



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 21, 2011

Ms. Mareia L. Schreiber  
Legal Assistant  
City of Galveston  
P.O. Box 779  
Galveston, Texas 77553-0779

OR2011-17169

Dear Ms. Schreiber:

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# 436852 (ORR# 11-392).

The City of Galveston (the "city") received a request for information relating to a named city bus driver and the bus he was driving on a specified date. You state the city has redacted some of the submitted information pursuant to section 552.024 of the Government Code.<sup>1</sup> You claim the rest of the submitted information is excepted from disclosure under section 552.103 of the Government Code.<sup>2</sup> We have considered the exception you claim and reviewed the information you submitted.<sup>3</sup>

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<sup>1</sup>Section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code §§ 552.024(c)(2), .117(a)(1).

<sup>2</sup>Although you also initially raised sections 552.101, 552.102, 552.107, and 552.130 of the Government Code, you have submitted no arguments in support of the applicability of those exceptions. Therefore, this decision does not address sections 552.101, 552.102, 552.107, and 552.130. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments explaining applicability of claimed exceptions to information at issue).

<sup>3</sup>This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We first note the present request for information consists partly of questions. Although a governmental body need not answer factual questions in responding to a request for information under the Act, a governmental body must make a good-faith effort to relate a request to responsive information that is within the governmental body's possession or control. We assume the city has done so. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990), 561 at 8-9 (1990).

We also 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 excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). We have marked completed reports made for or by the city that are subject to disclosure under section 552.022(a)(1). You do not claim section 552.108 of the Government Code. Although you assert the marked reports are excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *See id.* §§ 3-26, 28-37 (providing for "confidentiality" of information under specified exceptions); *see also 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the marked reports may not be withheld under section 552.103 of the Government Code but must instead be released pursuant to section 552.022(a)(1) of the Government Code.

Next, we address your claim for the rest of the submitted information under section 552.103, which 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 that claims section 552.103 bears the burden of providing relevant facts and documents sufficient to demonstrate the applicability of this exception to the information at issue. The governmental body must demonstrate that

(1) litigation was pending or reasonably anticipated on the date of the governmental body's receipt of the request for information, and (2) the requested information is related to the pending or anticipated 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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.* This office has concluded a governmental body's receipt of a claim it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish litigation is reasonably anticipated. If this representation is not made, then receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See Open Records Decision No. 638 at 4 (1996).*

You contend the rest of the submitted information is related to pending or anticipated litigation to which the city either already is or would be a party. You have provided documentation demonstrating the city was already a party to pending litigation and had received notices of claims that could result in additional litigation prior to the city's receipt of the present request for information. You state the pending and anticipated litigation is related to an accident. You explain the remaining information at issue is related to a city vehicle that was involved in the accident and the driver of the vehicle. Based on your representations and documentation and our review of the information at issue, we find the remaining information is related to litigation to which the city is or would be a party that was pending or reasonably anticipated when the city received the present request for information. We therefore conclude the city may withhold the rest of the submitted information under section 552.103 of the Government Code.

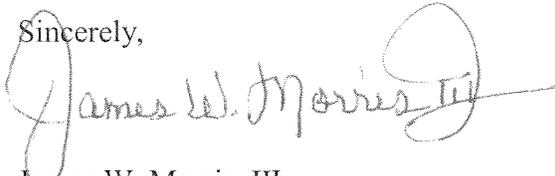
In reaching this conclusion, we assume the opposing parties in the pending and anticipated litigation have not already seen or had access to any of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See ORD 551 at 4-5.* If the opposing parties have seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).*

In summary, the city (1) must release the marked reports pursuant to section 552.022(a)(1) of the Government Code and (2) may withhold the rest of the 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](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 cursive script that reads "James W. Morris, III". The signature is written in dark ink and is positioned above the typed name.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/em

Ref: ID# 436852

Enc: Submitted documents

c: Requestor  
(w/o enclosures)