



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 13, 2020

Ms. Jacqueline E. Hojem
Public Information Coordinator
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2020-10693

Dear Ms. Hojem:

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# 821614 (ORR Nos. 2020-0259 – 2020-0267, 2020-0282, 202-0285, 2020-0286, 2020-0287, 2020-0288, 2020-0289, 2020-0298, and 2020-0299).

The Metropolitan Transit Authority of Harris Country ("Metro") received seventeen requests from the same requestor for information pertaining to herself; a named employee; and Metro policies, forms, audio and video recordings, and other related records. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of First Transit, Inc. ("First Transit"). Accordingly, you state, and provide documentation showing, you notified First Transit of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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 arguments from First Transit. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(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)(3). The submitted information includes a contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). Metro must release this information pursuant to section 552.022(a)(3) unless it is made confidential under the Act or other law. *See id.* Although Metro raises section 552.103 of the Government Code for this information, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (governmental body may waive section 552.103); Open Record Decision Nos 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (waiver of discretionary exceptions). Therefore, Metro may not withhold the completed contract subject to section 552.022(a)(3) under section 552.103 of the Government Code.

Metro and First Transit both raise section 552.103 of the Government Code for the remaining information. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties, we do not address First Transit's argument under section 552.103. *See Open Records Decision Nos. 638 at 2 (1996)* (section 552.103 only protects the litigation interests of the governmental body claiming the exception), 542 (statutory predecessor to section 552.103 does not implicate rights of third party). Accordingly, the remaining information may not be withheld on the basis of First Transit's arguments under section 552.103. However, we will address the Metro's arguments under section 552.103 of the Government Code.

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.

...

(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. 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.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated when it received a notice of claim letter, and the governmental body represents the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state, and provide supporting documentation showing, prior to Metro’s receipt of the instant request, Metro received numerous communications from the requestor regarding an incident involving the requestor on a Metro bus. In the communications, the requestor states she is notifying Metro of a possible claim against Metro regarding the incident at issue. You state, and provide supporting documentation demonstrating, the requestor has alleged Metro is responsible for her injuries as a result of the incident at issue and has threatened to file suit if Metro does not comply with the requestor’s demands. Thus, you state on the date Metro received the request for information, Metro reasonably anticipated litigation to which Metro would be a party. Based on your representations and our review, we find Metro reasonably anticipated litigation on the date the request was received. You also represent, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, Metro may withhold the remaining information under section 552.103 of the Government Code.

Generally, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, with the exception of the completed contract that is subject to section 552.022(a)(3) of the Government Code, which must be released, Metro may withhold the remaining 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/be

Ref: ID# 821614

Enc. Submitted documents

c: Requestor
(w/o enclosures)