



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2011

Ms. Allison Bastian
Assistant City Attorney
City of Brownsville
P.O. Box 911
Brownsville, Texas 78522-0911

OR2011-14070

Dear Ms. Bastian:

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# 431310.

The City of Brownsville (the "city") received a request for five categories of information pertaining to a specified motor vehicle accident: (1) the applicable insurance policy and declaration sheet, (2) the PIP/Med Pay file or medical benefits coverage that may be afforded the requestor's client, (3) the property damage file, (4) any correspondence between the city and the third-party tortfeasor's insurance company, and (5) all witness statements. You state the city does not have information responsive to items 2, 4, and 5 of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note the Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you raised section 552.108 of the Government Code as an exception to disclosure in your initial brief to this office, you did not submit to this office written comments stating the reasons why this section would except the submitted information; we therefore assume you no longer assert this exception. *See Gov't Code* §§ 552.301, .302.

Initially, we note some of the submitted information is not responsive to the request because it was created after the date the request was received. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released in response to the present request.

We next note some of the submitted information may have been the subject of a previous request by the city for a decision, in response to which this office issued Open Records Letter No. 2011-04728 (2011). We are unaware of any change in the law, facts, and circumstances on which the previous ruling is based. Therefore, to the extent the submitted information was the subject of Open Records Letter No. 2011-04728, the city must withhold or release any such information in accordance with the previous ruling. *See* Gov't Code § 552.301(f); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under section 552.301(a) of the Government Code). To the extent the submitted information was not the subject of the previous ruling, we will address the city's exceptions to disclosure.

Next, we note the submitted information contains a CR-3 accident report that 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 pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See id.* § 550.065(c)(4). Upon review, we find the requestor has provided the city with two of the three requisite pieces of information specified by the section 550.065(c)(4). Although you seek to withhold the CR-3 accident report under section 552.101 of the Government Code in conjunction with section 101.104 of the Texas Civil Practice and Remedies Code, and sections 552.103 and 552.117 of the Government Code, a statutory right of access generally prevails over the Act's exceptions to public disclosure. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act inapplicable to information statutes expressly make public), 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 3 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act).

You also assert portions of the CR-3 accident report are confidential under section 552.130 of the Government Code. This section provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state, or another state or country, is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as amendments to Gov't Code § 552.130(a)(1), (2)). As previously noted, a statutory right of access generally prevails over the Act's general exceptions to disclosure. *See* ORD 451 at 3. However, because section 552.130 has its own access provisions, we conclude section 552.130 is not a general exception under the Act. Thus, we must address the conflict between the access provided under section 550.065 of the Transportation Code and the confidentiality provided under section 552.130. Where information falls within both a general and a specific provision of

law, the specific provision prevails over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (“more specific statute controls over the more general”); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451. In this instance, section 550.065 specifically provides access only to accident reports of the type at issue, while section 552.130 generally excepts motor vehicle record information maintained in any context. Thus, we conclude the access to accident reports provided under section 550.065 is more specific than the general confidentiality provided under section 552.130. Accordingly, the city may not withhold any portion of the CR-3 accident report under section 552.130. Therefore, the city must release the CR-3 accident report we have marked in its entirety under section 550.065(c)(4).

Next, we note most of the remaining information is subject to section 552.022 of the Government Code, which provides in pertinent 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:

(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;

...

(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)(1), (3), (5). The remaining information contains completed reports subject to section 552.022(a)(1) and information in a contract relating to the expenditure of public funds subject to section 552.022(a)(3). The remaining information also includes completed estimates subject to section 552.022(a)(5). The city may only withhold this information if it is made confidential under “other law.” Although you seek to withhold the information at issue under section 552.103 of the Government Code, this is a discretionary exception that protects a governmental body’s interest 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Thus, the city may not withhold the information we have marked under section 552.022 under section 552.103. However, because sections 552.101, 552.117, and 552.130 of the Government Code are “other law” for purposes of section 552.022, we will consider your arguments under these sections for all of the remaining information. We will also consider your argument under section 552.103 for the remaining information not subject to section 552.022.

