



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 7, 2009

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

OR2009-17287

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# 363385.

VIA Metropolitan Transit ("VIA") received a request for information related to VIA's investigation of complaints filed by the requestor's client against VIA. You state that VIA has released some responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

We note that portions of Exhibit B consist of completed reports. This information, which we have marked, is subject to section 552.022(a)(1) of the Government Code, which provides that

[t]he 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[.]

Gov't Code § 552.022(a)(1). Accordingly, VIA may withhold the information we have marked under section 552.022(a)(1) only if it is "expressly confidential under other law[.]" *Id.* Although you raise section 552.103 of the Government Code as an exception against disclosure of Exhibit B, this section is a discretionary exception to disclosure that protects 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 section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, VIA may not withhold the information we have marked under section 552.022(a)(1) under section 552.103. As you raise no further exceptions against disclosure of the information we have marked under section 552.022(a)(1), VIA must release this information.

We next consider your argument under section 552.103 of the Government Code with regard to the remainder of the submitted information, which is not subject to section 552.022(a)(1). Section 552.103 provides in relevant 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 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 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 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.* This office has found that a pending complaint filed with the Equal Employment Opportunity Commission (the "EEOC") indicates that litigation is reasonably anticipated. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You inform this office that (1) the requestor's client filed a complaint with the EEOC on March 12, 2009, alleging that VIA discriminated against her and retaliated against her, and (2) VIA received the present request for information on September 16, 2009. Based on these representations, we agree that VIA reasonably anticipated litigation on the date it received this request. Furthermore, we agree that the remainder of the submitted information relates to the anticipated litigation. Therefore, VIA may generally withhold the remainder of the submitted information under section 552.103 of the Government Code.¹

We note, however, that once information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision No. 349 at 2 (1982). Thus, VIA may not withhold under section 552.103 any portion of the submitted information that the requestor's client has previously seen or had access to. We also note that the applicability of section 552.103(a) ends when the litigation has 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 (1982).

In summary, with the exception of (1) the information we have marked under section 552.022(a)(1) of the Government Code and (2) information that the requestor's client has previously seen or had access to, VIA may withhold the submitted 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,

¹As this ruling is dispositive, we need not address your remaining arguments against disclosure of Exhibit C.

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,

A handwritten signature in black ink, appearing to read 'R. Mitchell', with a stylized, cursive script.

Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 363385

Enc. Submitted documents

cc: Requestor
(w/o enclosures)