



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 5, 2019

Ms. Alicia K. Kreh
Counsel for City of Mansfield
Taylor Olson Adkins Sralla Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2019-21527

Dear Ms. Kreh:

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# 778851.

The Mansfield Fire Department (the "department") received a request for information pertaining to a specified incident. You claim the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have submitted only 9-1-1 call audio recordings and an emergency medical services ("EMS") report pertaining to the incident specified in the request. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 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).

Next, we note some of the submitted information consists of a completed EMS report made by or for the department, which is subject to section 552.022(a)(1) of the Government Code. Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception

to disclosure and does not make information confidential under the Act. *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (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, the department may not withhold the completed EMS report under section 552.103 of the Government Code. However, we will consider the department's argument under section 552.101 of the Government Code against release of the completed EMS report. We will also consider the department's argument under section 552.103 against release of the information not subject to section 552.022 of the Government Code.

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. This exception encompasses information made confidential by other statutes, such as section 773.091 of the Health and Safety Code, which provides in relevant part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(a)-(b), (g). Except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091. *See id.* Upon review, we find the EMS report constitutes records of the identity, evaluation, or treatment of a patient by EMS personnel. Accordingly, with the exception of information subject to section 773.091(g), the department must withhold the EMS report under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and

Safety Code. The information subject to section 773.091(g) of the Health and Safety Code must be released pursuant to section 552.022(a)(1) of the Government Code.

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). The governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (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). The governmental body must meet both parts of this test for information to be excepted from disclosure under section 552.103(a). See ORD 551 at 4.

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." See Open Records Decision No. 452 at 4 (1986). 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. See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. See Open Records Decision Nos. 346 (1982), 288 (1981). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents the notice of claim letter is in

compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established litigation is reasonably anticipated based on the totality of the circumstances. 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

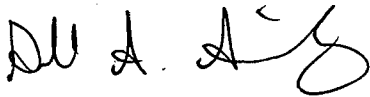
You state the remaining information pertains to litigation reasonably anticipated by the department. To support this assertion, you state, and provide documentation showing, prior to the department’s receipt of the instant request for information, the City of Mansfield (the “city”) received a notice of claim from the requestor pertaining to a specified incident at a specified city-owned facility. We note, however, the department is not a party to the anticipated litigation. Therefore, the department does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov’t Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103(a). You, as a representative of the city, affirmatively represent that the city objects to the release of the information at issue under section 552.103(a). The department does not affirmatively represent to this office the notice of claim meets the requirements of the TTCA; therefore, we will only consider the notice of claim as a factor in determining whether the city reasonably anticipated litigation over the incident in question. The notice of claim alleges the city’s liability for damages sustained in the incident at issue, and states that the requestor’s client “plans to file suit against the [city] for negligence in performance of its duties to construct, maintain, and repair its Baseball Diamond Ballpark in Mansfield, Texas.” Based upon your representation, our review of the remaining information, and the totality of the circumstances, we find the city reasonably anticipated litigation on the date the department received the instant request. We further find the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, we find the department may withhold the remaining information under section 552.103 of the Government Code on behalf of the city.

In summary, with the exception of information subject to section 773.091(g), the department must withhold the EMS report under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The information subject to section 773.091(g) of the Health and Safety Code must be released pursuant to section 552.022(a)(1) of the Government Code. The department may withhold the remaining information under section 552.103 of the Government Code on behalf of the city.

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 "Gerald A. Arismendez". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/gw

Ref: ID# 778851

Enc. Submitted documents

c: Requestor
(w/o enclosures)