



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 7, 2009

Mr. Ricardo R. Lopez  
Feldman, Rogers, Morris & Grover L.L.P  
517 Soledad Street  
San Antonio, Texas 78205-1508

OR2009-04600

Dear Mr. Lopez:

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# 339106.

The North East Independent School District (the "district"), which you represent, received a request for 1) the applicable policy of insurance with the district's insurance company and declaration sheet, 2) the district's PIP/Med Pay file or medical benefits coverage, 3) the property damage file, including any repair invoices, estimates, photos, and documents, 4) correspondence, notes or other documentation between the district's insurance company and the third party's insurance company, and 5) all witness statements taken regarding a specified incident. You inform us the district does not have information responsive to items 2, 4, or 5 of the request.<sup>1</sup> You claim the submitted 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 section 552.022 of the Government Code is applicable to a portion of the submitted information. Section 552.022 provides in relevant part:

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

(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 under this chapter unless they are expressly confidential under other law:

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of an estimate[.]

Gov't Code § 552.022(a)(5). The submitted information contains completed estimates. Thus, pursuant to section 552.022(a)(5), the district may only withhold the estimates if they are confidential under other law. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We note this section is a discretionary exception that protects the governmental body's interests and may be waived. *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law for the purposes of section 552.022 and the district may not withhold the information we have marked under section 552.103. Section 552.101, however, is other law for the purposes of section 552.022. Accordingly, we will address your argument under section 552.101.

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. Section 101.104 of the Civil Practice and Remedies Code provides:

(a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].

(b) Neither the existence nor the amount of the insurance is subject to discovery.

Civ. Prac. & Rem. Code § 101.104. Section 101.104 provides that insurance information is not discoverable or admissible as evidence during litigation proceedings under the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. *See City of Bedford v. Schattman*, 776 S.W.2d 812, 813-14 (Tex. App.—Fort Worth 1989, orig. proceeding) (protection from producing evidence of insurance coverage under section 101.104 is limited to actions brought under the Tort Claims Act). Section 101.104, however, is a civil discovery privilege and does not make insurance information expressly confidential for purposes of section 552.101. *See* Open Records Decision No. 551 at 3 (1990) (provisions of section 101.104 "are not relevant to the availability of the information to the public"); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision Nos. 647 at 2

(1996) (information that may be privileged in the civil discovery context may not be withheld from disclosure pursuant to section 552.101 of the Government Code), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under statutory predecessor to section 552.101). The Texas Supreme Court has determined the discovery privileges found in the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Although section 101.104 is a civil discovery privilege under the Civil Practice and Remedies Code, it is not a discovery privilege found in either the Texas Rules of Civil Procedure or the Texas Rules of Evidence. Thus, section 101.104 does not alone, or in conjunction with the *Georgetown* decision, constitute “other law” for purposes of section 552.022. Accordingly, we determine the completed estimates as well as the remaining information may not be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code.

We will now address section 552.103 for the information that is not subject to section 552.022. Section 552.103 of the Government Code 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). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684

S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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 that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state the district received a notice of claim from the requestor in the same document as the instant request. You also state the claim letter is in compliance with the TTCA. Upon review, we find you have established litigation was reasonably anticipated when the district received the request at issue. The submitted information relates to the incident that is the basis of the anticipated litigation. Accordingly, we also find the information not subject to section 552.022 relates to the anticipated litigation. Thus, we conclude the district may generally withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code.

We note, however, the opposing party has been provided some of this information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. We note once the information at issue has been obtained by all parties to the 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, to the extent the information not subject to section 552.022 has been obtained by or provided to all other parties to the litigation, it may not be withheld under section 552.103.

In summary, the district may withhold the information not subject to section 552.022 under section 552.103; to the extent it has not been obtained by or provided to all other parties to the litigation. 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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 339106

Enc. Submitted documents

c: Requestor  
(w/o enclosures)