



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2008

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2008-11122

Dear Mr. Toscano:

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# 318965.

The City of Dallas (the "city") received two separate requests for all records related to a specified motor vehicle accident. You state that you have released some of the responsive information. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we must address the second requestor's assertion that the city did not comply with section 552.301 of the Government Code. The second requestor asserts that if the city declines to release the requested records for any reason, the city must, within ten calendar days from the date of receipt of her written request, contact by writing and request a decision from this office to determine whether the information is within that exception. We note that the time limitations provided by the Act have been amended over the years. In 1987 a governmental body was required to request a decision from the Attorney General "within a reasonable time, no later than ten days" after receiving the request for the information. That statute was amended in 1989 to require the governmental body's request "within a reasonable

¹Although you also raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

²We 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.

time, no later than ten *calendar* days” after receiving the request. Act of May 29, 1989, 71st Leg., R.S., ch. 1248, § 14, 1989 Tex. Gen. Laws 4996, 5027 (emphasis added). In 1997 it was amended again by changing “calendar” days to “business” days. Act of June 1, 1997, 75th Leg., R.S., ch. 1231, § 5, 1997 Tex. Gen. Laws 4697, 4701. Accordingly, section 552.301(b) now requires a governmental body to ask for a ruling from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov’t Code § 552.301(b). The second requestor acknowledges that the city received her request on May 30, 2008 and asked for a ruling from this office, stating the exceptions that apply, on June 13, 2008. Thus, we find the city fully complied with section 552.301 of the Government Code.

Next, we note that the submitted information includes a CR-3 accident report form completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (Texas Peace Officer’s Accident Report form). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this case, both requestors have provided the information specified by the statute. Although you contend that some information in the report is excepted from disclosure under sections 552.130 and 552.136 of the Government Code, the exceptions found in the Act generally do not apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Accordingly, the CR-3 accident report form, which we have marked, must be released.

Section 552.103 provides in relevant 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex.App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *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 establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue 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.³ 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. *See* 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 that the information at issue relates to a collision between a vehicle owned by the city and a privately owned vehicle. You inform us that on May 20, 2008, the city received a letter from an attorney representing the individual involved in the collision, which requested that the city not destroy, alter, or otherwise dispose of certain items as they will be needed for the prosecution of the potential lawsuit against the city. You state that the information in Exhibits B, C, and D relates to the subject matter of the reasonably anticipated litigation, which is whether the city is liable for the individual's injuries arising from the accident which is the subject matter of the requests at issue. Based on these representations, and our review of the information at issue, we conclude that the city reasonably anticipated litigation when it received the requests for information. Our review of Exhibits B, C, and D shows that they are related to the anticipated litigation for purposes of

³Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

section 552.103. Accordingly, the city may withhold Exhibits B, C, and D under section 552.103 of the Government Code.⁴

We note, however, that once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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 section encompasses information protected by other statutes. Exhibit F consists of emergency medical services (“EMS”) records. This information is subject to section 773.091 of the Health and Safety Code, which provides in relevant part:

(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(b), (g). Based on our review, we conclude that the submitted EMS records contained in Exhibit F are confidential under section 773.091. Thus, the city must withhold Exhibit F pursuant to section 773.091 of the Health and Safety Code, except as specified by section 773.091(g).

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(1), (2). The city

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. You inform us that an employee’s identification number is the same number used for credit union bank accounts that belong to the city. We have marked an insurance policy number and an employee identification number that the city must withhold under section 552.136 of the Government Code.

In summary, the city must release the CR-3 accident report form, which we have marked, pursuant to section 550.065(c)(4) of the Transportation Code. The city may withhold Exhibits B, C, and D under section 552.103 of the Government Code. Except as specified by section 773.091(g) of the Health and Safety Code, the city must withhold Exhibit F under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. The city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The city must withhold the insurance policy number and the employee identification number that we have marked under section 552.136 of the Government Code. The remaining information must be released.⁵

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

⁵We note that the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Benjamin A. Diener
Assistant Attorney General
Open Records Division

BAD/jb

Ref: ID# 318965

Enc. Submitted documents

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