



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2010

Mr. Art Pertile, III
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2010-19286

Dear Mr. Pertile:

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# 404604 (City of Stafford Nos. COS10-021 and COS10-022).

The City of Stafford (the "city"), which you represent, received two requests from the same requestor for 38 categories of information pertaining to a fatal accident, the victim of the accident, the lawn mower involved in the accident, and related matters. We understand some of requested information either has been or will be released. You claim other responsive 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.¹

Initially, we note item one of the first request for information references the lawn mower involved in the fatal accident. The Act is applicable to "public information," which is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. *See* Gov't Code § 552.002. This office has ruled, however, that tangible physical items are not "information," as that term is contemplated under the Act. *See* Open Records Decision No. 581 (1990). Therefore, the lawn mower is not public information, for purposes

¹This letter ruling assumes that the submitted "representative copies" of the requested information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

of section 552.002 of the Government Code, and the Act does not require the city to make the lawn mower available to the requestor. *See* Gov't Code §§ 552.002, .021.

We also note some of submitted information 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.² Thus, the information created after the city received these requests is not responsive to the requests. This decision does not address the public availability of the non-responsive information we have marked, and the city need not release that information in response to these requests.

Next, we note most of the responsive information is subject to 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 expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). In this instance, most of the responsive information is contained in a completed investigation of the fatal accident by the city's police department. We have marked that information. We note you do not claim section 552.108 for the marked information. Although you seek to withhold the marked information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure 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 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022(a)(1). Therefore, the city may not withhold any of the information encompassed by section 552.022(a)(1) under section 552.103. We note sections 552.102(a) and 552.130 of the Government Code are applicable to some of the information encompassed by section 552.022(a)(1).³ Accordingly, we will address sections 552.102(a) and 552.130, which are confidentiality provisions for purposes of section 552.022(a)(1). We also will address your claim under section 552.103 for the information that is not encompassed by section 552.022(a)(1).

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held

²*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).

³The Office of the Attorney General will raise mandatory exceptions like sections 552.102 and 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions.

section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.130 of the Government Code 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 or to a personal identification document issued by a state agency or a local agency authorized to issue an identification document. *See* Gov't Code § 552.130(a)(1)-(3). We have marked Texas driver's license, motor vehicle and personal identification information the city must withhold under section 552.130.⁴ We note that because this exception protects privacy, which is a personal right that lapses at death, section 552.130 is not applicable to the deceased accident victim's Texas driver's license information. *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.); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

Section 552.103, the "litigation exception," 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 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

⁴We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including a Texas driver's license number and a Texas license plate number under section 552.130, without the necessity of requesting an attorney general decision.

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.” *Id.* This office has concluded a governmental body’s receipt of a claim 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 responsive information not encompassed by section 552.022(a)(1) is related to anticipated litigation to which the city would be a party. You note that in his first request for information, the requestor stated: “I am hereby providing you with notice that a jury may be asked to make negative inference from the destruction of any evidence related to this claim after you have received this notice [to preserve evidence].” You contend “[t]he requestor’s notice is clearly a claim against the [c]ity[.]” You also state that on the date of its receipt of the second request for information, the city also received a notice of claim from the requestor pursuant to the TTCA. You have submitted a copy of the notice of claim, which identifies the requestor as an attorney for the accident victim’s widow, individually and as a representative of his estate and his children. Based on your representations and the totality of the circumstances presented, we find litigation was reasonably anticipated on the dates of the city’s receipt of these requests for information. We also find the responsive information not encompassed by section 552.022(a)(1) is related to the anticipated litigation. We therefore conclude the city may withhold that information under section 552.103 of the Government Code.

In reaching this conclusion, we assume the requestor has not seen or had access to any of the information in question. We note that 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 party has 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).

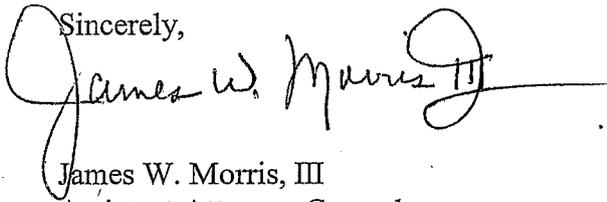
We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) except for the marked information the city must withhold under sections 552.102(a) and 552.130 of the Government Code, the city must release the marked information that is encompassed by section 552.022(a)(1) of the Government Code; and (2) the city may withhold the rest of the responsive information under section 552.103 of the Government Code.⁵

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,



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

JWM/dls

Ref: ID# 404604

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the remaining information encompassed by section 552.022(a)(1) includes the social security numbers of living persons. Section 552.147(b) of the Government Code authorizes a governmental 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.