



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 25, 2009

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

OR2009-08809

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# 347142.

VIA Metropolitan Transit ("VIA") received a request for all records pertaining to a specified traffic accident, records related to any disciplinary action taken against the VIA employee involved in the specified accident, and a photograph of the involved employee. You state VIA has provided some of the requested information to the requestor. You claim the submitted accident reports, special action sheets, photographs, and letters are excepted from disclosure under sections 552.103 and 552.130 of the Government Code. 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(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] 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). The submitted information contains completed accident reports. These reports must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to public 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, VIA may not withhold the completed accident reports, which we have marked, under section 552.103. You claim, however, portions of these reports are excepted under section 552.130 of the Government Code. Furthermore, we note portions of the reports may be subject to section 552.136 of the Government Code. Because information subject to section 552.022(a)(1) may be withheld under sections 552.130 and 552.136 of the Government Code, we will consider the applicability of these exceptions to the completed accident reports, along with your arguments under section 552.103 for the remaining information not subject to section 552.022.

You claim the accident reports include information protected by section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We have marked a Texas driver's license number and license plate number in the accident reports that VIA must withhold under section 552.130 of the Government Code.

The remaining information in the accident reports contains an insurance policy number. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We conclude the insurance policy number we have marked constitutes an access device number for purposes of section 552.136. Thus, VIA must withhold the marked insurance policy number in the accident reports under section 552.136 of the Government Code. As you have claimed no further exceptions to disclosure for the remaining information in the accident reports, this information must be released.

We now address your claim under section 552.103 for the remaining information not subject to section 552.022. Section 552.103 of the Government Code provides:

(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.

Id. § 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 that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, a potential opposing party hiring an attorney who makes a demand for disputed payments and threatens to sue if the payments are not made promptly. *See* *Open Records Decision No. 346* (1982); *see also* *Open Records Decision No. 518 at 5* (1989) (litigation must be "realistically contemplated"). Furthermore, 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. 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* Open Records Decision No. 638 at 4 (1996).

You assert VIA reasonably anticipated litigation pertaining to the requested information because VIA received a notice of claim letter prior to receiving the request for information. You indicate the claim letter meets the requirements of the TTCA. You also state the claim letter, which you have submitted for our review, is from an attorney representing the driver of a vehicle involved in the specified traffic accident. You explain, and our review shows, the claim letter alleges VIA is responsible and liable for personal injuries sustained by the attorney's client as a result of the accident. Furthermore, you state a second letter, which you have also submitted for our review, received from the attorney instructs VIA to preserve specified evidence related to the accident under a threat of sanctions if the evidence is not properly preserved. Based on your representations and our review, we conclude VIA reasonably anticipated litigation when it received the request for information. You assert the remaining special action sheets, photographs, and letters relate to the litigation because they pertain to the subject of the anticipated litigation. Thus, we agree the remaining information relates to the anticipated litigation. Accordingly, VIA may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code.

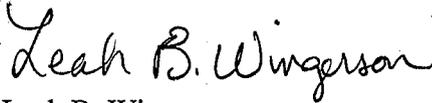
However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, VIA may withhold the information not subject to section 552.022 under section 552.103 of the Government Code. VIA must withhold the marked Texas driver's license and license plate numbers under section 552.130 of the Government Code, as well as the marked insurance policy number under section 552.136 of the Government Code, from the marked accident reports subject to section 552.022 of the Government Code. The remaining information in the accident reports must be released.

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 at (512) 475-2497.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 347142

Enc. Submitted documents

c: Requestor
(w/o enclosures)