



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 26, 2009

Ms. Rebecca Brewer  
Abernathy Roeder Boyd & Joplin P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2009-08846

Dear Ms. Brewer:

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# 347204.

The City of Wylie (the "city"), which you represent, received three requests from two requestors for information relating to the drowning deaths of two named individuals in April 2008 and other such incidents at the same location during a specified time interval.<sup>1</sup> You inform us that some of the requested information is the subject of a previous open records letter ruling. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the information you submitted.

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<sup>1</sup>We note that the city requested and received clarification of one of the instant requests. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>Although you claim the attorney-client and attorney work product privileges under section 552.101 of the Government Code, we note that those privileges are not encompassed by section 552.101. *See* Open Records Decision Nos. 676 at 1-3 (2002) (attorney-client privilege), 677 at 2-6 (2002) (attorney work product privilege). Instead, sections 552.107 and 552.111 are the respective exceptions under which the attorney-client and attorney work product privileges may be claimed.

We first note that a small portion of one of the submitted documents was created after the date of the city's receipt of these requests for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.<sup>3</sup> Thus, the information that did not exist when the city received these requests is not responsive to the requests. This decision does not address the public availability of that information, which we have marked, and it need not be released in response to these requests.

You inform us that a responsive recording of a 911 call was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2009-04809 (2009). In that ruling, we concluded that the information at issue was excepted from disclosure under section 552.103 of the Government Code. There is no indication of any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the city may continue to withhold the recording of the 911 call on the basis of Open Records Letter No. 2009-04809.<sup>4</sup> See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next note that the submitted information includes press releases, which the city seeks to withhold under section 552.103. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further public disclosure unless release of the information is prohibited by law or the information is confidential under law. See Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989). Section 552.103 is a discretionary exception to disclosure and does not prohibit the release of information or make information confidential under law. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (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). Thus, because the city has previously made the submitted press releases available to the public, they may not be withheld under section 552.103 and must be released. See also Gov't Code § 552.022(a)(15) (providing for release of information open to public under agency's policies).

We also note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a

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<sup>3</sup>See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>4</sup>As we are able to make this determination, we need not address your other arguments against disclosure of the recording of the 911 call.

governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. *Id.* § 552.022(a)(1). Section 552.022(a)(3) provides for required disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). Section 552.022(a)(5) provides for required disclosure of “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 the estimate,” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(5). In this instance, the submitted information includes completed reports and a completed investigation made of, for, or by the city; a contract relating to the receipt or expenditure of public funds by the city; and information used to estimate the need for or expenditure of public funds or taxes by the city. That information, which we have marked, is subject to section 552.022(a)(1), (3), and (5). The city does not claim an exception to disclosure under section 552.108. Sections 552.103, 552.107(1), and 552.111 are discretionary exceptions that protect a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d at 475-76; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived). As such, those sections do not make information expressly confidential for the purposes of section 552.022(a)(1), (3), or (5). Therefore, none of the marked information that is subject to section 552.022 may be withheld under section 552.103, section 552.107(1), or section 552.111.

The city also claims section 552.101 of the Government Code, which is a confidentiality provision for the purposes of section 552.022(a)(1), (3) and (5). Section 552.101 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 that other statutes make confidential. The city raises section 552.101 in conjunction with section 773.091 of the Health and Safety Code, which is part of the Emergency Medical Services Act, chapter 773 of the Health and Safety Code. Section 773.091 is applicable to records of the provision of emergency medical services (“EMS”) and provides in 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 or 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.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(a)-(c). Section 773.091 further provides, however, that

[t]he 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.

*Id.* § 773.091(g). We understand you to contend that section 773.091 is applicable to some of the information that is subject to section 552.022. We have marked EMS information that is confidential under section 773.091, except as specified by 773.091(g). We note that such information may be released to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf." *Id.* § 773.092(e)(4). When the patient is deceased, as is the case here, the patient's personal representative may consent to the release of the patient's records. *Id.* § 773.093(a); see Open Records Decision No. 632 (1995) (defining "personal representative" for purposes of Health & Safety Code § 773.093). The consent must be in writing, signed by the patient, authorized representative, or personal representative, and specify (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. Health & Safety Code § 773.093(a). Therefore, the city must withhold the marked EMS information under section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the deceased individual's personal representative provides the city with written consent for release that meets the requirements of section 773.093(a). See *id.* §§ 773.092, .093; ORD 632.

