



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2010

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2010-07954

Dear Ms. Chatterjee:

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# 381360.

The University of Texas—Pan American (the "university") received a request for twenty-four categories of information pertaining to the requestor's client, who is a university employee, and an October 23, 2009 incident involving the requestor's client. You state the university will release some of the responsive information to the requestor. You also state the university does not have information responsive to seven categories of the request.¹ You inform this office the university will redact the home address, telephone numbers, social security numbers, and family member information of certain current and former university employees, and provided notice to the requestor pursuant to section 552.024(c-2).² You also

¹The 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).

²Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. Gov't Code § 552.024(c). However, some of the information you marked under this section is contained in reports completed by police officers. Generally, the protections afforded an individual under section 552.024 are only applicable to information held by a governmental body in its capacity as an employer. You have not provided this office with any indication the submitted police records are held by the university in an employment capacity. Accordingly, section 552.024 is applicable to information you marked in the submitted police and accident reports only to the extent these reports are held in an employment capacity. If they are not held in an employment capacity, the information you marked under section 552.024 may not be withheld on that basis, and we consider the availability of the information you marked with the remainder of those reports.

inform this office the university will redact any remaining social security numbers under section 552.147 of the Government Code and the submitted insurance policy number under section 552.136 of the Government Code.³ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, portions of which consist of representative samples.⁴ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing an interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's claim the university failed to comply with the procedural requirements of the Act in requesting a decision from this office. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision 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). Pursuant to section 552.301(e), the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The university represents it received the request for information on March 11, 2010, and that it was closed for business on March 18 and 19, 2010. The university also represents it requested clarification on seven categories of the request from the requestor on March 17, 2010 and received a response to this request from the requestor on April 2, 2010. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general opinion is measured from the date request is clarified or narrowed). Based on these representations, and upon review of the submitted briefs, we find the university complied with the requirements of section 552.301(b) and (e) in timely requesting a ruling and providing the necessary information to this office.

³Section 552.147(b) of the Government Code authorizes a government 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. Gov't Code § 552.147(b). Additionally, this office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁴We assume the representative samples of records submitted to this office are 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.

The requestor also alleges she was not properly notified of the university's request for a ruling from this office as required by sections 552.301(d) and (e-1) of the Government Code. Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. Gov't Code § 552.301(d). Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). The determination of whether or when a governmental body mailed its notice of the request for a decision or a copy of the written comments to the requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* The submitted information reflects the requestor was mailed a copy of each brief concurrent with the timely mailings to this office. Consequently, based on the submitted information, we find the university complied with sections 552.301(d) and (e-1) in requesting this ruling.

Next, we note some of the information submitted for review is not responsive to the request for information because it was created after the request was received by the university. This ruling does not address the public availability of any information that is not responsive to the request, and the university is not required to release this information, which we have marked, in response to this request.

Next, we note some of the remaining responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The remaining responsive information includes an Incident Investigation and Follow-up report, an Accident Report Form, a CR-3 accident report, and a police report, each of which is a report or investigation that has been completed by the university. We find these documents are subject to section 552.022(a)(1). The remaining responsive information also contains work orders, purchase orders, and invoices from an account that relate to the university's expenditure of public funds, as well as an insurance policy document pertaining to an account related to the university's receipt of public funds, that are subject to section 552.022(a)(3). Generally, the university may only withhold information subject to section 552.022 if it is expressly confidential under "other law." *Id.* § 552.022(a). Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022 and the university may not withhold any information that is subject to section 552.022 under section 552.103. However, you also raise sections 552.101 and 552.130 for some information in the documents subject to section 552.022. Sections 552.101 and 552.130 are a mandatory exceptions to disclosure, and thus are "other law" for purposes of section 552.022. We therefore consider whether sections 552.101 and 552.130 of the Government Code except from disclosure any information that is subject to section 552.022.

The submitted CR-3 accident report 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 subsection (e), accident reports are privileged and confidential. *See id.* § 550.065. Section 550.065(c)(4) provides for the release of accident reports 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 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.* Although you claim the requestor has not provided two of the required pieces of information, the request includes both the date of the accident and the name of an individual involved in the accident. Thus, we conclude the requestor has provided two of the pieces of information required by section 550.065(c)(4). Consequently, the requestor in this instance has a statutory right of access to the submitted accident report pursuant to section 550.065(c)(4).

You claim portions of this accident report are excepted from disclosure sections 552.117 and 552.130 of the Government Code. However, a statutory right of access generally prevails over the Act's exceptions to disclosure. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act inapplicable to information that statutes expressly make

public), 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). We also understand you to claim the insurance policy number in this report is subject to redaction under section 552.136 of the Government Code pursuant to ORD 684. However, ORD 684 does not apply to information in a peace officer's accident report completed pursuant to chapter 550 of the Transportation Code. *See* ORD 684 at 8. Therefore, the university must release the submitted CR-3 accident report in its entirety to the requestor under section 550.065(c) of the Transportation Code.

You marked two Texas driver's license numbers in the submitted police report, and a vehicle identification number from one of the submitted work orders under section 552.130 of the Government Code. This section excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. Gov't Code § 552.130(a)(1), (2). We agree the university must withhold the Texas motor vehicle record information you marked in these documents under section 552.130 of the Government Code.⁵ As you raise no other exceptions for the information subject to section 552.022, the remaining information in these pages must be released.

We next turn to the information not subject to section 552.022. Section 552.103 of the Government Code provides in pertinent 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 university 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 is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of*

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

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.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the “APA”), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

You represent the requestor’s client is currently engaged in a workers’ compensation claim that is pending before the Texas Department of Insurance Division of Workers’ Compensation (the “department”), regarding injuries sustained at the university as a result of the October 23, 2009 incident at issue. You state this claim was pending prior to the university’s receipt of the request. Contested cases before the department are generally governed by the APA. Labor Code § 410.153. Thus, based on your representations, we agree litigation was pending for purposes of section 552.103 on the date the university received the present request for information. Upon review, we also find the submitted information relates to this pending litigation.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). We marked e-mails in the remaining information that reflect they were received from or sent by the requestor, who represents the university’s only opposing party in the pending litigation. This information may not be withheld under section 552.103. *Id.* The remaining responsive information not subject to section 552.022 may be withheld under section 552.103.⁶ However, we note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim the remaining information is excepted by section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating

⁶As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

As noted above, the remaining e-mails were received from or sent by the requestor, who is not a privileged party. Accordingly, this information is not protected by the attorney-client privilege and generally may not be withheld under section 552.107 of the Government Code. However, we agree these non-privileged e-mails are submitted as part of an otherwise privileged e-mail string. Thus, if these e-mails do not exist separate and apart from the privileged string in which they are submitted, they may be withheld as privileged attorney-client communications under section 552.107. If the non-privileged e-mails exist separate and apart from the e-mail string in which they are submitted, they may not be withheld.

In summary, the university must release the submitted CR-3 accident report in its entirety pursuant to section 550.065(c)(4) of the Transportation Code. With the exception of the Texas motor vehicle record information you marked that must be withheld under section 552.130 of the Government Code, the information that is subject to section 552.022, which we have marked, must be released. If the e-mails we marked as non-privileged do not exist separate and apart from the otherwise privileged e-mail chain in which they are submitted, they may be withheld under section 552.107 of the Government Code; otherwise,

the non-privileged e-mail must be released. The remaining responsive information may be withheld under section 552.103 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.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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 381360

Enc. Submitted documents

cc: Requestor
(w/o enclosures)