



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2009

Mr. Robert E. Hager
Nichols, Jackson, Dillard, Hager, & Smith, LLP
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2009-00890

Dear Mr. Hager:

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# 332768.

The City of Wilmer (the "city"), which you represent, received a request for all documents concerning a specified incident, including: photographs; written estimates or repair bills for property damage; squad car video or audio tapes; call logs; autopsy report; driving record of the named officer; any medical reports for the named officer following the specified incident; and any reports evidencing any disciplinary action taken against the named officer following the specified incident. You state that the city does not possess most of the information that would be responsive to the request.¹ You state that a copy of the CRB-3 peace officer's crash report was released. *See* Trans. Code § 550.065. You claim that the submitted information

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).

is excepted from disclosure under section 552.103 of the Government Code.² We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in 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 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 is 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. *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 governmental body 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 litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body

²Although you also raise section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence and the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). In addition, you also raise section 552.022 of the Government Code. However, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. See Gov't Code § 552.022.

has established that litigation is reasonably anticipated based on the totality of the circumstances.

You state, and provide documentation showing, that the request for information includes a notice-of-claim letter. You do not affirmatively represent to this office that the claim letter is in compliance with the TTCA; therefore, we will only consider the claim as a factor in determining whether the city reasonably anticipated litigation over the incident in question. Additionally, we note the claim letter is from an attorney stating that he is authorized to pursue a claim on behalf of the widow of the individual involved and on behalf of her husband's estate. This letter also contains an offer to settle the claim for the city's liability limits. After reviewing your arguments and the submitted documents, and based on the totality of the circumstances, we conclude that, for purposes of section 552.103, you have established that litigation was reasonably anticipated when the city received the request for information. Our review of the submitted documents also shows that they are related to the anticipated litigation for purposes of section 552.103(a). Therefore, the city may withhold the submitted information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/jb

Ref: ID# 332768

Enc. Submitted documents

c: Requestor
(w/o enclosures)