



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2013

Ms. Cheryl Elliott Thornton
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2013-03978

Dear Ms. Thornton:

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# 480854 (CAO File No. 12PIA0611).

The Harris County Risk Management Department (the "county") received a request for information pertaining to a specified incident involving the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note the responsive information contains a CR-3 accident form subject to section 550.065 of the Transportation Code. This section provides that, except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. Transp. Code § 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) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4).

In this instance, the requestor has provided the county with two of the requisite pieces of information specified by the statute. Although you seek to withhold this information under sections 552.103 and 552.111 of the Government Code, we note a statutory right of access

prevails over the general exceptions to public disclosure under the Act. *See, e.g.*, 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 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Accordingly, the county must release the submitted CR-3 accident report form in its entirety to this requestor pursuant to chapter 550 of the Transportation Code.

Some 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 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[.]

Gov't Code § 552.022(a)(1). The remaining information contains a completed county accident report. Although you assert this report is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *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 (1999) (governmental body may waive section 552.103), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). As such, sections 552.103 and 552.111 do not make information confidential for the purposes of section 552.022. Therefore, the county may not withhold the information subject to section 552.022 under section 552.103 or section 552.111. We note, however, some of the information subject to section 552.022 falls within the scope of sections 552.101, 552.1175, 552.130, and 552.136 of the Government Code.¹ As these exceptions can make information confidential for purposes of section 552.022, we will address their applicability.

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82.

This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We conclude the personal financial information we have marked is confidential under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.1175 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175.

Upon review, we have marked information that is subject to section 552.1175. If the individual whose information is at issue is a currently licensed peace officer and if the individual elects to restrict access to the information at issue in accordance with section 552.1175(b), the county must withhold the information we have marked under section 552.1175 of the Government Code.²

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130(a). We conclude the information we have marked falls within the scope of section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states 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.” *Id.* § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). We conclude the insurance policy number we have marked falls within the scope of section 552.136 of the Government Code.

We note the submitted records indicate the requestor's client may have an ownership interest in one of the motor vehicles involved in the accident. If that is the case, pursuant to

²Section 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. Gov't Code § 552.147(b).

section 552.023 of the Government Code, the requestor has a right of access to his client's personal financial information, motor vehicle information, and insurance policy number.³ *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). To the extent the requestor has a right of access under section 552.023, the county may not withhold the marked personal financial information under section 552.101 of the Government Code in conjunction with common-law privacy, the marked motor vehicle information under section 552.130 of the Government Code, or the marked insurance policy number under section 552.136 of the Government Code. Otherwise, the county must withhold the marked personal financial information under section 552.101 and common-law privacy, the marked motor vehicle information under section 552.130, and the marked insurance policy number under section 552.136.

You claim the remaining information, which is not subject to section 552.022, is excepted from disclosure under section 552.103, which provides, in relevant part, the following:

(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 applies 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 requested information is related to that 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.); Open Records Decision No. 551 at 4 (1990). The governmental body must

³Section 552.023 provides in part that “[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.” Gov’t Code § 552.023(a).

meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 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 that 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. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). This office has concluded a governmental body's receipt of a claim letter 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. *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. *Id.*

You assert the county reasonably anticipated litigation involving the requestor's client in this instance because the county received a notice of claim prior to the date it received the present request for information. You do not state the claim letter complies with the requirements of the TTCA; however, the letter you have submitted for our review concerns injuries sustained by the requestor's client and alleges liability on the part of the county. Further, you state the remaining information pertains to the subject of the anticipated litigation. Based on your representations, our review of the information, and the totality of the circumstances, we conclude the remaining information pertains to litigation the county reasonably anticipated when it received the request for information.

⁴In addition, this office has concluded that 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).

We note however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to pending 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). In this case, the opposing party to the pending litigation has seen or had access to a portion of the information at issue. Therefore, this information, which we have marked, is not protected by section 552.103 and may not be withheld on that basis. However, the county may withhold the remaining information under section 552.103 of the Government Code.⁵ We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We will address your remaining argument for the information to which the opposing party had access or has seen.

You claim the remaining information at issue is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *see also* Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Upon review, we find the remaining information at issue was communicated with the opposing party to the anticipated litigation, who does not share a privity of interest or common deliberative process with the county. Therefore, we conclude you have failed to demonstrate any of the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the county. Consequently, the county may not withhold any of the remaining information at issue under section 552.111 of the Government Code and must release it.

In summary, the county must release the CR-3 accident report we have marked pursuant to section 550.065(c)(4) of the Transportation Code. With regard to the information subject to section 552.022(a)(1) of the Government Code, the county must withhold the marked information under section 552.1175 of the Government Code, if the individual whose information is at issue is a currently licensed peace officer and if the individual elects to restrict access to the information at issue in accordance with section 552.1175(b); and, unless the requestor has a right of access pursuant to section 552.023 of the Government Code, the county must withhold the information we have marked under (1) section 552.101 in conjunction with common-law privacy; (2) section 552.130 of the Government Code; and (3) section 552.136 of the Government Code. The county must release the remaining information subject to section 552.022.⁶ Except for the information to which the opposing party had access or has seen, the county may withhold the remaining information under section 552.103(a) of the Government Code. The county must release the information to which the opposing party had access or has seen, which we have marked.

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

⁶We note some of the information being released contains information to which the requestor has a special right of access. *See* Gov't Code § 552.023(a). Because the requestor has a right of access to this information that would be confidential with respect to the general public, if the county receives another request for this information from someone other than this requestor or his client, the county must again seek a ruling from this office.

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 "Cindy Nettles". The signature is fluid and cursive, with the first letter of the first name being a large capital 'C'.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 480854

Enc. Submitted documents

c: Requestor
(w/o enclosures)