



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 25, 2012

Mr. Thomas Bailey  
Legal Services  
VIA Metropolitan Transit  
P.O. Box 12489  
San Antonio, Texas 78212

OR2012-05891

Dear Mr. Bailey:

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# 451697.

VIA Metropolitan Transit ("VIA") received a request for all records related to the sidewalk, curb, and driveway at a specified location, complaints regarding the curb and sidewalk at that location, the painting of "fire lane" on the curb and sidewalk, lease agreements with Amtrak for the specified location, and documents reflecting the duties and responsibilities of any party for maintenance and upkeep of the specified location.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note a portion 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 made confidential under this chapter or other law:

...

---

<sup>1</sup>We note the requestor narrowed his request for information on February 15, 2012.

(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 lease agreement relates to the receipt of funds by a governmental body and is subject to section 552.022(a)(3) of the Government Code. VIA must release information subject to section 552.022(a)(3) unless the information is made confidential under the Act or other law. *Id.* You raise section 552.103 as an exception to disclosure of the requested information. However, section 552.103 is a discretionary exception that 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the lease agreement may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions to disclosure, the lease agreement must be released pursuant to section 552.022(a)(3) of the Government Code. However, we will consider your argument under section 552.103 of the Government Code for the remaining information not subject to section 552.022.

Section 552.103 of the Government Code 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 an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> 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).

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* We note the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the “TTCA”), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the 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* ORD 638 at 4.

You inform us, and provide documentation showing, prior to VIA’s receipt of the instant request for information, VIA received a notice from the requestor asserting a claim for personal injuries and damages arising from an alleged injury sustained at the specified location. You represent the notice of claim complies with the TTCA. Based on your representations and our review, we determine VIA has established it reasonably anticipated litigation on the date it received the request for information. We also find the remaining information is related to the anticipated litigation for purposes of section 552.103 of the Government Code. Accordingly, VIA may withhold the remaining information under section 552.103 of the Government Code.

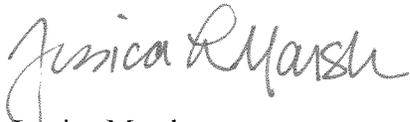
In reaching this conclusion with respect to the remaining information, we assume the opposing party in the pending litigation has not seen or had access to any of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has 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 note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, VIA must release the lease agreement under section 552.022(a)(3) of the Government Code. VIA 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, 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 "Jessica Marsh".

Jessica Marsh  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 451697

Enc. Submitted documents

c: Requestor  
(w/o enclosures)