



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 17, 2012

Mr. Jason L. Mathis  
For Town of Addison  
Cowles & Thompson  
901 Main Street, Suite 3900  
Dallas, Texas 75202-3793

OR2012-20211

Dear Mr. Mathis:

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# 473954.

The Town of Addison (the "town"), which you represent, received a request for seven categories of information pertaining to the arrest and custody of a named individual on a specified date, including video recordings, the police report related to the arrest, any internal investigation files, reprimands, or reports related to the named individual's injuries, and the personnel files of the officers involved with the arrest and booking. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note you have not submitted information pertaining to internal investigation files, reprimands, or the personnel files of the officers involved with the arrest and booking for our review. Although you state the town submitted a representative sample of information, no portion of the submitted representative sample pertains to these categories of information. Thus, we find the submitted information is not representative of the

---

<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information sought regarding these portions of the request. Please be advised this open records letter applies only to the type of information you have submitted for our review. Therefore, this letter ruling does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office. See Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information is presumed to be public). Thus, to the extent any information responsive to this portion of the request existed when the present request was received, we assume it has been released.<sup>2</sup> If such information has not been released, then it must be released at this time. See *id.* §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.103 of the Government Code provides, in relevant 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information 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, orig. proceeding); *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

---

<sup>2</sup>We note 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).

governmental body must meet both parts 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 that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. 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 town reasonably anticipates litigation related to the arrest and detention of the named individual because the named individual's attorney made the instant request to investigate potential claims against the town. As noted above, a potential opposing party hiring an attorney who makes a request for information does not establish litigation is reasonably anticipated. Thus, you have not provided this office with evidence any objective steps toward filing a lawsuit were taken prior to the date the town received the request for information. *See* Gov't Code § 552.301(e); ORD 331. Consequently, we find you have not established litigation was reasonably anticipated on the date the town received the request for information. Thus, the town may not withhold any of the information at issue under section 552.103 of the Government Code.

Section 552.111 excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives,

including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See* TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You claim the submitted information consists of attorney work product created in anticipation of litigation. We note the submitted information consists of an incident report, arrest warrant, witness statements, and information created in the ordinary course of business by the town's police department. In Open Records Decision No. 677, our office held information created in a governmental body's ordinary course of business may be considered to have been prepared in anticipation of litigation, and thus, constitutes attorney work product, if the governmental body explains to this office the primary motivating purpose for the routine practice that gave rise to the information. *See id.* at 8; *see also Brotherton*, 851 S.W.2d at 206. You have not demonstrated the town's primary motivating purpose for the creation of this information was anticipation of litigation. Thus, we find you have not demonstrated the town anticipated litigation when creating the information at issue. Moreover, we note Texas Rule of Civil Procedure 192.5(c)(1) provides, "information discoverable under Rule 192.3 concerning . . . witness statements" is not work product. TEX. R. CIV. P. 192.5(c)(1). Further, rule 192.3 excludes from the work product privilege a "witness statement," defined as "a written statement signed or otherwise adopted or approved in writing by the person making it," a "recording of a witness's oral statement," or a "substantially verbatim transcription of such a recording." *Id.* 192.3(h). Therefore, we find you have not demonstrated the submitted information comprises attorney work product. Accordingly, the town may not withhold the submitted information under the work product privilege of section 552.111 of the Government Code.

Section 552.1175 protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain individuals,

when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.<sup>3</sup> See Gov't Code § 552.1175. Section 552.1175 applies to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Upon review, we find the town must withhold the information we have marked under section 552.1175, if the individual to whom this information pertains is currently a licensed peace officer and elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code. However, the town may not withhold the information we have marked under section 552.1175 if the individual at issue is not currently a licensed peace officer, or no election is made.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's license or driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country. *Id.* § 552.130(a)(1)-(2). Accordingly, the town must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the town must withhold the information we have marked under section 552.1175, if the individual to whom this information pertains is currently a licensed peace officer and elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code. The town must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released.<sup>4</sup>

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

---

<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Because such information is confidential with respect to the general public, if the town receives another request for this information from a different requestor other than the named individual, then the town should again seek a ruling 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, appearing to read "Kathleen J. Santos".

**Kathleen J. Santos**  
**Assistant Attorney General**  
**Open Records Division**

KJS/dls

Ref: ID# 473954

Enc. Submitted documents

c: Requestor  
(w/o enclosures)