



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 12, 2009

Mr. John Schneider  
First Assistant City Attorney  
City of Pasadena  
P.O. Box 672  
Pasadena, Texas 77501

OR2009-06418

Dear Mr. Schneider:

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# 342765 (Pasadena request no. SL0916).

The Pasadena Police Department (the "department") received two requests for information pertaining to incident number 09-4256. The first request seeks 30 categories of information pertaining to the specified incident. The second request seeks information pertaining to a specified training session. You state that the CR-3 accident report pertaining to this incident has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor seeks 30 categories of information pertaining to this incident, as well as information pertaining to a specified training session. However, with respect to the first request, you have only submitted the requested incident report and related CR-3 accident report for our review. Further, you have not submitted information pertaining to who was to attend the specified training session. Accordingly, to the extent that the department maintained additional information responsive to these requests for information on the date the department received the requests, we assume that you have released the remaining responsive information to the requestor. If not, you must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting

that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We also note that the submitted information includes records that were created after the department received the requests at issue. In this instance the requests were received on February 20, 2008. However, much of the submitted incident report appears to have been created after February 20, 2008. Because the department did not maintain these portions of the report at the time it received these requests, these records are not encompassed by the requests, and we do not address them in this ruling. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Thus, to the extent any of the submitted information was created after the department received the instant requests, this information is not responsive and need not be released in response to these requests. However, to the extent the submitted information was created before the instant requests were received by the department, we address your arguments against disclosure.

You assert that the responsive information is subject to section 552.103 of the Government Code, which 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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.*); ORD 551 at 4. A 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 for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* 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. 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).

You inform this office that the department received a letter from an attorney representing a potential opposing party that requests the preservation of evidence pertaining to the incident at issue. You assert that this letter indicates that there is a “substantial chance that a claim will be filed.” However, you do not indicate, nor does the information reflect, that any party has taken any objective steps towards initiating litigation against the department. *See* Open Records Decision No. 361 (1983). Therefore, we find the department has not demonstrated that litigation was reasonably anticipated on the date it received the instant requests for information. Accordingly, the department may not withhold any portion of the submitted responsive information under section 552.103 of the Government Code.

You next assert that the responsive information is excepted from disclosure under section 552.108(a)(2), which excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of 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-at-issue-relates-to-a-concluded-criminal-case-that-did-not-result-in-a-conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information pertains to a concluded criminal investigation that did not result in a conviction or deferred adjudication. However, upon review of the submitted information, we note that, at the time the requests were received by the department, the investigation pertaining to the incident at issue was ongoing. We therefore determine that you have not established that section 552.108(a)(2) is applicable to the responsive information. Consequently, the

department may not withhold this information under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>1</sup> This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that is highly intimate and embarrassing and of no legitimate concern to the public. The department must withhold this information under section 552.101 in conjunction with common-law privacy.

We note that some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). The department must withhold the information we have marked under section 552.117(a)(2).

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the department must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

In summary, this ruling does not address the public availability of any information to the extent it was created after the department received the instant requests for information. The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The department must also withhold the information we have marked under section 552.117(a)(2). The department must withhold the Texas

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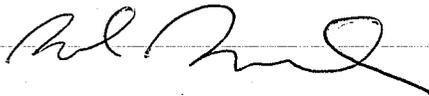
<sup>1</sup>The Office of the Attorney General will generally raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

motor vehicle record information we have marked under section 552.130. As you raise no other exceptions to disclosure, the remaining responsive information must be released.

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](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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 342765

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)