



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2010

Ms. Jacqueline Hojem
Public Information Officer and Senior Paralegal
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208

OR2010-05901

Dear Ms. Hojem:

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# 377023 (MTA No. 2010-0118).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for the following five categories of information: (1) proposals provided by Parsons Transportation Group, Inc. ("Parsons") to obtain a contract with the authority that relate to the Houston rail system; (2) communications between a named individual and the authority regarding Parsons' proposal and/or contracting to provide rail services to the authority; (3) communications involving MetroplexCore, LLC ("MetroplexCore"), Parsons, and/or two named individuals that relate to Parsons' proposal to contract with the authority for rail services; (4) documents showing amounts paid or to be paid to Parsons related to its contract with the authority; and (5) documents showing amounts paid to MetroplexCore and/or a named individual related to a specified authority rail project. You claim a portion of the submitted information is subject to a previous determination by this office. You also claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information, part of which is a representative sample.¹

¹We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

First, you represent the information responsive to category one of the request was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-13938 (2009). In that ruling, we held the authority may withhold the submitted information under section 552.103 of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the authority may continue to rely on Open Records Letter No. 2009-13938 as a previous determination and withhold the submitted information responsive to category one of the request in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note 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 they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information responsive to categories four and five of the request, which we marked, is information in an account that relates to the expenditure of funds by the authority and thus falls within the purview of section 552.022(a)(3). Therefore, the authority may only withhold this information if it is confidential under "other law." Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure that protects the 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, the authority may not withhold any of the information subject to section 552.022 under section 552.103. However, some of the information subject to section 552.022 is excepted from public disclosure under section 552.136 of the Government Code, which is "other law" for purposes of

section 552.022.² Thus, we will consider the applicability of this exception to the information subject to section 552.022(a)(3). Additionally, we will address your argument under section 552:103 for the information not subject to section 552.022.

Section 552.136 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(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we conclude the bank account number we have marked must be withheld under section 552.136.³ The remaining information subject to section 552.022 must be released.

We now turn to your argument under section 552.103 of the Government Code for the information not subject to section 552.022(a)(3) of the Government Code. 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.

²The 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).

³We 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 bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable 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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation reflecting, the authority received the request for information after MetroplexCore filed a lawsuit against the authority in Harris County District Court. You also state the submitted information is related to this pending litigation because the litigation involves issues related to Parsons' contract for rail services with the authority. Based on your representations and our review, we agree litigation related to the remaining information at issue was pending against the authority on the date the authority received request. We therefore conclude the authority may withhold the remaining information under section 552.103 of the Government Code.

However, we note once the information at issue has been obtained by the authority's opposing parties in the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. 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).

In summary, the authority may continue to rely on Open Records Letter No. 2009-13938 as a previous determination and withhold the information responsive to category one of the request in accordance with that ruling. The authority must withhold the account number we marked pursuant to section 552.136 of the Government Code, but must release the remaining portions of the documents we have marked subject to section 552.022(a)(3) of the Government Code. The authority may withhold the remaining 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,

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 "Bob Davis", with a long horizontal flourish extending to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/rl

Ref: ID# 377023

Enc. Submitted documents

cc: Requestor
(w/o enclosures)