



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2013

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

OR2013-06330

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# 483288.

VIA Metropolitan Transit ("VIA") received a request for witness statements, photographs, work orders, and repair estimates pertaining to a specified accident involving the requestor's client. You state VIA has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.130 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 is subject to section 552.022 of the Government Code, which provides in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the 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:

¹Although you do not raise section 552.130 of the Government Code in your brief, we understand you to raise this exception based on your markings.

(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). You inform this office the submitted photographs are part of a completed supervisor's report.² Therefore, we find the submitted photographs are subject to section 552.022(a)(1). Although you raise section 552.103 of the Government Code for this information, section 552.103 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, VIA may not withhold the information subject to section 552.022 under section 552.103. However, the photographs at issue contain motor vehicle record information subject to section 552.130 of the Government Code. As this exception can make information confidential for purposes of section 552.022, we will address its applicability to the submitted photographs.

Section 552.130 of the Government Code provides information relating to a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. *See* Gov't Code § 552.130(a)(2). We understand you have redacted a license plate number pursuant to Open Records Decision No. 684 (2009).³ We have marked additional motor vehicle record information. We note, however, the purpose of section 552.130 is to protect the privacy interests of individuals. The redacted license plate number and the information we have marked pertain to a vehicle that may belong to the requestor's client. Because the requestor is acting as the authorized representative of his client, the requestor has a right of access to any motor vehicle record information belonging to his client under section 552.023 of the Government Code. *See id.* § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, if the redacted license plate number and the information we have marked pertain to a vehicle owned by the requestor's client, then the requestor has a right of access to this information under section 552.023 of

²We note, pursuant to subsections (b) and (c) of section 552.303 of the Government Code, we requested additional information from you regarding whether any of the submitted information is part of a completed investigation or report. *See* Gov't Code § 552.303.

³Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without requesting a decision, including a Texas license plate number under section 552.130 of the Government Code.

the Government Code. In that instance, VIA may not withhold this information pursuant to Open Records Decision No. 684 or section 552.130. If the redacted license plate number and the information we have marked do not pertain to a vehicle owned by the requestor's client, then VIA must withhold this information under section 552.130 of the Government Code.

We now turn to your argument under section 552.103 for the information not subject to section 552.022. Section 552.103 of the Government Code 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). 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information 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, orig. proceeding); *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 governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that 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.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that 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. 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 that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend VIA reasonably anticipates litigation regarding this matter because the requestor informs VIA in the request letter that his law firm has been retained to represent an individual for personal injuries and damages allegedly resulting from an automobile accident negligently caused by VIA. The requestor also states once his client’s medical treatment is complete, he will forward a demand package to VIA. Additionally, the requestor instructs VIA to include his law firm’s name “on any check or draft for settlement, partial payment of damages or to satisfy any judgment.” Based on your representations and our review, we find VIA reasonably anticipated litigation on the date the request was received. We also find the remaining information is related to the anticipated litigation. We therefore conclude VIA may withhold the remaining information under section 552.103 of the Government Code.

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The applicability of section 552.103(a) also ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, if the redacted license plate number and the information we have marked do not pertain to a vehicle owned by the requestor’s client, then VIA must withhold this information under section 552.130 of the Government Code. VIA must release the remaining information in the submitted photographs pursuant to section 552.022(a)(1) of the Government Code. VIA may withhold the remaining information under section 552.103 of the Government Code.

⁴In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 483288

Enc. Submitted documents

c: Requestor
(w/o enclosures)