



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 14, 2010

Mr. Paul Taylor  
Division Director  
RM Legal and Regulatory Affairs  
TASB Risk Management Fund  
P.O. Box 301  
Austin, Texas 78767-0301

OR2010-10470

Dear Mr. Taylor:

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# 386623.

The TASB Risk Management Fund ("TASB") received a request for documents, photographs, and videos pertaining to a specified accident involving a school bus and insurance policies covering the accident. You state TASB received a video recording from the Arlington Independent School District (the "district") that identifies students from the district. You state TASB has withheld this video recording pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.<sup>1</sup> You claim that 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.<sup>2</sup>

---

<sup>1</sup>FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. These provisions apply to student records in the custody of educational institutions and to records directly transferred from the educational institution to a third party. 34 C.F.R. § 99.33(a)(2). The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is 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.

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(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:

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

(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 the estimate[.]

Gov't Code § 552.022(a)(3), (5). We have marked checks, insurance policy documents, and an insurance settlement agreement that consist of information in an account or contract related to the receipt or expenditure of funds by TASB. We have also marked a completed estimate. Thus, pursuant to section 552.022, TASB may only withhold this marked information if it is confidential under "other law." You claim these documents are excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). 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). Consequently, TASB may not withhold the information subject to section 552.022 under section 552.103. The Texas Supreme Court has determined that 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). 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 and therefore is not "other law" for purposes of section 552.022. You also raise section 101.104 in conjunction with section 552.101 of the Government Code, which 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 is "other law" for purposes of section 552.022. As we note above, section 101.104 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 No. 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). Accordingly, we determine information subject to section 552.022 may not be withheld from disclosure on the basis of section 101.104 of the Civil Practice and Remedies Code.

We note portions of the estimate are subject to section 552.130 of the Government Code.<sup>3</sup> Section 552.130 excepts from disclosure information that relates to a Texas motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130(a)(2). We have marked the Texas motor vehicle information TASB must withhold under section 552.130.

We also note portions of the checks are subject to section 552.136 of the Government Code, which provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Accordingly, TASB must withhold the bank account numbers and routing numbers we have marked in the submitted checks under section 552.136. As you raise no further exceptions to disclosure, the remaining information which is subject to section 552.022 must be released.

We next turn to the information not subject to section 552.022, all of which you claim is excepted by section 552.103 of the Government Code. Section 552.103 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). 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

---

<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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.); Open Records Decision No. 551 at 4 (1990). 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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452.

The requestor is an attorney representing the spouse and estate of the individual who died in the specified accident. You point out that the requestor expresses her willingness to seek the information at issue "through the formal discovery procedures involved in litigation." Thus, you argue this request caused TASB to reasonably anticipate litigation related to the submitted information at the time the request was received. After reviewing your arguments and the submitted documents, we conclude that, for purposes of section 552.103, TASB reasonably anticipated litigation on the date it received the present request for information. We also find the remaining information pertains to that anticipated litigation. Therefore, TASB may withhold the remaining information at issue under section 552.103 of the Government Code.

We note, however, once 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 Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the potential opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, TASB must withhold the Texas motor vehicle information we have marked in the estimate under section 552.130 of the Government Code. TASB must withhold the bank account numbers and routing numbers we have marked in the checks under section 552.136 of the Government Code. TASB must release the remaining information subject to

section 552.022 of the Government Code, which we have marked. TASB may withhold the remaining submitted information under section 552.103 of the Government Code.<sup>4</sup>

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, toll free at (888) 672-6787.

Sincerely,



Tamara H. Holland  
Assistant Attorney General  
Open Records Division

THH/jb

Ref: ID# 386623

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>4</sup>We 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 Texas license plate numbers under section 552.130 of the Government Code and bank account numbers and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.