



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2010

Ms. Jacqueline Hojem
Public Information Coordinator
Metropolitan Transit Authority
P.O. Box 61429
Houston, Texas 77208-1429

OR2010-17280

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# 399973 (MTA No. 2010-0645).

The Metropolitan Transit Authority (the "authority") received a request for the personnel files of two named employees. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports and evaluations made of, for, or by the authority. That information is subject to disclosure under section 552.022(a)(1). Section 552.022(a)(3) provides for required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of

¹Although you also raise section 552.1175 of the Government Code with respect to the information at issue, we note section 552.117 is the proper exception for information the authority holds in its capacity as an employer.

public or other funds by a governmental body,” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). The submitted information also includes information in an account relating to the receipt or expenditure of public or other funds by the authority. That information is subject to disclosure under section 552.022(a)(3). Section 552.022(a)(15) provides for required disclosure of “information regarded as open to the public under an agency’s policies[,]” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(15). Thus, the submitted job description is subject to section 552.022(a)(15) if the authority considers job descriptions to be open to the public under its policies. Although you seek to withhold the information that is subject to section 552.022, which we have marked, under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *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 Gov’t Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1), (3), or (5). Therefore, the marked information that is subject to section 552.022(a)(1), (3), and (15) may not be withheld under section 552.103. However, because information subject to section 552.022 may be withheld under section 552.130 of the Government Code, we will consider the applicability of this exception to the information marked under section 552.022. We will also consider the authority’s claimed exceptions for the information not subject to section 552.022.

We turn to the authority’s claim under section 552.103 of the Government Code for the information that is not subject to section 552.022. 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). The authority 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 authority 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 authority must meet 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 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.” *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, a potential opposing party hiring an attorney who makes a demand for disputed payments and threatens to sue if the payments are not made promptly. See Open Records Decision No. 346 (1982); see also Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). This office has also stated that a pending complaint with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, an authority employee filed a complaint with the EEOC against the authority prior to its receipt of the request for information. Based on your representations and our review of the submitted EEOC complaint, we agree the authority reasonably anticipated litigation on the date it received the present request for information. We also agree the information at issue is related to the EEOC complaint for purposes of section 552.103. Thus, we agree the authority may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code.²

We note, however, once the information at issue has been obtained by all parties to 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).

Next, we note portions of the information subject to section 552.022 may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this

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

information be kept confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the authority may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the authority's receipt of the request for the information. The authority may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election for confidentiality under section 552.024. Therefore, if the employees at issue timely elected confidentiality under section 552.024, then the authority must withhold the social security numbers we have marked under section 552.117(a)(1).³

The authority claims portions of the remaining information subject to section 552.022 are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). Therefore, the authority must withhold the Texas motor vehicle record information you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code.

We note that section 552.136 of the Government Code is applicable to some of the information that is subject to section 552.022.⁴ Section 552.136 provides that "[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining "access device"). We have marked insurance policy numbers that the authority must withhold under section 552.136.⁵

Finally, we note some of the remaining information that is subject to section 552.022 is protected by copyright. A custodian of public records must comply with the copyright law

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code §552.147. Therefore, even if section 552.117 does not apply to the social security numbers at issue, the authority may withhold these social security numbers under section 552.147.

⁴This office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁵We note that this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers, Texas license plate numbers, and a copy of a Texas driver's license under section 552.130 of the Government Code and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the authority may withhold the information that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. As for the information we have marked under section 552.022 of the Government Code: (1) if the employees at issue timely elected confidentiality under section 552.024 of the Government Code, then the authority must withhold the social security numbers we have marked under section 552.117(a)(1) of the Government Code, (2) the authority must withhold the Texas motor vehicle record information you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code, (3) the authority must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code, and (4) the remaining information subject to section 552.022 of the Government Code must be released, but any information protected by copyright must be released in accordance with copyright law.

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/em

Ref: ID# 399973

Enc. Submitted documents

c: Requestor
(w/o enclosures)