



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 22, 2016

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

OR2016-14135

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# 614437.

The Texas Department of Transportation (the "department") received a request for notices, audits, reports, or other memoranda related to sanctions issued by the department during a specified time period. You state the department will release some information to the requestor. 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.<sup>1</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note some of the information at issue may be subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless it is excepted by section 552.108 of the Government Code or "made

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<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

confidential under [the Act] or other law[.]” *Id.* § 552.022(a)(1). Information subject to section 552.022(a)(1) must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. We note the request for information is for notices, audits, reports, or other memoranda addressing the investigation that prompted the issuance of sanctions issued by the department since 2005 and may implicate section 552.022(a)(1). The representative sample of information you have submitted does not indicate whether the information at issue or the responsive information it represents is part of a completed investigation. Thus, we rule conditionally. With the exception of the submitted notices of sanctions, to the extent the information at issue is part of a completed investigation, it is subject to section 552.022(a)(1). Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *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 section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold information subject to section 552.022(a)(1) under section 552.103. In that instance, we note some of the information at issue contains information that is subject to section 552.117 of the Government Code, which makes information confidential under the Act.<sup>2</sup> Thus, we will address the applicability of section 552.117 for this information. To the extent the information at issue is not part of a completed investigation, it is not subject to section 552.022(a)(1) and we will address your argument under section 552.103 for this information. In either instance, we will address your argument under 552.103 for the submitted notices of sanctions, which are not subject to section 552.022(a)(1).

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

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 department 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 of the receipt of the request for information, and (2) the information at issue is related to the pending or anticipated 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 department must meet both prongs of this test for information to be excepted under section 552.103(a). We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings ("SOAH") is considered litigation for the purposes of the APA. *See id.*

You explain the department and the requestor are parties to a pending contested case before SOAH that pertains to sanctions against the requestor's client. You state the submitted information is related to this pending contested case because it concerns similar sanctions. Based upon these representations and our review of the submitted information, we agree the submitted information is related to pending litigation involving the department. Therefore, the department may withhold the submitted notices of sanctions and the information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code.

However, we note once the information has been obtained by all parties to the 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 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold

information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Accordingly, to the extent the information we have indicated is subject to section 552.022(a)(1) of the Government Code, and the individual at issue made a timely election under section 552.024, the department must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code; however, the department may not withhold the cellular telephone number we have marked if the cellular telephone service is paid for by a governmental body. The department may not withhold this information if the individual whose information is at issue did not make a timely election to keep the information confidential or the cellular telephone service is paid for by a governmental body.

In summary, the department may withhold the submitted notices of sanctions and the information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. To the extent the information we have indicated is subject to section 552.022(a)(1) of the Government Code, and the individual at issue made a timely election under section 552.024, the department must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code; however, the department may not withhold the cellular telephone number we have marked if the cellular telephone service is paid for by a governmental body. The department must release any remaining information that is subject to section 552.022(a)(1) 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](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,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bw

Ref: ID# 614437

Enc. Submitted documents

Requestor  
(w/o enclosures)