



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 8, 2011

Ms. Neera Chatterjee  
University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2011-04878

Dear Ms. Chatterjee:

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# 416314 (ORR Nos. 135302 & 135513).

The University of Texas System (the "system") received two requests from the same requestor for information pertaining to (1) construction of a specified project, including plans, contracts, licenses, permits, bond information, insurance certificates, inspection reports, and employee information, and (2) an incident in which a named individual suffered injuries while working on construction of the specified project. You state the system does not maintain information responsive to portions of the requests for information.<sup>1</sup> You state the system is withholding insurance policy numbers under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. Additionally, you state release of the submitted information may

---

<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

implicate the proprietary interests of VCC, L.L.C. ("VCC"), PBS&J Corp. ("PBS&J"), and Moody Nolan, Inc. ("Moody"). Accordingly, you state, and provide documentation showing, you notified VCC, PBS&J, and Moody of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [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). A portion of the submitted information consists of completed investigations that are subject to section 552.022(a)(1). The system must release this information pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. See *id.* You claim this information is subject to section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the system may not withhold the information at issue, which we have noted, under section 552.103 of the Government Code. As you raise no further exceptions to disclosure for the information we have noted, the system must release it. However, we will consider your argument under section 552.103 for the information not subject to section 552.022(a)(1). We will also consider your argument under section 552.101 of the Government Code for a portion of the submitted information.

Section 552.103 of the Government Code provides in relevant 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show 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. *See 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). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101. On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You explain the requestor in this instance is the attorney for the named individual who suffered injuries while working on the specified project. You inform us the named individual is insured through the Rolling Owner Controlled Insurance Program, which "provides workers' compensation, general liability, and excess liability insurance coverage for all contractors working on designated projects for the [s]ystem." You have provided documentation demonstrating on February 10, 2011, prior to the date the system received the instant requests for information, the system received notice of a third party claim relating to the named individual's injuries. Further, the submitted documentation demonstrates the Claims Coordinator within the system's Office of Risk Management anticipates the system will be named in a lawsuit arising out of the incident. You do not affirmatively represent to this office the notice of claim complies with the notice requirements of the TTCA or an applicable ordinance. Therefore, we will only consider the claim as a factor in determining whether the system reasonably anticipated litigation over the incident in question. Nevertheless, based on your representations and our review, we agree the system reasonably anticipated litigation on the date the system received the instant requests for information. You explain the information at issue pertains to the substance of the anticipated litigation. Based on your representations and our review, we find the remaining information is related to the anticipated litigation. Therefore, the system may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.<sup>3</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the system must release the information we have noted pursuant to section 552.022 of the Government Code. The system may withhold the remaining 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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

---

<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/tf

Ref: ID# 416314

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Ryan McClendon  
VCC, LLC  
600 East Las Colinas Boulevard, Suite 1225  
Irving, Texas 75039  
(w/o enclosures)

PBS&J Corporation  
6504 Bridge Point Parkway, Suite 200  
Austin, Texas 78730  
(w/o enclosures)

Moody Nolan, Inc.  
300 Spruce Street, Suite 300  
Columbus, Ohio 43215  
(w/o enclosures)