Although you also appear to claim that other information also is confidential under section 773.091, we note that the remaining information in question involves drowning victims who were deceased when EMS personnel arrived. The term "patient" is not defined for the purposes of section 773.091 of the Health and Safety Code. When a word used in a statute is not defined and that word is "connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art." Gov't Code § 312.002; see also *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998). Taber's Cyclopedic Medical Dictionary defines "patient" as "one who is sick with, or being treated for, an illness or injury; [or] . . . an individual receiving medical care." Taber's

Cyclopedic Medical Dictionary 1446 (17th ed. 1989). We also note that other statutes dealing with medically related professions generally define patient as an individual who consults a health care professional. See Health & Safety Code § 611.001 (mental health records), Occ. Code §§ 159.001 (physician records), 201.401 (chiropractic records), 202.401 (podiatric records), 258.101 (dental records). Thus, because the generally accepted medical definition of patient indicates that the term refers to a living individual, we find that the term does not encompass information that concerns the deceased individuals. Therefore, we conclude that section 773.091 of the Health and Safety Code is not applicable to any of the remaining information that is subject to section 552.022, and thus the city may not withhold any of that information on that basis under section 552.101.

The city also raises section 552.101 in conjunction with common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have determined that common-law privacy encompasses certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). We note that because privacy is a personal right that lapses at death, a deceased individual has no right to privacy. See *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

The documents that are subject to section 552.022 contain personal financial information that is intimate or embarrassing and not a matter of legitimate public interest. The city must withhold that information, which we have marked, under section 552.101 in conjunction with common-law privacy. The city may not withhold any of the remaining information that is subject to section 552.022 on privacy grounds under section 552.101.

We also note that section 552.130 of the Government Code is applicable to some of the information that is subject to section 552.022.<sup>5</sup> This exception also is a confidentiality provision for the purposes of section 552.022. Section 552.130 excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). We have marked Texas driver's license and motor vehicle information that the city must withhold under section 552.130. Because this exception protects privacy, driver's license information related to deceased individuals may not be withheld under section 552.130. *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489; *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145; Attorney General Opinions JM-229 (1984); H-917 (1976); ORD 272.

Next, we address your claim under section 552.103 for the submitted information that is not contained in the press releases or subject to section 552.022. Section 552.103 provides in 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.).

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<sup>5</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

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.* This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You inform us, and have provided documentation reflecting, that the city received a notice of claim prior to its receipt of the instant requests for information. We note that the claim was made by an attorney for the survivors of the victims of the April 2008 drownings. We understand you to contend that the information not contained in the press releases or subject to section 552.022 is related to the notice of claim. You do not affirmatively represent to this office, however, that the notice of claim complies with the TTCA. Nevertheless, based on your representations and the city's receipt of the claim, we find that the city reasonably anticipated litigation on the date of its receipt of the instant requests for information. We also find that the information at issue is related to the anticipated litigation. We therefore conclude that the information that is not contained in the press releases or subject to section 552.022 may be withheld under section 552.103.<sup>6</sup>

In reaching this conclusion, we assume that the opposing parties in the anticipated litigation have not seen or had access to any of the information in question. 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* ORD 551 at 4-5. If the opposing parties have seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the city may continue to withhold the recording of the 911 call on the basis of our ruling under section 552.103 of the Government Code in Open Records Letter

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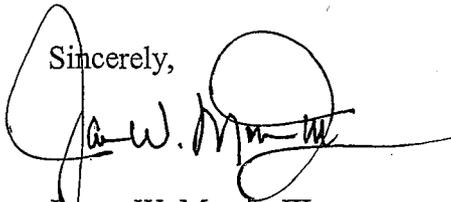
<sup>6</sup>As we are able to make this determination, we need not address your claims for this information under sections 552.107(1) and 552.111.

No. 2009-04809; (2) the city must release the marked press releases; (3) the city must withhold the marked EMS information under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the deceased individual's personal representative provides the city with written consent for release that meets the requirements of section 773.093(a); (4) the city must withhold the marked personal financial information under section 552.101 in conjunction with common-law privacy; (5) the marked Texas driver's license and motor vehicle information must be withheld under section 552.130 of the Government Code; (6) except for the information that must be withheld under sections 552.101 and 552.130, the city must release the marked information that is subject to section 552.022(a)(1), (3), and (5) of the Government Code; and (7) the city may withhold the rest of the submitted information under section 552.103.

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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 347204

Enc: Submitted information

c: Requestors  
(w/o enclosures)