



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2012

Ms. Leni Kirkman
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Strategic Communications & Patient Relations
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OR2012-05070

Dear Ms. Kirkman:

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# 450063.

The Bexar County Hospital District d/b/a University Health System ("UHS") received a ten-part request for information related to the construction of a parking garage, the collapse of a portion of the garage, and named business entities.¹ You state some of the requested information has been released. You claim other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also believe this request for information may implicate the interests of third parties. You inform us the interested parties were notified of the request and of their right to submit arguments to this office as to why the requested information should not be released.² We

¹You state, and have provided documentation confirming, UHS requested and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

received correspondence from The Beck Group (“Beck”), Clark/McCarthy/Bartlett (“Clark”), J.E. Dunn Construction Company (“Dunn”), Gilbane/J.E. Dunn (“Gilbane”), and an attorney for Broaddus + Munoz, LLC (“Broaddus”) and ZachryVaughnLayton (“ZVL”).³ We have considered all the submitted arguments and reviewed the information UHS submitted, some of which consists of representative samples.⁴

We first note an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, only Beck, Clark, Dunn, Gilbane, Broaddus, and ZVL have submitted arguments to this office. As we have received no correspondence from any of the other third parties UHS notified, none of those parties has demonstrated any of the submitted information is proprietary for purposes of the Act. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Therefore, none of the submitted information may be withheld on the basis of any interest any of the other third parties may have in the information.

We next note some of the submitted information falls within the scope of 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 excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). In this instance, the submitted information includes completed reports made of, for, or by UHS. We have marked the types of information that are subject to disclosure under section 552.022(a)(1). UHS does not claim an exception to disclosure under section 552.108 of the Government Code. Although UHS does seek to withhold the submitted information under sections 552.103, 552.107(1), and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body’s interests 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 Gov’t Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov’t Code § 552.111 could be waived). As such, sections 552.103, 552.107(1), and 552.111 do not make information confidential for purposes of section 552.022(a)(1). Therefore, the marked types of information that are subject to section 552.022(a)(1) may not be withheld under

³We note Beck and Clark have submitted information they contend should be withheld from disclosure. This decision is applicable only to the information UHS submitted to his office in requesting the decision. *See* Gov’t Code § 552.301(e)(1)(D).

⁴This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes UHS 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).

sections 552.103, 552.107(1), or 552.111. We note the attorney-client privilege, which UHS claims under section 552.107(1), also is found at Texas Rule of Evidence 503, which has been held to make information confidential for purposes of section 552.022(a)(1). *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We do not understand UHS to claim, however, that any of the information encompassed by section 552.022(a)(1) is protected by the attorney-client privilege. Therefore, none of that information may be withheld under rule 503. We also note UHS, Beck, Clark, Dunn, Gilbane, Broaddus, and ZVL claim sections 552.101, 552.102, and 552.110 of the Government Code, which do make information confidential for purposes of section 552.022(a)(1).⁵ In this instance, however, we do not understand UHS or any of the third parties to claim that sections 552.101, 552.102, or 552.110 are applicable to any of the information encompassed by section 552.022(a)(1). Therefore, none of the information encompassed by section 552.022(a)(1) may be withheld on the basis of any of those exceptions.

We note the information encompassed by section 552.022(a)(1) includes insurance policy numbers. Section 552.136 of the Government Code provides in part that “[n]otwithstanding any other provision of [the Act], 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.”⁶ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Section 552.136 is a confidentiality provision for purposes of section 552.022(a)(1). This office has determined an insurance policy number is an access device for purposes of section 552.022(a)(1). Therefore, UHS must withhold the insurance policy numbers we have marked under section 552.136(b) of the Government Code.

We also note some of the information encompassed by section 552.022(a)(1) appears to be protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See Open Records Decision No. 180 at 3 (1977); see also Open Records Decision No. 109 (1975)*. A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See ORD 180 at 3*. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. Thus, except for the marked insurance

⁵Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.102(a) excepts “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 552.102(a). Section 552.110 excepts “a trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” *Id.* § 552.110(a)-(b).

⁶This office will raise section 552.136 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions)*.

policy numbers that must be withheld under section 552.136 of the Government Code, the marked information encompassed by section 552.022(a)(1) of the Government Code must be released, but any information protected by copyright may only be released in compliance with copyright law.

Next, we address UHS's claim for the rest of the submitted information under section 552.103 of the Government Code. This 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 bears the burden of providing relevant facts and documents sufficient to demonstrate the applicability of this exception to the information at issue. The governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of the governmental body's receipt of the request for information, and (2) the requested information is related to the pending or anticipated litigation. *See 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.). 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 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 litigation is reasonably anticipated. If this representation is not made, then 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 Open Records Decision No. 638 at 4 (1996).*

UHS explains the submitted information is related to the construction of a parking garage for UHS and the collapse of a portion of the garage. UHS informs us it subsequently received a demand letter from an attorney who, along with the requestor, represents two construction workers who were injured in the incident. UHS states it received the demand letter prior to its receipt of the present request for information. UHS has provided a copy of the demand letter, which places UHS on notice of a claim pursuant to the TTCA. UHS also has provided a copy of the original petition in a lawsuit the requestor's clients have filed against Broaddus. We note the lawsuit was filed prior to UHS's receipt of the present request. Based on the notice of claim, the pending lawsuit, and the potential inclusion of UHS in the lawsuit, UHS contends litigation was reasonably anticipated when UHS received the present request. UHS also contends the rest of the submitted information is related to the anticipated litigation. Based on UHS's representations and documentation and our review, we find the remaining information is related to litigation UHS reasonably anticipated when it received the present request. We therefore conclude UHS may withhold the remaining information under section 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing parties in the anticipated litigation have not already seen or had access to any of the remaining information. 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 parties have seen or had access to information related to anticipated litigation, through discovery or otherwise, 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).

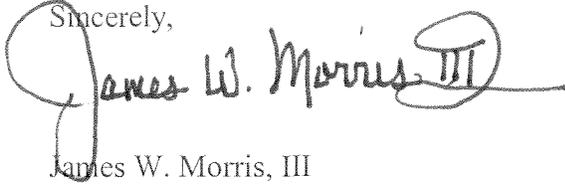
In summary, UHS (1) must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code; (2) must release the rest of the marked information encompassed by section 552.022(a)(1) of the Government Code, but may only release copyrighted information in compliance with copyright law; and (3) may withhold the rest of the submitted information under section 552.103 of the Government Code. As we are able to make these determinations, we need not address the remaining arguments against disclosure.

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,



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JWM/em

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