



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 17, 2012

Ms. Kerri L. Butcher  
Interim Chief Counsel  
Capital Metropolitan Transportation Authority  
2910 East Fifth Street  
Austin, Texas 78702

OR2012-05443

Dear Ms. Butcher:

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# 450915.

The Capital Metropolitan Transportation Authority (the "authority") received a request for information pertaining to a specified accident involving the requestor's client. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive because it was created after the date the authority received the instant request. The authority need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, 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:

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<sup>1</sup>Although you also claim the submitted information is excepted under sections 552.301(a) and 552.303 of the Government Code, those provisions are not exceptions to disclosure. Rather, those sections specify certain requirements a governmental body must follow when requesting a ruling from this office. See Gov't Code §§ 552.301(a), .303.

Without limiting the amount or kind of information that is public information under [the Act], the following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or 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 contains completed reports. Although you assert these reports are excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the authority may not withhold the completed reports under section 552.103 of the Government Code. However, we note portions of the completed reports are subject to sections 552.101, 552.130, and 552.136 of the Government Code.<sup>2</sup> Because sections 552.101, 552.130, and 552.136 make information confidential under the Act, we will address their applicability to the completed reports.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision No. 545 (1990). Upon review, we find the information we have marked in the completed reports is highly intimate or embarrassing and not of legitimate public interest. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

We note portions of the remaining completed reports are subject to sections 552.130 and 552.136 of the Government Code. Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license, title,

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1)-(2). We have marked the information that the authority must withhold under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides that “[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.” *Id.* § 552.136(b). This office has determined an insurance policy number is an access device for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”); Open Records Decision No. 684 at 9 (2009). We have marked an insurance policy number subject to section 552.136 of the Government Code. You have not claimed any other exceptions to disclosure for the remaining information in the completed reports. Thus, with the exception of the information we have marked, the authority must release the submitted completed reports, which we have marked, pursuant to section 552.022(a)(1).

You claim the remaining information, which is not subject to section 552.022, is excepted from disclosure under section 552.103 of the Government Code, which 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.

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

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 the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded a governmental body’s receipt of a claim letter 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. *See* Open Records Decision No. 638 at 4 (1996).

You assert the authority reasonably anticipates litigation pertaining to the remaining information because the authority received a notice of claim letter from the requestor’s law firm prior to receiving the request for information. You indicate the claim letter meets the requirements of the TTCA, and alleges the authority’s liability for injuries sustained by the requestor’s client as a result of the accident specified in the request. Based on your representations and our review, we conclude the authority reasonably anticipated litigation when it received the request for information. You state the remaining information relates to the litigation because it pertains to the accident at issue in the anticipated litigation. Upon review, we agree. Therefore, we find section 552.103(a) applies to the remaining information.

We note, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). In this instance, the requestor and his client have already seen some of the submitted information, which we have marked. Therefore, because the opposing party in the anticipated litigation has seen this information, it may not be withheld under section 552.103 of the Government Code. As you have not claimed any other exceptions to disclosure, the authority must release the information we have marked. The authority may withhold the remaining information under section 552.103(a) of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, with the exception of the information we have marked under sections 552.101, 552.130, and 552.136 of the Government Code, which must be withheld under these exceptions, the authority must release the completed reports we have marked pursuant to section 552.022(a)(1) of the Government Code. With the exception of the information we have marked for release, the authority may withhold the remaining information under section 552.103(a) 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 "Sean Opperman".

Sean Opperman  
Assistant Attorney General  
Open Records Division

SO/dls

Ref: ID# 450915

Enc. Submitted documents

c: Requestor  
(w/o enclosures)