



January 12, 2001

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

OR2001-0139

Dear Mr. Castaneda:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 143132.

The Dallas Area Rapid Transit ("DART") received a request for information relating to a personnel matter. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted. We also received and have reviewed the comments which the requestor submitted to this office.¹

Section 552.103 of the Government Code, the "litigation exception," 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.

...

¹The requestor is concerned that DART disclosed a request for public information prior to asking for this attorney general decision. We note that a request for information under the Public Information Act is not confidential.

(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 that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date that the governmental body received the written request for information and (2) the requested information is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

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 establish that litigation is reasonably anticipated, the governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In raising section 552.103, you contend that “litigation can be reasonably anticipated and reasonably contemplated in this matter beyond mere expectation and conjecture.” You direct our attention to correspondence that DART received from the Rail Employees Association (the “REA”). You assert that the referenced correspondence “invok[es] the administrative and litigation processes allowed by law under 13c of the Labor Relations Act.” You also state that “[t]he information being sought by the requestor . . . is the same as that which is involved in the threatened 13c union labor action.” In its letter to DART dated September 20, 2000, the REA states that it “[w]ill file a 13(c) complaint with the Federal Department of Labor.” The letter further states that REA “will request a Federal Mediator on site to mediate this dispute & [sic] to monitor DART’s actions in this case to ensure we are not harassed or intimidated further.” You inform this office that you received the request for the

information in question on October 24, 2000. Your request for this decision provides no further information with regard to the status of any dispute between the REA and DART on October 24. *See* Gov't Code § 552.103(c). Furthermore, you provide no explanation to this office of how or why a possible "13(c) complaint" by the REA constitutes concrete evidence of anticipated litigation under section 552.103. *See* Open Records Decision Nos. 452 at 5 (1986) (requestor's public threats of intent to sue do not alone trigger statutory predecessor to section 552.103), 331 at 1-2 (1982) (mere threats of litigation do not suffice to substantiate claim under statutory predecessor). Therefore, having carefully considered your arguments and the information you submitted, we find that you have not demonstrated that DART reasonably anticipated litigation on the date of its receipt of the request for information. Accordingly, we conclude that the requested information is not excepted from disclosure under section 552.103.

We note, however, that section 552.117(1) excepts from public disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental employee, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

Additionally, a social security number may be confidential under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*.² *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes DART to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number in question was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, prior to releasing a social security number, DART should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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).

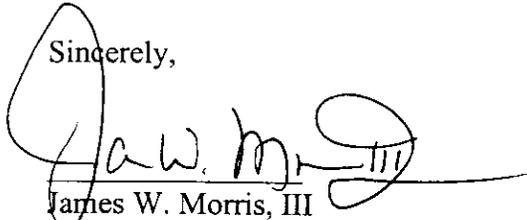
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at 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 "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 143132

Encl. Submitted documents

cc: Mr. Irby Foster, President
Rail Employees Association
2331 Gus Thomasson Road, Suite 118
Dallas, Texas 75228
(w/o enclosures)