



October 11, 2000

Mr. Roland Castaneda
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2000-3920

Dear Mr. Castaneda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 140016.

Dallas Area Rapid Transit ("DART") received a request for numerous categories of information related to a Title VI report dated June 24, 1997 that was submitted by DART to the Federal Transit Administration. The request additionally seeks the "2000 Title VI report" if it has been completed. You assert that much of the information that would otherwise be responsive to the request does not exist, and that the Act does not require DART to create responsive information. As to the responsive documents that you have submitted for our review and marked as attachment G, you assert this information is excepted from disclosure under section 552.103 of the Government Code. The requestor has also submitted comments to this office. *See Gov't Code § 552.304.* We have considered the submitted comments and arguments, the exception you claim, and we have reviewed the submitted information.

We note at the outset that much of the request is framed as a series of questions posed in response to the information contained in the 1997 Title VI report, which has previously been released to the requestor. You contend that DART is not required by the Act to prepare answers to these questions. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See Gov't Code §§ 552.002, .021, .227, .351.* Thus, this office has long held that the Act does not require a governmental body to prepare new information in order to respond to a request. Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). The Act therefore does not require a governmental body prepare new information in order to answer questions. Open Records Decision No. 555 at 1-2 (1990). We thus agree with your assertion that DART is not required by the Act to prepare new information in order to answer the questions that have been posed by the requestor.

As to the request for the completed 2000 Title VI report, which apparently did not exist at the time of the present request, we note that the Act does not *require* a governmental body to inform a requestor if information that is responsive to an earlier request comes into existence after the request for that information is made. Open Records Decision No. 452 at 3 (1986). We also note, however, that DART is not *prohibited* by the Act from informing the requestor once the 2000 report is completed, nor does the Act prohibit DART from providing that information to the requestor upon completion of the report.

We acknowledge your representation to this office that the information that is responsive to the request is contained in the submitted attachment G, which we note consists of only four pages of documents. However, we also note that you state in the submitted attachment E that much of the responsive information “either does not exist *or would have to be collected, compiled, researched and/or prepared and assessed* in order to be provided” to the requestor. (Emphasis added). As stated above, DART is not required by the Act to create new information in order to respond to the request. However, we advise that a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 at 8 (1990). Thus, we believe that the Act *does* require DART to *collect* and *compile* the information held by DART, which DART owns or to which DART has a right of access, which is responsive to the request and which existed at the time the request was received. *See* Gov’t Code § 552.002(a). We also emphasize that the difficulty of complying with a public information request is not a relevant factor in determining whether the responsive information is excepted from required public disclosure under the Act. *See, e.g., Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

We next address the section 552.103 assertion. Section 552.103 of the Government Code, the “litigation exception,” excepts from disclosure information:

[R]elating 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.

[Information is excepted from disclosure] 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). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation

exception is applicable, DART must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *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).

You essentially argue that litigation was reasonably anticipated at the time DART received the present request, based on a pending case involving Via Metropolitan Transit Authority in Bexar County, Texas. To demonstrate that litigation is reasonably anticipated for purposes of section 552.103, DART must furnish concrete evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has found that litigation was reasonably anticipated where a prospective plaintiff threatened to sue on several occasions and hired an attorney. Open Records Decision No. 288 at 2 (1981). In this instance, however, we have no indication that DART has been threatened with suit by either the requestor or any other prospective plaintiff. Upon careful consideration of the submitted arguments and comments, we conclude in this instance that you have not demonstrated that litigation is realistically contemplated and more than mere conjecture. Therefore, the information responsive to the request is not excepted from disclosure by section 552.103 of the Government Code and must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

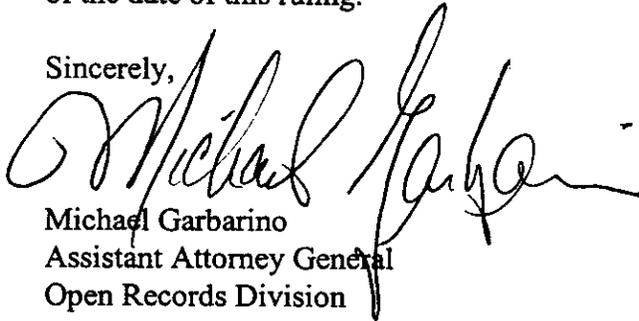
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, written over the typed name and title below it.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID#140016

Encl. Submitted documents

cc: Mr. Tom Rubin
2007 Bywood Drive
Oakland, California 74602-1937
(w/o enclosures)