise no other exceptions to disclosure, the remaining information must be released.

In summary, with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the information that we have marked under section 773.091(b) of the Health and Safety Code is confidential and, thus, it is excepted from disclosure pursuant to section 552.101 of the Government Code. The remaining 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, 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/krl

Ref: ID# 262500

Enc. Marked documents

c: Mr. Kenneth L. Johnson
2807 Allen Street, Suite 697
Dallas, Texas 75204
(w/o enclosures)