You raise section 552.103 of the Government Code for the remaining information that is not subject to section 552.022. Section 552.103 provides, in 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 the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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).

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 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. If that representation is not made, the

receipt of the claim letter is a factor that 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).

In this instance, the requestor is the attorney representing an individual who was allegedly injured by a city bus in the specified motor vehicle accident. You provide documentation which reveals, that concurrent with the instant request for information, the requestor submitted a notice of claim to the city. Although you do not affirmatively represent that this notice meets the requirements of the TTCA, the requestor states the notice is intended to notify the city that pursuant to the TTCA, the requestor's client will be making a claim for damages and injuries. Based on these representations and the totality of the circumstances, we conclude the city has established that litigation was reasonably anticipated when the city received the request for information. We also find the information not subject to section 552.022 relates to the anticipated litigation. Accordingly, the city may withhold this information, which we have marked, under section 552.103.

We note that 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 that 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 your arguments for the remaining information that is subject to section 552.022. 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 exception encompasses information that other statutes make confidential. Section 101.104 of the Texas Civil Practice and Remedies Code provides as follows:

- (a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the TTCA].
- (b) Neither the existence nor the amount of the insurance is subject to discovery.

Tex. Civ. Prac. & Rem. Code § 101.104. Section 101.104 prohibits the discovery and admission of insurance information during a trial under the TTCA. *See City of Bedford v. Schattman*, 776 S.W.2d 812, 813-14 (Tex. App.—Fort Worth 1989, orig. proceeding) (protection from producing evidence of insurance coverage under section 101.104 is limited to actions brought under the Tort Claims Act). However, section 101.104 does not make insurance information confidential for purposes of section 552.101 of the Government Code. *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"). The Act differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See* Gov't

Code §§ 552.005 (Act does not affect scope of civil discovery), .006 (Act does not authorize withholding public information or limit availability of public information to public except as expressly provided by the Act); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision No. 575 (1990) (*overruled in part by* Open Records Decision No. 647 (1996)) (section 552.101 does not encompass discovery privileges). Thus, we find section 552.101 does not make the information at issue confidential for purposes of section 552.101. Therefore, the city may not withhold this information under section 552.101 in conjunction with section 552.104.

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 this information be kept confidential under section 552.024 of the Government Code.³ Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). We note section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The information at issue contains a city employee's cellular telephone number, which we have marked. Accordingly, to the extent this employee timely elected confidentiality under section 552.024 and pays for the cellular telephone service with personal funds, the city must withhold her cellular telephone number under section 552.117(a)(1). If the employee did not timely elect to keep her personal information confidential or does not pay for the cellular telephone service with personal funds, her cellular telephone number may not be withheld under section 552.117(a)(1).

Finally, as noted above, section 552.130 of the Government Code provides that information relating to a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)(2)). The information at issue contains a vehicle identification number and license plate number.

³Although we understand you to raise section 552.117(a)(2) of the Government Code, which is applicable to personal information relating to a peace officer, based on the substance of your brief, we note the proper exception for personal information relating to an official or employee of a governmental body is section 552.117(a)(1).

Therefore, the city must withhold this information, which we have marked, under section 552.130.⁴

In summary, to the extent the submitted information was the subject of Open Records Letter No. 2011-04728, the city must withhold or release any such information in accordance with the previous ruling. The city must release the CR-3 accident report we have marked in its entirety under section 550.065(c)(4) of the Transportation Code. The city may withhold the information we have marked under section 552.103 of the Government Code. To the extent the employee whose cellular telephone number we have marked timely elected confidentiality for her personal information under section 552.024 of the Government Code and pays for the cellular telephone service with personal funds, the city must withhold her cellular telephone number under section 552.117(a)(1) of the Government Code. If the employee did not timely elect confidentiality or does not pay for the cellular telephone service with personal funds, her cellular telephone number may not be withheld under section 552.117(a)(1) of the Government Code. Finally, the city must withhold the information we have marked under section 552.130 of the Government Code. The remaining responsive information must be released.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

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⁴We note this office 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 license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 431310

Enc. Submitted documents

c: Requestor
(w/o enclosures)