



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2014

Ms. Savannah Gonzalez
Assistant District Attorney
Hidalgo County Criminal District Attorney
100 North Closner, Room 303
Edinburg, Texas 78539

OR2014-03696

Dear Ms. Gonzalez:

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# 515431 (Hidalgo Ref# 2013-0061-DA).

The Hidalgo County Sheriff's Office (the "sheriff's office") received a request for any investigative information related to a specified incident. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). In this instance, the information at issue includes completed reports subject to section 552.022(a)(1). The information subject to section 552.022(a)(1), which we have marked, must be released unless it is excepted by section 552.108 of the Government Code or made confidential by the Act or other law. *See id.* Although you raise

section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, none of the information we have marked under section 552.022(a)(1) may be withheld under section 552.103 of the Government Code. However, we will consider your argument under section 552.103 for the remaining information, which is not subject to section 552.022.

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 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, 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 governmental body must meet both prongs of this test for information to be excepted from disclosure 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 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, or an applicable municipal ordinance, is sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of a claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *Id.*

You inform us, and provide documentation, that the sheriff's office received a notice of claim prior to the instant request alleging liability on the part of the sheriff's office for its involvement in the incident at issue. You do not state the letter complies with the notice requirements of the TTCA; therefore we will only consider the claim as a factor in determining whether the sheriff's office reasonably anticipated litigation over the incident in question. Nevertheless, based on your representations, our review of the submitted information and the totality of the circumstances, we determine the sheriff's office has established it reasonably anticipated litigation on the date it received the request for information. Further, we find the information at issue is related to the anticipated litigation. Accordingly, we conclude the sheriff's office may generally withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

We note, however, once information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Thus, information that has been seen by all parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it may not be withheld on that basis. In this instance, some of the information at issue was provided by the opposing party to the sheriff's office; thus, all parties have already seen the information. As such, this information, which we have marked, may not be withheld under section 552.103. Accordingly, with the exception of the information we have marked, the sheriff's office may withhold the information not subject to section 552.022 under section 552.103. We note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, with the exception of the information subject to section 552.022 of the Government Code and the information seen by all parties in the anticipated litigation, the sheriff's office may withhold the information under section 552.103 of the Government Code. The remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Rashandra C. Hayes", with a stylized flourish at the end.

Rashandra C. Hayes
Assistant Attorney General
Open Records Division

RCH/dls

Ref: ID# 515431

Enc. Submitted documents

c: Requestor
(w/o enclosures)