



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 20, 2020

Mr. Albert Tovar
Office of General Counsel
VIA Metropolitan Transit
123 North Medina Street
San Antonio, Texas 78207

OR2020-20949

Dear Mr. Tovar:

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# 840702.

VIA Metropolitan Transit ("VIA") received a request for 22 categories of information pertaining to a specified incident involving the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor seeks tangible items pertaining to the specified incident. The Act applies to "public information," which is defined in section 552.002 of the Government Code. *See Gov't Code §§ 552.002, .021.* Section 552.002(a) provides, in relevant part, the following:

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.

Gov't Code § 552.002(a). This office has ruled tangible items are not "information," as that term is contemplated under the Act. *See* Open Records Decision No. 581 (1990). Thus, tangible items are not public information for purposes of section 552.002 of the Government Code, and the Act does not require VIA to make tangible items available to the requestor. *See* Gov't Code § 552.021.

Next, we note you have not submitted information responsive to all the remaining categories listed in the request for information. To the extent any information responsive to the remaining portions of the request existed on the date VIA received the present request for information, we assume VIA has released it to the requestor. If VIA has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. In addition, a federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open Records Decision No. 599 at 4 (1992). You raise section 552.101 in conjunction with section 40.321 of title 49 of the Code of Federal Regulations, which relates to the confidentiality of workplace drug and alcohol testing information of employers participating in the United States Department of Transportation ("DOT") drug or alcohol testing process. *See* 49 C.F.R. pt. 40 (procedures for transportation workplace drug and alcohol testing programs). Section 322 of title 49 of the United States Code authorizes the Secretary of Transportation (the "secretary") to prescribe regulations necessary to carry out the duties and powers of the secretary. *See* 49 U.S.C. § 322. Section 40.321 of title 49 of the Code of Federal Regulations provides:

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

(a) A "third party" is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the

transmission of information in the course of the drug or alcohol testing process.

(b) “Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases,” in which an employee agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

49 C.F.R. § 40.321. You state some of the requested information consists of the drug and alcohol test results of a VIA employee that are confidential under section 40.321. We understand VIA maintains the information at issue pursuant to section 40.321 of title 49 of the Code of Federal Regulations. You state no written consent has been given with respect to disclosure of the information in question. *See id.* § 40.321(b). Based upon your representations and our review, we conclude VIA must withhold the requested drug and alcohol test results under section 552.101 of the Government Code in conjunction with section 322 of title 49 of the United States Code and section 40.321 of title 49 of the Code of Federal Regulations.¹

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 (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.*

¹ As our ruling is dispositive, we need not address the remaining 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.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” See Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. See Open Records Decision Nos. 346 (1982), 288 (1981). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101. On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. See Open Records Decision No. 361 (1983).

VIA states the submitted information pertains to reasonably anticipated litigation against VIA. VIA submits documentation demonstrating, prior to the date it received the instant request for information, it received a notice of representation and preservation of evidence letter from the requestor, an attorney representing an individual in a personal injury claim. You do not affirmatively represent to this office this letter complies with the TTCA; therefore, we will only consider this letter as a factor in determining whether VIA reasonably anticipated litigation pertaining to incident at issue. Nevertheless, based upon these representations, our review of the information at issue, and the totality of the circumstances, we find VIA reasonably anticipated litigation when it received the request for information. VIA also states, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, VIA may withhold the submitted information under section 552.103 of the Government Code.²

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

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, VIA must withhold the requested drug and alcohol test results under section 552.101 of the Government Code in conjunction with section 322 of title 49 of the United States Code and section 40.321 of title 49 of the Code of Federal Regulations. VIA 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 <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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/jxd

Ref: ID# 840702

Enc. Submitted documents

c: Requestor
(w/o enclosures)