KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2015-26609

Dear Ms. Parker:

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# 591093.

The Texas Department of Transportation (the "department") received a request for certain information related to a specified incident. You state you do not have information responsive to some categories of the request.[1] 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 representative sample of information.[2] Additionally, we have considered comments from NTE Mobility Partners Segments 3, LLC ("NTE3") and North Tarrant Infrastructure, LLC ("NTI"). *See* Gov't Code § 552.304

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[1]The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

[2]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(interested third party may submit comments stating why information should or should not be released).

Initially, you state some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-07330 (2015). In that ruling, we determined the department may withhold the Traffic Control Inspection Checklists pursuant to section 409 of title 23 of the United States Code, and the department may withhold the remaining information under section 552.103(a) of the Government Code. There is no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the department may continue to rely on Open Records Letter No. 2015-07330 as a previous determination and withhold the information at issue in accordance with that ruling.[3] *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, the information you have submitted was not at issue in the previous ruling. Accordingly, we will address the public availability of this information.

Section 552.103 of the Government Code provides, in relevant part, as follows:

> (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.
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> . . .
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> (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 has the burden of providing relevant facts and documents to show section 552.103(a) 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. *See Univ. of Tex. Law Sch. v. Tex.*

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[3]As our ruling is dispositive, we need not address NTE3's and NTI's arguments against disclosure of this information.

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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

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 provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *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). This office has concluded, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing 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. Open Records Decision No. 638 (1996). If that representation is not made, the receipt of a 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.

You state, prior to its receipt of the instant request, the department reasonably anticipated litigation because the department received a notice of claim letter from the requestor. You do not affirmatively represent to this office the notice of claim complies with the TTCA; therefore, we will only consider the notice of claim as a factor in determining whether the department reasonably anticipated litigation over the incident in question. Nevertheless, based on these representations, our review of the submitted information, and the totality of the circumstances, we determine the department has established it reasonably anticipated litigation prior to the date it received the request for information. We further find the submitted information is related to the anticipated litigation for purposes of section 552.103. Accordingly, we conclude the department may withhold the submitted information under section 552.103.

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

In summary, the department may continue to rely on Open Records Letter No. 2015-07330 as a previous determination and withhold the information at issue in accordance with that ruling. The department may withhold the submitted 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 591093

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)