



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2012

Mr. Stephen R. Alcorn
Assistant City Attorney
City of Grand Prairie
P.O. Box 534045
Grand Prairie, Texas 75053-4045

OR2012-00178

Dear Mr. Alcorn:

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# 441275.

The Grand Prairie Police Department (the "department") received a request for (1) the requestor's client's personnel records; (2) information pertaining to internal affairs investigation numbers 2011-016 and 2011-018; (3) the Chain of Command Board record; and (4) disciplinary records during a certain time period regarding violations of specified policies. You state the department has provided most of the requested information to the requestor. You claim the submitted information is not subject to the Act. Alternatively, you claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, you assert the submitted information is not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information," *see id.* § 552.021, which is defined by section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body

and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). You contend the submitted investigator notes are not subject to the Act because they are not part of the completed internal affairs investigation files and were not reviewed or considered by the Chief of Police during his examination of the final investigation reports. We note, however, the information at issue was created by a department investigator during investigations conducted by the department, and consists of information collected, assembled, or maintained in connection with the transaction of the department’s official business. Therefore, we conclude the submitted information is subject to the Act and must be released, unless the department demonstrates the information falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021.

You claim the submitted information is excepted under section 552.103 of the Government Code, which provides, in 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.

...

(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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See 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). *See* ORD 551 at 4.

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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim 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 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state the requestor represents a former department employee who was terminated from her job because of performance issues. You explain personnel rules allow the former employee to appeal her termination. You contend that, in the event the former employee is not successful in her appeals, she fits within some "categories that are considered protected classes in several employment statutes[.]" Thus, you assert litigation "is a very real possibility . . . if she takes exception to the allegations [that lead to her employment termination]." Although you generally assert the department reasonably anticipates litigation related to the submitted investigator notes, you have not informed us the former employee has actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See* ORD 331. Therefore, you have not established the department reasonably anticipated litigation when it received the request for information. Consequently, the department may not withhold any of the submitted information under section 552.103 of the Government Code. As you have not claimed any other exceptions to disclosure, the department must release the submitted information.¹

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

¹We note the information to be released contains information pertaining to the requestor's client that may be confidential with respect to the general public under section 552.117(a)(1) of the Government Code. Because this provision protects a person's privacy, the requestor has a right to his client's private information pursuant to section 552.023 of the Government Code. Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests). If the department receives another request for this particular information from a different requestor, then the department should again seek a decision from this office.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 441275

Enc. Submitted documents

c: Requestor
(w/o enclosures)