



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 30, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-18905

Dear Ms. Folsom:

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# 504073 (Houston GC No. 20761).

The City of Houston (the "city") received a request for twenty-one categories of information pertaining to a specified incident, Houston Fire Department (the "fire department") policies, named fire department firefighters, and the insurance company providing coverage for the fire department. You state the city does not possess information responsive to category number twenty-one of the request regarding insurance coverage because the city is self-insured.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you inform us that the city's Legal Department (the "legal department") "is not the custodian" of records for seventeen of the categories of the request for information. It is not clear from your statement whether you are informing us that the city does not maintain the

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic 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).

information at issue, or merely whether the legal department, as opposed to some other part of the city, does not maintain it. We note the Act does not require the city to answer factual questions, conduct legal research, or create responsive information. Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds the information on behalf of the governmental body that receives the request. *See* Gov't Code § 552.002; Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Moreover, administrative inconvenience in responding to a request for information under the Act is not grounds for refusing to comply with the request. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976).

Here, the request at issue was received by the city and was not expressly limited to legal department records. The fact that the requested information might be maintained by a different department or division within the city than the one that received the request does not mean that the request may be dismissed. *Cf.* Attorney General Opinion JM-266 at 3 (1984) (fact that a request for public records might be more appropriately directed to a different governmental body does not mean that it can be dismissed by a governmental body to which it is properly directed). Thus, because you have not provided any information responsive to those portions of the request for review, the city must release such information at this time to the extent such information existed and was maintained by the city on the date the city received the request. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). The submitted information includes completed reports that are subject to section 552.022(a)(1) and must be released unless they are either excepted under section 552.108 of the Government Code or are confidential under the Act or other law. You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Therefore, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.103. However, we note the information subject to section 552.022 contains information that is subject to section 552.101 of the Government

Code, which protects information made confidential under law, and sections 552.117 and 552.130 of the Government Code, which make information confidential under the Act.² Accordingly, we will address the applicability of these exceptions to the information that is subject to section 552.022. We will also address the applicability of section 552.103 to the information that is not subject to section 552.022.

Section 552.103 of the Government Code 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 that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (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 the pending or anticipated litigation. *See 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *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 demonstrate litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* We note 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. *See Open Records*

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

Decision No. 361 (1983). This office has concluded, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996).

You state, and submit supporting documentation showing, prior to the date the city received the present request for information, the city received a claim letter from the requestor on behalf of her client. In the letter, the requestor alleges personal injury, economic damages, mental anguish, and pain and suffering stemming from the incident at issue. You state the claim letter complies with the TTCA. Based upon these representations and our review, we conclude the city anticipated litigation at the time the city received the present request. We also agree the information at issue is related to the anticipated litigation for the purposes of section 552.103. As such, we conclude the city may withhold the information that is not subject to section 552.022 under section 552.103.

We note once the information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

We now address the information that is subject to section 552.022(a)(1) of the Government Code. 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. Section 552.101 encompasses information protected by other statutes, such as 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.

...

(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). Except for the information specified in section 773.091(g), emergency medical services (“EMS”) records are deemed confidential under section 772.091. *See id.* The information we have marked consists of records made and maintained by EMS personnel; thus, we find section 773.091 is applicable to the information at issue. Accordingly, with the exception of the information subject to section 773.091(g), which is not confidential and must be released, the city must withhold the EMS records we have marked under section 552.101 in conjunction with section 773.091(b).³

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked must be withheld under section 552.117(a)(1). The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s or driver’s license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov’t Code § 552.130(a). We conclude the city must withhold the information we have marked under section 552.130.⁴

In summary, the city may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code. With the exception of the information subject to section 773.091(g) of the Health and Safety Code, which is not confidential

³This ruling does not affect an individual’s right of access to a patient’s EMS records from the EMS provider. *See Health & Safety Code §§ 773.092, .093; cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (Medical Practice Act does not provide patient general right of access to his or her medical records from governmental body responding to request for information under Public Information Act).

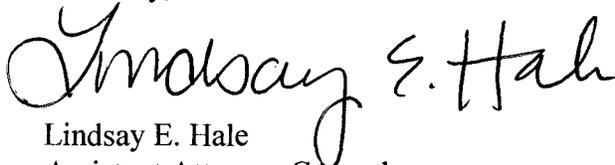
⁴We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

and must be released, the city must withhold the EMS records we have marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. If the individuals whose information we marked timely requested confidentiality pursuant to section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.130 of the Government Code. The city must release the remaining information pursuant to section 552.022(a)(1) 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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 504073

Enc. Submitted documents

c: Requestor
(w/o enclosures)