



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 27, 2003

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

OR2003-4423

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# 183389.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for information relating to a bus accident. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides 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;

...

(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)(1), (3). In this instance, the submitted information includes completed reports made of, for, or by the authority. The authority must release the completed reports under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. The submitted documents also include information that is subject to section 552.022(a)(3) and may be withheld only if the information is expressly confidential under other law. Section 552.103 of the Government Code, which you raise, is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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 Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 is not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the authority may not withhold the information that is subject to section 552.022(a)(1) or (3) under section 552.103. We have marked that information.

We note, however, that the section 552.022(a)(1) information includes a driver's license number. Section 552.130 of the Government Code excepts from required public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). If the information that we have marked is a Texas driver's license number, then the authority must withhold the marked driver's license information under section 552.130.

Next, we address your claim under section 552.103 of the Government Code with respect to the remaining information. This exception 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). The governmental body that raises section 552.103 must provide relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date that the governmental body received the

request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both parts of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

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 that 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.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when the governmental body (1) has received a notice of claim letter and (2) represents that the notice is in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance. *See* Open Records Decision No. 638 at 4 (1996).

You state, and have submitted documentation demonstrating, that the authority has received a notice of injury and claim for damages. You inform us that the submitted notice complies with the notice requirements of the TTCA. You also state that the remaining information at issue relates to the claim. Based on your representations and the submitted documentation, we find that you have shown that the authority reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the remaining information relates to the anticipated litigation. We therefore conclude that section 552.103 of the Government Code is applicable to the submitted information that is not subject to section 552.022.

We note, however, that this information includes correspondence with an attorney for the opposing party to the anticipated litigation. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, to the extent that the opposing party to the anticipated litigation has seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, section 552.103 does not except from disclosure any of the submitted information that the opposing party to the anticipated litigation has seen or to which the opposing party has had access. Otherwise, the information that is not subject to section 552.022(a)(1) or (3) is excepted from disclosure at this time under section 552.103. We note that 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 authority must withhold a Texas driver's license number under section 552.130 of the Government Code. With the possible exception of that information, the authority must release the marked information that is subject to section 552.022(a)(1) or (3). The information that is not subject to section 552.022 is excepted from disclosure under section 552.103 at this time, except to the extent that the opposing party to the anticipated litigation has seen or had access to that information.

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).

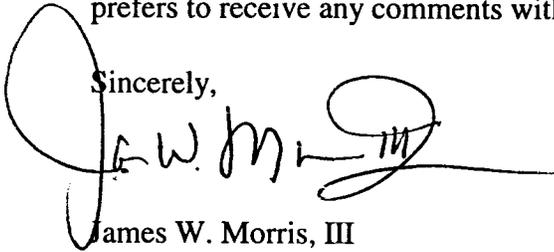
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal flourish at the end.

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

JWM/sdk

Ref: ID# 183389

Enc: Submitted documents

c: Mr. Mark E. Dykes
Lovett, Tew & Dykes, L.L.P.
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Houston, Texas 77057
(w/o enclosures)