



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2014

Ms. Julie P. Doshier
Counsel for the City of Highland Village
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
500 North Akard
Dallas, Texas 75201

OR2014-23239

Dear Ms. Doshier:

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# 547753 (Reference No. 68586).

The Highland Village Police Department (the "department"), which you represent, received a request for information pertaining to a specified arrest of the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes the results of an analysis of a breath specimen. Section 724.018 of the Transportation Code provides that "[o]n request of the person who has given a specimen at the request of a peace officer, full information concerning the analysis of the specimen shall be made available to the person or the person's attorney." Transp. Code § 724.018. In this instance, the requestor is the attorney for the person who provided the breath specimen at the request of a peace officer. Although you seek to withhold this information under sections 552.103 and 552.108 of the Government Code, a specific right of access provision prevails over the Act's general exceptions to disclosure. *See* Open Records Decision No. 451 at 4 (1986) (specific statutory right of

access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Therefore, the department must release the breath test results to this requestor pursuant to section 724.018 of the Transportation Code.

Section 552.103 of the Government Code provides 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). 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You assert the submitted information relates to litigation reasonably anticipated by the City of Highland Village (the "city"). As the department is not a party to the anticipated litigation, the department does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body whose litigation interests are at stake that it seeks to withhold the information from disclosure under section 552.103, as well as a demonstration of how that exception applies to the requested information. You, as an attorney for the city, state the information at issue is directly related to the anticipated litigation and the city wishes to withhold the information. You state this information pertains to an incident that resulted in damage to property owned by the city. You state the city is filing an insurance claim with the insurance carrier for the requestor's client. You further state the claim has not been resolved, and, in the event that claim is denied, "the city still has a right to file suit." Based on these representations and our review, we find litigation was reasonably anticipated at the time the department received the request. You state the information at issue is related to the anticipated litigation. Based on your representations and our review, we find the submitted information is related to the anticipated litigation. Accordingly, we find the submitted information is generally subject to section 552.103 of the Government Code.

However, the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see* Open Records Decision No. 127 (1976). This office has stated basic information about a crime may not be withheld under section 552.103 even if it is related to the litigation. Open Records Decision No. 362 (1983). We note basic information includes, among other items, the details of the arrest, a detailed description of the offense, and the name, age, address, race, sex, physical description, and social security number of the arrested person. See ORD 127 at 3-4. Thus, we find the basic offense information from the offense report may not be withheld on the basis of section 552.103. Therefore, with the exception of basic information, the department may withhold the submitted information under section 552.103(a) of the Government Code.¹

We note once the information has been obtained by all parties to the pending litigation, through discovery or otherwise, 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 is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

You seek to withhold some of the basic information under the common-law informer's privilege. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *Open Records Decision No. 279 at 1-2 (1981)* (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988)*.

You seek to withhold the complainant's identifying information under the common-law informer's privilege. You state the information at issue reveals the identity of a complainant who reported a violation of the law to the department. Based upon your representations and our review, we conclude the department has demonstrated the applicability of the common-law informer's privilege to the information at issue. Therefore, the department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

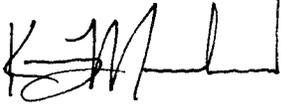
In summary, the department must release the breath test results to this requestor pursuant to section 724.018 of the Transportation Code. With the exception of basic information, which must be released, the department may withhold the submitted information under section 552.103(a) of the Government Code. In releasing basic information, the department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

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 'KJM', with a horizontal line extending to the right.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 547753

Enc. Submitted documents

c: Requestor
(w/o enclosures)