



December 17, 2001

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

OR2001-5922

Dear Mr. Castaneda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156222.

Dallas Area Rapid Transit ("DART") received a request for several types of information relating to DART employees, including (1) documentation of administrative inquiries or investigations since 1993 involving certain Transit Police Regulatory Directives; (2) documentation of employees' use of DART computers to access restricted Internet sites; (3) employees investigated or disciplined for unauthorized use of DART computers or equipment; (4) transit officers' pay records indicating personal time off balances and hours; and (5) records relating to investigations involving a named employee. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We first note that much of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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). In this instance, all of the documents in Attachment D and most of the documents in Attachment F constitute completed investigations. DART must release this information under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, this exception is not other law that makes information confidential for the purposes of section 552.022. *See also 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived). We have marked the submitted information that is subject to section 552.022(a)(1). DART may not withhold that information under section 552.103.

We note, however, that some of the information in Attachment F is confidential under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information must be withheld from disclosure under section 552.101 in conjunction with the common-law right of privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since determined that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing types of information that attorney general has determined to be private). We have marked information in Attachment F that is protected by common-law privacy and must be withheld from disclosure under section 552.101.

Attachment F also contains a Texas license plate number. Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle title or registration issued by an agency of this state, including a Texas license plate number. *See* Gov't Code § 552.130(a)(2). We have marked the information in Attachment F that DART must withhold under section 552.130.

With respect to the information that is not subject to section 552.022, we address your claim under section 552.103. This exception provides in 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). A governmental body that raises section 552.103 bears the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for the information *and* (2) that the requested information is related to the 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 [1<sup>st</sup> 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 met 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, a 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).

You inform this office that a former employee has challenged his termination by commencing a grievance proceeding. You indicate that the former employee is required to pursue the grievance process prior to filing a lawsuit and is actively involved in the grievance proceeding. You note that the requestor is an attorney for the former employee. You indicate that DART will be a party to the anticipated litigation. You assert that the remaining information relates to the anticipated litigation. Having considered your representations, we find that you have demonstrated that DART reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the remaining information is related to the anticipated litigation. We therefore conclude that DART may withhold this information at this time under section 552.103.

In reaching this conclusion, we assume that DART does not seek to withhold any information that the opposing party to the anticipated litigation has seen or to which the opposing party already has had access. 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 the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to the anticipated litigation has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or no longer is reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, all of the information in Attachment D and most of the information in Attachment F is subject to section 552.022 of the Government Code. This information may not be withheld under section 552.103. DART must release this information, except for the information in Attachment F that DART must withhold under sections 552.101 and 552.130. DART may withhold the remaining information in Attachments E and F at this time under section 552.103.

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).

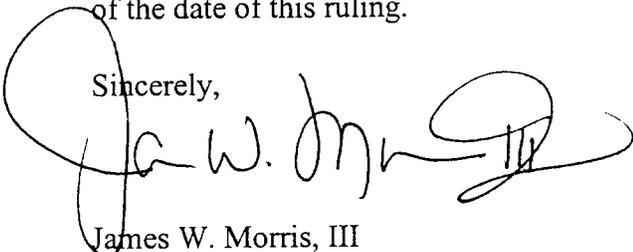
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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,



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

JWM/sdk

Ref: ID# 156222

Enc: Marked documents

c: Ms. Jane E. Bishkin  
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(w/o enclosures)