



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2010

Ms. Jakki A. Hansen
Assistant General Counsel
Metropolitan Transit Authority
P.O. Box 61429
Houston, Texas 77208-1429

OR2010-02993

Dear Ms. Hansen:

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# 371515 (MTA No. 2010-0055).

The Metropolitan Transit Authority ("Metro") received a request for all documentation regarding a specified claim. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes documents that are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant 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 includes completed reports made by or for Metro, which are expressly public under section 552.022(a)(1). A completed report must be released under section 552.022(a)(1) unless the information is excepted from

disclosure under section 552.108 or expressly confidential under other law. Although you claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions under the Act and do 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 Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111 are not "other law" that make information expressly confidential for purposes of section 552.022. Thus, no portion of the information subject to section 552.022 may be withheld under either section 552.103 or section 552.111 of the Government Code. We note the completed reports include information subject to sections 552.117 and 552.130 of the Government Code, which are "other law" for purposes of section 552.022.¹ Therefore, we will consider these exceptions for that information.

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Metro may only withhold information under section 552.117(a)(1) on behalf of an employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. We have marked the information that is subject to section 552.117. If the employee whose personal information is at issue timely elected to withhold such information under section 552.024, Metro must withhold this information under section 552.117(a)(1) of the Government Code. If the employee did not timely elect confidentiality, Metro may not withhold the information pertaining to that individual under section 552.117(a)(1).

Section 552.130 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. *See Gov't Code* § 552.130 (a)(1). Metro must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130.²

¹ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

² We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number, a Texas license plate number, and the portion of a photograph that reveals a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an

We will now address your claim under section 552.103 in regard to the remaining information. Section 552.103 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 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 receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 satisfy both prongs of this test for information to be excepted under section 552.103(a).

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 that 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." Open Records Decision No. 452 at 4 (1986). 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. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You claim Metro reasonably anticipates litigation relating to the claim for damages that is the subject of the requested information. The requestor states he is an attorney representing two claimants against Metro. You inform us, and provide documentation showing, Metro received a notice of injury and claim for damages that is in compliance with the Texas Tort Claims Act notice provisions. The notice is dated December 8, 2009, and stamped as received December 9, 2009, the date of the request. Based on your representations and our review, we agree that litigation was reasonably anticipated on the date the request was received. Furthermore, we find that the information at issue relates to the anticipated litigation for purposes of section 552.103(a). Accordingly, Metro may withhold the remaining information under section 552.103 of the Government Code.³

We note, however, that the opposing party in the anticipated litigation has seen or had access to some of the information at issue. 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. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, 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). To the extent the opposing party has seen or had access to the remaining information, it is not protected by section 552.103 and may not be withheld on that basis. To the extent the opposing party has not seen or had access to the remaining information, Metro may withhold it under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, Metro must release the information we have marked subject to section 552.022(a)(1) of the Government Code.⁴ In releasing this information, Metro must withhold the information we have marked pursuant to section 552.117, if the employee elected to make her information confidential under section 552.024 prior to the date of the request for information, and the Texas motor vehicle record information we have marked under section 552.130. To the extent the opposing party has not seen or had access to the remaining information, Metro may withhold the remaining information under section 552.103 of the Government Code.

³ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁴ We note the requestor, as the attorney for two individuals whose information is at issue, has a special right of access to some of the information being released in this instance. Gov't Code § 552.023(a) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if Metro receives another request for this information from a different requestor, Metro must again seek a ruling from this office.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/rl

Ref: ID# 371515

Enc. Submitted documents

c: Requestor
(w/o enclosures)