



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 6, 2017

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

OR2017-22850

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# 678966.

The Texas Department of Transportation ("TxDOT") received a request for information pertaining to a specified accident. The department claims the requested information is excepted from disclosure under section 552.103 of the Government Code. The department also states, and provides documentation showing, it notified North Tarrant Infrastructure, L.L.C. ("NTI") of the department's receipt of the request for information and of NTI's right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).* We have received comments from NTI objecting to the release of some of the information at issue.¹ We have considered the submitted arguments and reviewed the submitted information.

¹We note NTI states it also represents NTE Mobility Partners Segments 3 L.L.C. In addition, although we understand TxDOT to raise the attorney-client privilege under section 552.107 and the Government Code and the attorney work product privilege under section 552.111 of the Government Code, it has not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume TxDOT no longer asserts these exceptions. *See Gov't Code §§ 552.301, .302.*

Initially, NTI argues the request for information is “too vague and overly broad[.]” A governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. See Open Records Decision No. 561 at 8-9 (1990). As TxDOT has submitted information our review, we consider it to have made a good faith effort to identify information responsive to the request. Therefore, we will address the submitted arguments to withhold the information at issue.

Next, NTI asserts the submitted information is not public information under the Act. The Act is applicable only to “public information.” See *id.* §§ 552.002, .021. Section 552.002(a) reads as follows:

(a) In this chapter, “public information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the

governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Further, information that is written, produced, collected, assembled, or maintained by an individual officer or employee of a governmental body in the officer's or employee's official capacity may be subject to disclosure under the Act if the information pertains to official business of the governmental body. Gov't Code § 552.002(a)(3). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See id.* § 552.002(a-1). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

We further note the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, if the information at issue is related to TxDOT's business, the mere fact it is not in TxDOT's possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act).

NTI asserts its information is not public information because it is not a governmental body for purposes of the Act. However, TxDOT submitted a copy of the requested information to this office. Furthermore, TxDOT explains the information pertains to TxDOT's development of a road project where the accident occurred. In addition, NTI informs us "TxDOT enjoys some limited access" to NTI's materials pursuant to its facilities agreement with TxDOT. Based on these representations and our review, we find the requested information constitutes "public information" as defined by section 552.002(a). Therefore, the submitted is subject to the Act in its entirety and TxDOT must release it, unless it falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021..301, .302. Consequently, we will address the submitted arguments against the release of this information under the Act.

Section 552.103 of the Government Code provides, in 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.

...

(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 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 is 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, 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 governmental body must meet both prongs of this test for information to be excepted from disclosure 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 demonstrate 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.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

TxDOT states it reasonably anticipated litigation when it received the request for information because the requested information pertains to a trucking accident and the requestor is a paralegal employed by a "well-known plaintiff's lawyer [who] specializes in trucking accidents." NTI also asserts the information relates to anticipated litigation. However, upon review we find neither TxDOT nor NTI has demonstrated any party had taken concrete steps toward filing litigation when TxDOT received the request for information. Thus, we conclude TxDOT and NTI have failed to demonstrate TxDOT reasonably anticipated

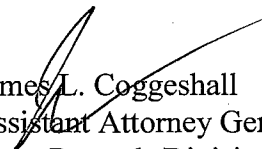
litigation when it received the request for information. Therefore, TxDOT may not withhold the submitted information under section 552.103(a) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.² See Gov't Code § 552.130. TxDOT must withhold visible license plates in the submitted photographs under section 552.130 of the Government Code. TxDOT must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/sb

Ref: ID# 678966

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).