



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2010

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

OR2010-01902

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# 369433.

The VIA Metropolitan Transit ("VIA") received a request for all information and policies concerning the scope of rights, privileges, obligations, duties, and jurisdiction of the police force of VIA as authorized by the executive committee of VIA under Texas Transportation Code § 452.110 and all records pertaining to the employment of a named VIA police officer. You claim that the submitted information is excepted from disclosure under sections 552.102, 552.103, 552.117, 552.122, 552.130, 552.136, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you did not submit to this office information and policies concerning the scope of rights, privileges, obligations, duties, and jurisdiction of the police force of VIA as authorized by the executive committee of VIA under Texas Transportation Code § 452.110. Therefore, to the extent information responsive to this portion of the request existed at the time VIA received the request for information, we assume you have released it to the requestor. If you have not released such information, you must do so at this time.

¹Although you raise section 552.1175 of the Government Code, section 552.117 is the proper exception for information the VIA holds in its capacity as an employer.

See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if a governmental body concludes that no exceptions apply to the requested information, it must release information as soon as possible under circumstances).

Next, we note some of the submitted 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 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). The submitted information contains completed employment evaluations and incident reports. Pursuant to section 552.022(a)(1) of the Government Code, a completed evaluation or report is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other law. Sections 552.103 and 552.122 of the Government Code are discretionary exceptions that protect a governmental body's interest 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); Open Records Decision No. 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.122 are not other law that make information confidential for the purposes of section 552.022. Consequently, the completed evaluations and incident reports, which we have marked, may not be withheld under sections 552.103 or 552.122 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.102, 552.117, 552.130, 552.136, and 552.147, we will consider the applicability of these exceptions to the completed evaluations and incident reports. Additionally, we will address all of the claimed exceptions for the information not subject to section 552.022.

You assert that the information subject to section 552.022(a)(1) is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy protects

information that (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find that you have failed to demonstrate that any portion of the information subject to section 552.022(a)(1) is intimate or embarrassing and not of legitimate public interest. Accordingly, no portion of the information at issue may be withheld under section 552.102(a) in conjunction with common-law privacy.

You also assert that the information subject to section 552.022(a)(1) is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). VIA must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

You claim that the information subject to section 552.022(a)(1) contains Texas motor vehicle record information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver's license or permit and a Texas motor vehicle title or registration. Gov't Code § 552.130. Upon review, however, we find that the information subject to section 552.022(a)(1) does not contain any Texas motor vehicle record information. Therefore, no portion of the information at issue may be withheld under section 552.130 of the Government Code.

Next, you assert that section 552.136 of the Government Code is applicable to the information subject to section 552.022(a)(1). Section 552.136 of the Government Code states "[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." Gov't Code § 552.136. Upon review, we find no portion of the information subject to section 552.022(a)(1) contains access device numbers for purposes of section 552.136. Accordingly, none of the information at issue may be withheld on this basis.

Finally, section 552.147 of the Government Code states that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Upon review, we find that the information subject to section 552.022(a)(1) does not contain a social security number. Therefore, no portion of the information at issue may be withheld

under section 552.147 of the Government Code. As you raise no further exceptions for the remaining information subject to section 552.022(a)(1), it must be released to the requestor.

Next, we will address your claims for the information that is not subject to section 552.022. You state that this information 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 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that prior to VIA's receipt of the request for information, VIA was named as a defendant in a lawsuit pertaining to a civil rights violation allegedly caused by the acts and conduct of, among others, the named VIA police officer. We therefore agree that litigation was pending on the date VIA received the request. Furthermore, having reviewed your arguments and representations, we find that the information not subject to section 552.022(a)(1) is related to the pending proceedings for purposes of section 552.103. Therefore, VIA may generally withhold such information pursuant to section 552.103 of the Government Code.²

²As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, VIA must release the marked completed evaluations and incident reports subject to section 552.022(a)(1) of the Government Code; however, in doing so, VIA must withhold the information we have marked under section 552.117(a)(2) of the Government Code. VIA may withhold the information not subject to section 552.022(a)(1) 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 369433

Enc. Submitted documents

cc: Requestor
(w/o enclosures)