



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2012

Mr. Charles H. Weir
Ms. Enid Howard
Assistant City Attorneys
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2012-09312

Dear Mr. Weir and Ms. Howard:

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# 456570 (File No. W006632).

The City of San Antonio (the "city") received a request for information related to an accident involving a named individual. You claim some of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted. We assume the city has released any other information responsive to this request that existed on the date of the city's receipt of the request. If not, then any such information must be released immediately.¹ See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We first note the submitted information includes a CR-3 crash report that was completed pursuant to chapter 550 of the Transportation Code. See Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c) or (e), accident reports are privileged and confidential. See *id.* § 550.065(b). Section 550.065(c)(4) provides for the release of an accident report to a person who provides two of the following three items of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. See *id.* § 550.065(c)(4). Under this provision, the Texas Department of

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. 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).

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 of the items of information specified by the statute. *Id.* We note the exceptions to disclosure found in the Act are generally not applicable to information another statute makes public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). In this instance, the requestor has provided the city with two of the three specified items of information. Therefore, the crash report we have marked must be released to this requestor in its entirety pursuant to section 550.065(c)(4) of the Transportation Code.

We next note the remaining information at issue includes completed reports that are subject to disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is made confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). You do not claim an exception under section 552.108. Section 552.103 of the Government Code, which you do claim, is a discretionary exception that protects 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 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022(a)(1). Therefore, the completed reports may not be withheld under section 552.103 of the Government Code. In this instance, however, sections 552.101, 552.117, and 552.130 of the Government Code are or may be applicable to information in the completed reports.² Accordingly, we will address those exceptions, which are confidentiality provisions for purposes of section 552.022(a)(1). We also will address your claim under section 552.103 for the remaining information.

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 other statutes make confidential. Records of the provision of emergency medical services (“EMS”) are confidential under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, which provides in 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.

²This office will raise sections 552.101, 552.117, and 552.130 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(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(b)-(c). Section 773.091(g) provides 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 note information made confidential by section 773.091 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). In this instance, the requestor is an attorney for the patient to whom the submitted EMS information pertains. The city must withhold the EMS information we have marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except as specified by section 773.091(g), unless the city receives the required consent for release of the information under sections 773.092 and 773.093. *See id.* §§ 773.092, .093; Open Records Decision No. 632 (1995).

Section 552.101 of the Government Code also encompasses 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 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 other types of information also 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 have marked medical information in one of the completed reports that is highly intimate or embarrassing, not a matter of legitimate public interest, and as such confidential under common-law privacy. We note the requestor may be an authorized representative of the individual to whom the marked information pertains. If so, then he has a right of access to the individual's medical information under section 552.023 of the Government Code, and the information may not be withheld from the requestor on privacy grounds. *See Gov't Code* § 552.023; Open Records Decision No. 481 at 4 (1987)

(privacy theories not implicated when individual requests information concerning herself).³ If the requestor is not the patient's authorized representative, then the city must withhold the marked medical information under section 552.101 of the Government Code in conjunction with common-law privacy.

Common-law privacy also encompasses certain types of personal financial information. Personal financial information related 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. 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), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial information in one of the completed reports that is highly intimate or embarrassing and not a matter of legitimate public interest. The city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) also encompasses an employee's personal cellular telephone or pager number if the employee pays for the telephone or pager service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. The city must withhold the information we have marked in one of the completed

³Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

reports under section 552.117(a)(1) of the Government Code to the extent the employee to whom the information pertains timely requested confidentiality for the information under section 552.024 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information related 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 or another state or country. *See* Gov't Code § 552.130(a)(1)-(2). The city must withhold the driver's license and motor vehicle information we have marked in one of the completed reports under section 552.130 of the Government Code.

Next, we address your claim under section 552.103 of the Government Code for the remaining information at issue, including any information encompassed by section 773.091(g) of the Health and Safety Code that is not otherwise subject to release under sections 773.092 and 773.093 of the Health and Safety Code. 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 seeks to withhold information under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the 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 [1st Dist.] 1984, writ ref'd n.r.e.). 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.”⁴ *Id.* This office has concluded 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 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 contend the remaining information at issue is related to anticipated litigation. You state the city received a notice of claim from the requestor regarding the accident to which his request for information pertains. You inform us the claim meets the notice requirements of the TTCA. You contend the remaining information at issue is related to the accident to which the claim pertains. Based on your representations and our review, we find the remaining information is related to litigation the city reasonably anticipated on the date of its receipt of the present request for information. We therefore conclude the city may withhold the remaining information under section 552.103 of the Government Code, including any information encompassed by section 773.091(g) of the Health and Safety Code that is not otherwise subject to release under sections 773.092 and 773.093.

In reaching this conclusion, we assume the opposing party in the anticipated litigation has not seen or had access to any of the remaining 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 relates to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information related 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 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, the city (1) must release the marked crash report in its entirety pursuant to section 550.065(c)(4) of the Transportation Code; (2) must withhold the marked EMS information under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except as specified by section 773.091(g), unless the department receives the required consent for release of the information under sections 773.092 and 773.093; (3) must withhold the marked medical information under section 552.101 in conjunction with common-law privacy, unless the requestor has a right of

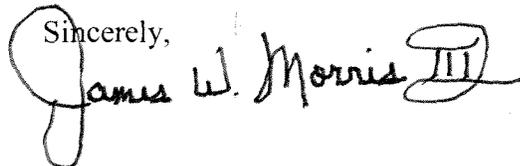
⁴Among other examples, this office concluded litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney 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).

access to the information under section 552.023 of the Government Code; (4) must withhold the marked personal financial information under section 552.101 in conjunction with common-law privacy; (5) must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent the employee to whom the information pertains timely requested confidentiality for the information under section 552.024 of the Government Code; (6) must withhold the marked driver's license and motor vehicle information under section 552.130 of the Government Code; (7) must release the remaining information in the completed reports pursuant to section 552.022(a)(1) of the Government Code; and (8) may withhold the rest of the submitted information under section 552.103 of the Government Code, including any information encompassed by section 773.091(g) of the Health and Safety Code that is not otherwise subject to release under sections 773.092 and 773.093.

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, 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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "III" at the end.

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

JWM/bs

Ref: ID# 456570

Enc: Submitted documents

c: Requestor
(w/o enclosures)