



September 12, 2002

Ms. Paula J. Alexander  
General Counsel  
Metropolitan Transit Authority of Harris County  
1201 Louisiana, 16<sup>th</sup> Floor  
Houston, Texas 77002

OR2002-5091

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168489.

The Metropolitan Transit Authority of Harris County (the “authority”) received a request from a former authority employee for eleven categories of information. You claim that the requested information is exempted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

First, we note that you have submitted a memorandum dated July 3, 2002 which indicates that information responsive to category six of the request does not exist, and that information responsive to categories eight through eleven “were submitted from previous open records requests.” With regard to the information which does not exist, we note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). As for the information responsive to categories eight through eleven, we understand from the July 3, 2002 memorandum that this information has already been provided to the requestor. If it has not already been provided to the requestor, you must release such information to the requestor at this time, as you have not submitted this information to our office for review. See Gov’t Code §§ 552.006, .301(a), .302.

We next note that some of the submitted records fall within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part that

*the 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) (emphasis added). The authority must release the requested information that falls within subdivision (1) of section 552.022(a) unless that information is expressly confidential under other law or is protected by section 552.108. *See id.* § 552.022(a)(1). Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the interests of the governmental body and may be waived. As such, section 552.103 is not "other law" that makes information expressly confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.--Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (general discussion of discretionary exceptions), 542 at 4 (1990) (stating that statutory predecessor to section 552.103 does not implicate third-party interests and may be waived by governmental body). Therefore, the authority may not withhold the information that falls within the scope of section 552.022 under section 552.103. Nor do you raise section 552.108. Therefore, the information subject to section 552.022(a)(1), which we have marked, must be released to the requestor.

We will next address your argument under section 552.103 for the remaining information. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The authority has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). The authority must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that 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.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted information to this office showing that prior to the date of the open records request, the requestor filed a complaint with the Texas Commission on Human Rights (the "TCHR") alleging discrimination on the basis of race, age, and national origin. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated. Our review of the records at issue also shows that they are related to anticipated litigation for purposes of section 552.103(a). Thus, with the exception of the information subject to section 552.022, you may withhold the requested information pursuant to section 552.103(a).

We note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 168489

Enc. Submitted documents

c: Mr. Ed Blakemore  
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(w/o enclosures)