



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2009

Mr. Bennett M. Wyse
Messer, Campbell & Brady
6351 Preston Road, Suite 350
Frisco, Texas 75034

OR2009-11747

Dear Mr. Wyse:

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# 352882.

The City of Breckenridge (the "city"), which you represent, received a request for several categories of information pertaining to a specified incident. You state that you are releasing some of the requested information. You state that you maintain no information responsive to portions of the requested information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.119, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the information you have submitted in this instance was the subject of a previous request for information received by the city's police department (the "department"). In response to that request, this office issued Open Records Letter No. 2009-03543 (2009). In that ruling, we held that the department failed to demonstrate the applicability of sections 552.103, 552.108, and 552.111 of the Government Code to some of the submitted personnel files and complaint information. We also held that the department

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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).

must withhold the information we marked under sections 552.101, 552.117, 552.130, and 552.136 of the Government Code. Accordingly, we held that, with the exception of the information subject to sections 552.101, 552.117, 552.130, and 552.136, the department must release the personnel files and complaint information at issue. We note that information that has been previously released to the public may not be withheld from a subsequent requestor unless the governmental body is able to demonstrate that the information is confidential by law or that release is prohibited by law. *See* Gov't Code § 552.007. Although you raise sections 552.103 and 552.108 of the Government Code for the information that was previously ordered to be released, these sections are discretionary exceptions that protect a governmental body's interests and may be waived. *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); Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, sections 552.103 and 552.108 do not make information confidential or prohibit its release. Further, the city does not raise any additional arguments to withhold the portions of the submitted information that were previously ordered to be released. Thus, with regard to the submitted information that was previously requested and ruled on by this office, we conclude that the city must continue to withhold or release that information in accordance with Open Records Letter No. 2009-03543.² To the extent the submitted information was not encompassed by the prior ruling, we will consider your arguments against disclosure.

Next, we note that the submitted information includes a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that the attorney general shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Code Crim. Proc. art. 49.18(b). In 2003, the Office of the Attorney General revised the format of a custodial death report. The attorney general has determined that the two-page report and summary must be released to the public; however, any other documents submitted with the revised report are confidential under article 49.18 of the Code of Criminal Procedure. *See also* Open Records Decision No. 623 at 3 (1994) (exceptions to public disclosure under Act generally not applicable to information that another statute expressly makes public). In this instance, you have submitted a revised custodial death report. Accordingly, the submitted two-page custodial death report and summary, which we have marked, must be released under article 49.18 of the Code of Criminal Procedure.

We also note that the submitted information contains court-filed documents. These documents are subject to section 552.022(a)(17) of the Government Code, which provides

²We note that because the information you seek to withhold under section 552.102 of the Government Code was previously disposed of under section 552.101 of the Government Code in conjunction with common-law privacy, we need not address your argument under this exception. Similarly, we do not address your argument to withhold information under section 552.119 because our previous ruling disposed of this information under section 552.130 of the Government Code.

that "information that is also contained in a public court record" is "public information and not excepted from required disclosure under this chapter unless [it is] expressly confidential under other law[.]" Gov't Code § 552.022(a)(17). Although you seek to withhold this information under sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, sections 552.103 and 552.108 are not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). While sections 552.101, 552.102, 552.117, 552.119, 552.130, and 552.136 are other law for the purposes of section 552.022, upon review we find that these sections are not applicable to the information that is subject to section 552.022(a)(17). As you raise no other exception for this information, it must be released.

We now address section 552.103 of the Government Code for the remaining information. Section 552.103 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* 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.* This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You state, and provide documentation showing, that on January 16, 2009, the city received a notice of claim letter from the attorney of a potential opposing party in compliance with the Texas Tort Claim Act. You also state that the submitted documents directly relate to the anticipated litigation. Based on your representations and our review of the submitted notice of claim and information at issue, we conclude that the city may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).³

In summary, with regard to the submitted information that was previously requested and ruled on by this office, we conclude that the city must continue to withhold or release that information in accordance with Open Records Letter No. 2009-03543. The marked two-page custodial death report and summary must be released under article 49.18 of the Code of Criminal Procedure. With the exception of the information subject to section 552.022(a)(17), the city may withhold the remaining 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,

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

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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 352882

Enc. Submitted documents

cc: Requestor
(w/o enclosures)