



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 31, 2022

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

OR2022-02718

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# 928590.

VIA Metropolitan Transit ("VIA") received a request for information pertaining to a specified incident involving the requestor's clients. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered the exceptions you claim 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(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). Some of the submitted information consists of a completed report that is subject to section 552.022(a)(1). VIA must release the information at issue 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 you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure 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 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). Therefore, none of the information subject to section 552.022(a)(1), which we have marked, may be withheld under section 552.103. As you make no further arguments against disclosure of this information, VIA must release it pursuant to section 552.022(a)(1). However, we will consider your argument under section 552.103 for the information not subject to section 552.022.

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:

(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 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 prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

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 that 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, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing

¹ We note you have not submitted the responsive drug and alcohol test results for our review. In this instance, we can determine the extent to which this fungible information may be excepted from disclosure. As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). 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).

You state, and provide supporting documentation showing, prior to VIA’s receipt of the instant request, VIA received a letter from the requestor alleging injuries and damages to his clients in an incident that involves VIA. Thus, you state on the date VIA received the request for information, VIA reasonably anticipated litigation to which VIA would be a party. Based on your representations, our review of the submitted information, and the totality of the circumstances, we find VIA 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, VIA may withhold the submitted information not subject to section 552.022 of the Government Code 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 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 release the information we have marked pursuant to section 552.022(a)(1) of the Government Code. 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 not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.³

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.

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

³ 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, VIA must again seek a decision from this office if it receives another request for the same information from another requestor.

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,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/jxd

Ref: ID# 928590

Enc. Submitted documents

c: Requestor
(w/o enclosures)