



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2011

Ms. Karla A. Schultz
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2011-18389

Dear Ms. Schultz:

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# 438906.

The Hayes Consolidated Independent School District (the "district"), which you represent, received a request for information pertaining to a specified motor vehicle accident. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

Initially, we note the submitted information contains a CR-3 accident report form that was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c) or (e), accident reports are privileged and confidential. *See id.* § 550.065(b). 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. *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

¹We note the submitted information contains social security numbers. 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.

two or more pieces of information specified by the statute.² *Id.* The requestor has provided the district with two of the three pieces of information pursuant to section 550.065(c)(4). Although you contend this report is excepted from disclosure under section 552.103 of the Government Code, the exceptions found in the Act generally do not apply to information that is made public by other statutes. Open Records Decision Nos. 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). Thus, the district must release the report, which we have marked, in its entirety to the requestor.

Portions of the remaining information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

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 unless made confidential under this chapter or 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[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). Although you assert this information is excepted from disclosure under section 552.103, this section is discretionary and does not make information confidential under the Act. *Id.* §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions); 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022, which we have marked, under section 552.103. However, sections 552.102, 552.117, and 552.130 of the Government Code make information confidential under chapter 552.³ See Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 3 (to be codified as an amendment to Gov't Code § 552.102) (providing for

²Transp. Code § 550.0601 (“department” means Texas Department of Transportation).

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); see, e.g., Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

“confidentiality” of information under section 552.102), § 9 (to be codified as an amendment to Gov’t Code § 552.117) (providing for “confidentiality” of information under section 552.117), § 21 (to be codified as an amendment to Gov’t Code § 552.130) (providing for “confidentiality” of information under section 552.130). Therefore, we will consider the applicability of these exceptions to the information subject to section 552.022.

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 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information in the documents subject to section 552.022 that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code may be applicable to some of the submitted information. Section 552.117(a)(1) 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 that this information be kept confidential under section 552.024 of the Government Code. 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)). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. We have marked information in the documents subject to section 552.022 that must be withheld if section 552.117(a)(1) applies.

Section 552.130(a) of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or

(3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

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). The requestor has a right of access to her client's motor vehicle record information pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) (“[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). However, the district must withhold under section 552.130 the remaining motor vehicle record information, which we have marked, in the documents subject to section 552.022. The district must release the remaining information in the documents subject to section 552.022.

You assert the information not subject to the section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which 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.

The governmental body has the burden of providing relevant facts and documents to show 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 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure 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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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.⁴ 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 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 requested information pertains to a motor vehicle accident between a district school bus and a vehicle driven by the requestor's client. You assert the district anticipated litigation with regard to an underlying insurance dispute about the accident when it received the request for information. Specifically, you state, "there is an on-going dispute between [r]equestor and the [d]istrict's insurance carrier over what [r]equestor refers to as 'the negligent acts of a person/company [the district's insurance company] insure[s].'" You argue the district reasonably anticipated litigation related to this dispute between the district's insurer and the requestor when it received the request for information "[b]ased on [r]equestor's legal representation of [the requestor's client], the documented events surrounded [sic] the accident, [r]equestor's allegations of negligence by a [district] employee, and the ongoing dispute over alleged injuries and insurance coverage[.]" Based on your representations, our review of the submitted documents, and the totality of circumstances we conclude that, for purposes of section 552.103, you have established litigation was reasonably anticipated when the district received the request for information. We also find you have established the records at issue are related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103 is applicable to the documents that are not subject to section 552.022.

However, the district seeks to withhold information that the requestor, who represents the opposing party to the anticipated litigation, has already seen or had access to. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party

⁴In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

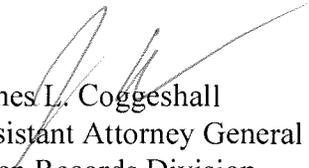
to anticipated litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the requestor has already seen or had access to is not excepted from disclosure under section 552.103, and the district must release it to the requestor. However, the district may withhold under section 552.103 the remaining information not subject to section 552.022.

To conclude, the district must release the following: (1) the CR-3 accident report we have marked pursuant to section 550.065 of the Transportation Code; (2) the information we have marked under section 552.022 of the Government Code; however, in releasing this information, the district must withhold the information we have marked under sections 552.102 and 552.130 of the Government Code and the information we have marked under section 552.117(a)(1) of the Government Code if the employee at issue timely elected to withhold that information; and (3) the submitted information that the requestor has already seen or had access to.⁵ The district may withhold the remaining information 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

⁵Because the requestor has a special right of access to the information being released, the district must again seek a decision from this office if it receives another request for the same information from another requestor.

Ref: ID# 438906

Enc. Submitted documents

c: Requestor
(w/o enclosures)