



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2011

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2011-06181

Dear Ms. Constantine:

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# 416450.

The Dallas/Fort Worth International Airport Board (the "board") received a request for all records pertaining to a specified incident involving the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.103, 552.130, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the request because it was created after the request was received by the board. This ruling does not address the public availability of the information that is not responsive to the request, and the board is not required to release this information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Next, we note the responsive records include emergency medical service ("EMS") records pertaining to the requestor's client that are subject to section 552.101 of the Government

¹Although you also raise section 552.101 of the Government Code in conjunction with section 552.147, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).*

Code.² 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 section encompasses information protected by other statutes, including 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 [EMS] personnel or by a physician providing medical supervision that are created by the [EMS] personnel or physician or maintained by an [EMS] 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), EMS records are deemed confidential and may be released only in accordance with chapter 773 of the Health & Safety Code. *See id.* §§ 773.091-.094. Upon review, we have marked the EMS records in the responsive information, which are subject to section 773.091. Records that are confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information[.]" *Id.* §§ 773.092(e)(4), .093. Section 773.093 provides a consent for release of EMS records must be written and signed by the patient, authorized representative, or personal representative and must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093(a). Although you claim the EMS records are excepted from disclosure under section 552.103 of the Government Code, a specific statutory right of access prevails over the Act's general exceptions to disclosure. *See Open Records Decision No. 451 at 4 (1986)* (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Thus, if the board receives proper consent, the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. If the board does not receive proper consent, then, with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. In that case, we consider your claim under

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

section 552.103 of the Government Code for the information subject to section 773.091(g) along with the remaining information.

Section 552.103 of the Government Code 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). 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* Open Records Decision No. 551 at 4-5 (1990). 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 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.*); ORD 551 at 4. 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 for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 5 (1986). This office has concluded that 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 ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, 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 litigation is reasonably anticipated. *See id.* In this instance, you affirmatively represent the written request for information in this instance meets the notice requirements of the TTCA. Based on this representation, we agree litigation was reasonably anticipated on the date the board received the request. Additionally, upon

review of the notice and submitted information, we find the remaining responsive information relates to the anticipated litigation.

The submitted information includes incident report number 10-4774, which involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex Civ. App.—Houston [14th Dist. 1975, writ ref'd n.r.e.); see Open Records Decision No. 127 (1976). This office has stated that basic information about a crime may not be withheld under section 552.103 of the Government Code even if it is related to the anticipated litigation. Open Records Decision No. 362 (1983). Thus, we find the basic offense information from this incident report may not be withheld on the basis of section 552.103 of the Government Code.

Additionally, once information is obtained from or provided to all the opposing parties in the litigation, there is no interest in withholding that information under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). We have marked two letters and a witness statement in the remaining information that reflect they were obtained from or provided to the requestor or his client, who is the board's lone opposing party in the anticipated lawsuit. Consequently, these documents may not be withheld under section 552.103 of the Government Code. The remaining information at issue may be withheld under section 552.103. However, we note the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

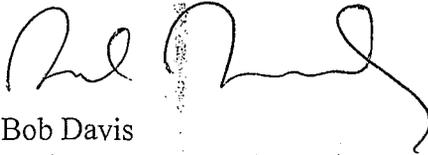
In summary, if the board receives proper consent, the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. If the board does not receive proper consent, then, with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. With the exception of basic information from report number 104774 and the documents we marked that were obtained from or provided to the requestor or his client, the remaining responsive information, including the information subject to section 773.091(g), may be withheld under section 552.103 of the Government Code. The basic information from report number 10-4774 and the documents we marked that were obtained from or provided to the requestor or his client must be released.³

³The information being released includes the requestor's client's social security number, which you marked to withhold pursuant to section 552.147 of the Government Code. However, because section 552.147 protects personal privacy, the requestor has a right of access to his client's social security number under section 552.023 of the Government Code. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles). Thus, the marked number must be released to this requestor. However, if the board receives another request for this information from a different requestor, the board may withhold this social security number under section 552.147(b) of the Government Code without the necessity of requesting a decision from this office under the Act.

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, appearing to read 'Bob Davis', with a long, sweeping underline that extends to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 416450

Enc. Submitted documents

c: Requestor
(w/o enclosures)