



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 23, 2009

Mr. Thomas Bailey  
VIA Metropolitan Transit  
P.O. Box 12489  
San Antonio, Texas 78212

OR2009-05416

Dear Mr. Bailey:

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# 340816.

The VIA Metropolitan Transit ("VIA") received a request for five categories of information pertaining to a specified accident. You state you do not have information responsive to categories one, two, and four.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted records include information that is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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[.]

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<sup>1</sup>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).

Gov't Code § 552.022(a)(1). The submitted information contains a completed accident report made for VIA, which is expressly public under section 552.022(a)(1). Therefore, VIA must release this report unless it is confidential under other law or is excepted from disclosure under section 552.108. Although you claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022. *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). Thus, VIA may not withhold the accident report subject to section 552.022, which we have marked, under section 552.103 of the Government Code. However, section 552.130 of the Government Code is other law for section 552.022 purposes. We also note that a portion of the report subject to section 552.022 may be excepted from disclosure under section 552.136 of the Government Code, which is also considered other law for purposes of section 552.022.<sup>2</sup> Thus, we will address the applicability of sections 552.130 and 552.136 for the report subject to section 552.022.

Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Upon review, we find VIA must withhold the Texas motor vehicle record information we have marked in the completed report under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of this chapter, 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). Accordingly, VIA must withhold the information we have marked in the completed report under section 552.136 of the Government Code.

We now turn to your section 552.103 claim for the information not subject to section 552.022. Section 552.103 of the Government Code 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.

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<sup>2</sup>The 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).

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(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.

*Id.* § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (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).*

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *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. *Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989)* (litigation must be “realistically contemplated”). In *Open Records Decision No. 638 (1996)*, this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the “TTCA”), Civil Practice & Remedies Code, chapter 101, or an applicable municipal ordinance. 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. *See 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).*

You assert that VIA reasonably anticipates litigation relating to the subject of the present request. You state and provide documentation showing that, upon receipt of the present request, VIA received a notice of claim letter relating to the accident at issue. You state that the notice is in compliance with the TTCA. Based on your representations and our review of the submitted information, we find that you have demonstrated that VIA reasonably anticipated litigation at the time it received the instant request. Furthermore, we find that the

remaining submitted information is related to the anticipated litigation for purposes of section 552.103 of the Government Code.

We note, however, 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 is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has obtained or otherwise been given access to the information, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). A portion of the submitted information, which we have marked, appears to have been provided to or obtained from the opposing party. Accordingly, any documents that were provided to or were obtained from the opposing party may not be withheld from the requestor under section 552.103. Further, 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). Thus, except for the information obtained from or provided to the opposing party to the litigation, VIA may withhold the remaining information that is not subject to section 552.022 under section 552.103.

In summary, with the exception of the information we have marked under sections 552.130 and 552.136 of the Government Code, VIA must release the completed accident report subject to section 552.022(a)(1) of the Government Code. Except for the information obtained from or provided to the opposing party to the litigation, the remaining submitted information may be withheld 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](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 at (512) 475-2497.

Sincerely,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/rl

Ref: ID# 340816

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)