



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 3, 2020

Ms. Rebecca S. Hayward  
Counsel for the City of San Benito  
Denton, Navarro, Rocha, Bernal & Zech, P.C.  
701 East Harrison, Suite 100  
Harlingen, Texas 78550-9165

OR2020-03217

Dear Ms. Hayward:

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# 809910.

The City of San Benito (the "city"), which you represent, received a request for the internal affairs investigation findings and Texas Rangers investigation findings pertaining to a specified case. You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which you indicate is a representative sample.<sup>1</sup>

Initially, we note Exhibit B1 was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-36558 (2019). We note there is a change in the circumstances regarding the requestor's right of access to certain information in the previous ruling. However, as noted in Open Records Letter No. 2019-36558, the city may withhold a peace officer's home address and telephone number, personal cellular telephone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. *See* Open Records Decision No. 670 (2001). Additionally, section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117(a)(1) without requesting a decision from this office if the current or former

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<sup>1</sup> We assume that 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.

employee or official chooses not to allow public access to the information. *See* Gov't Code § 552.117(a)(1). Accordingly, we conclude the city must rely on Open Records Letter No. 2019-36558 as a previous determination and withhold or release Exhibit B1 in accordance with that ruling, section 552.024 of the Government Code, and our previous determination in Open Records Decision No. 670.<sup>2</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.103 of the Government Code provides, in part, the following:

(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.

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 establish 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

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<sup>2</sup> As we are able to make this determination, we need not address your submitted arguments against disclosure of this information.

containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>3</sup> ORD 555; *see also* 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 contend the remaining information relates to anticipated litigation against the city. You explain the information at issue relates to the death of an individual. You state, and provide documentation demonstrating, prior to the city’s receipt of the instant request, the family of the deceased individual hired an attorney to represent them and the attorney has verbally and publicly alleged the city is at fault for the death. Additionally, you inform us the city has been assigned counsel to represent it in pre-litigation matters relating to the incident at issue. Further, you state the information at issue is related to the anticipated litigation. Based upon your representations, our review of the information at issue, and the totality of the circumstances, we find you demonstrated the city reasonably anticipated litigation on the date it received the instant request and the information at issue relates to the anticipated litigation. Accordingly, the city may generally withhold the remaining information under section 552.103(a) of the Government Code.<sup>4</sup>

We note, however, information normally found on the front page of an offense or incident report is generally considered public. *See 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); Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). This office has determined section 552.103 does not except from release basic information about a crime. *See* Open Records Decision No. 362 at 2 (1983). Accordingly, with the exception of basic information, the city may withhold the remaining information under section 552.103(a) of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be

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<sup>3</sup> In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

<sup>4</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.108 of the Government Code. Gov’t Code § 552.108(c).

disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); ORD 350.

In summary, the city must rely on Open Records Letter No. 2019-36558 as a previous determination and withhold or release Exhibit B1 in accordance with that ruling, section 552.024 of the Government Code, and our previous determination in Open Records Decision No. 670. With the exception of basic information, the city may withhold the remaining information under section 552.103(a) of the Government Code.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Gerald Arismendez  
Assistant Attorney General  
Open Records Division

GAA/jxd

Ref: ID# 809910

Enc. Submitted documents

c: Requestor  
(w/o enclosures)