



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 9, 2020

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

OR2020-22698

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# 843316 (MTA TPIA No. 2020-0522).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for a specified report. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information may have been the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2020-13020 (2020). In that ruling, we determined the authority must release the information we marked pursuant to section 552.022(a)(1) of the Government Code and the authority may withhold the remaining information under section 552.103 of the Government Code. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Thus, to the extent the submitted information is identical to the information previously requested and ruled upon, the authority must continue to rely on Open Records Letter No. 2020-13020 as a previous determination and withhold or release the information at issue in accordance with that ruling. *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, to the extent the information in the current request is not encompassed by the prior ruling, we will consider the exceptions you raise.

Next, we note some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes a report completed by the authority that is subject to section 552.022(a)(1) of the Government Code. The authority must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although the authority raises sections 552.103 and 552.111 of the Government Code for the information at issue, these sections are discretionary exceptions to disclosure and do 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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, none of the information subject to section 552.022(a)(1), which we indicated, may be withheld under section 552.103 or section 552.111. Accordingly, the authority must release the information we indicated pursuant to section 552.022(a)(1) of the Government Code. However, we will consider your arguments under section 552.103 and section 552.111 for the information not subject to section 552.022.

You raise section 552.103 of the Government Code for the remaining information not subject to section 552.022. 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 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 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. *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 parts of this test for information to be excepted from disclosure under section 552.103(a). See ORD 551 at 4.

To establish litigation is reasonably anticipated, a governmental body must provide this office with “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 that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter, prior to its receipt of a request for information, containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). 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 that 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. Open Records Decision No. 331 (1982). Further, 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. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state, and provide documentation demonstrating, the authority received notices of claim from the requestor prior to the authority’s receipt of the present request for information. You explain the requestor alleges to have suffered injuries from multiple incidents that occurred while using authority services and has made numerous threats to sue the authority if the claimed damages are not paid. Moreover, you affirmatively state the notices of claim received by the authority meet the requirements of the TTCA. Thus, we find the authority reasonably anticipated litigation related to the matter at issue when it received the present request for information. Further, you state the information at issue is directly related to the subject matter of the anticipated litigation. We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Upon review, we find some of the remaining information was seen by an opposing party and may not be withheld under section 552.103(a). However, the authority may withhold the remaining information not seen by an opposing party, which we indicated, under section 552.103 of

the Government Code.¹ Further, we note 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).

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *See Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

¹ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

You state the remaining information consists of advice, opinions, and recommendations of authority employees regarding policymaking matters of the authority. However, we find the remaining information is general administrative and purely factual information that does not rise to the level of policymaking or has been shared with individuals with whom you have not demonstrated the authority shares a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate the remaining information constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the authority. Therefore, the authority may not withhold the remaining information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon, the authority must continue to rely on Open Records Letter No. 2020-13020 as a previous determination and withhold or release the information at issue in accordance with that ruling. The authority must release the information we indicated pursuant to section 552.022(a)(1) of the Government Code. The authority may withhold the information we indicated under section 552.103 of the Government Code. The authority must release the remaining information.²

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,

Deborah Southerland
Assistant Attorney General
Open Records Division

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² We note the requestor has a right of access to some of the information being released. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, the authority must again seek a decision from this office if it receives another request for the same information from another requestor.

Ms. Jacqueline E. Hojem - Page 6

Ref: ID# 843316

Enc. Submitted documents

c: Requestor
(w/o enclosures)