



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2009

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

OR2009-00811

Dear Mr. Simmons:

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# 332799.

The Dallas Area Rapid Transit ("DART") received a request for financial records pertaining to DART'S Employee Activities Committee ("EAC"). You claim the submitted information is excepted from disclosure under sections 552.103 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the requestor's assertion that DART did not comply with section 552.301 of the Government Code. The requestor states DART failed to timely respond to previous requests for information contained in e-mail communications between the requestor and DART. You have submitted copies of these e-mail communications, dated September 15, 2008 and October 7, 2008. Upon review of these communications, we determine the e-mails were not sent to DART's public information officer or the officer's designee. *See Gov't Code § 552.301(c)* (stating that a written request includes a request in

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

writing that is sent to the officer for public information, or the person designated by that officer, by e-mail or facsimile). Thus, we find DART did not violate the procedural requirements of section 552.301 of the Government Code by not responding to these e-mail communications. *See generally, id.* § 552.301 (enumerating the responsibilities a governmental body incurs upon receipt of a written request for information that it wishes to withhold). Accordingly, we will address DART's arguments against disclosure.

Next, you inform us the documents in Attachment D were previously submitted to this office as the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-12415 (2008). That decision authorized DART to withhold portions of the information under sections 552.103 and 552.136 of the Government Code. You do not inform us there has been a change in the law, facts, and circumstances on which Open Records Letter No. 2008-12415 is based. We therefore agree DART must continue to rely on Open Records Letter No. 2008-12415, and withhold or release the information in Attachment D in accordance with that ruling. *See id.* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under section 552.301(a)). However, we will address your arguments under sections 552.103 and 552.136 for the remaining information submitted in Attachments E and E-1.

We note section 552.022 of the Government Code is applicable to the documents in Attachment E. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" Gov't Code § 552.022(a)(3). DART must also release this information unless it is expressly confidential under other law. Section 552.103 of the Government Code, which you raise for this information, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, DART may not withhold Attachment E under section 552.103. Section 552.136 of the Government Code, however, is other law for purposes of section 552.022. Thus, we first address the applicability of section 552.136 to the information in Attachment E.

Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Accordingly, DART must withhold the bank account and routing numbers we have marked in Attachment E under section 552.136 of the Government Code.

We now turn to your argument under section 552.103 for the documents in Attachment E-1. Section 552.103 provides in relevant part as follows:

(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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *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 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 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. *See* 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).

In this instance, you claim Attachment E-1 is excepted from disclosure under section 552.103 because DART reasonably anticipates litigation. You inform us, and have submitted documentation showing, that prior to the date DART received the instant request for

information, DART received a letter from the attorney for the requestor's company making a demand for payment and threatening to sue DART and EAC if the dispute is not resolved. Further, you inform us, and have submitted documentation showing, that also prior to the date DART received the instant request for information, DART received another letter from this same attorney acknowledging a payment made by DART to his client, but disputing the amount of the payment as the full amount withheld. Having reviewed your arguments and the submitted information, we conclude litigation was reasonably anticipated on the date DART received the instant request for information. Furthermore, we find the information in Attachment E-1 is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude DART may withhold the documents in Attachment E-1 pursuant to section 552.103 of the Government Code.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, DART must continue to rely on Open Records Letter No. 2008-12415, and withhold or release the information in Attachment D in accordance with that ruling. DART must withhold the information we have marked in Attachment E under section 552.136 of the Government Code.² DART may withhold Attachment E-1 under section 552.103 of the Government Code. The remaining information in Attachment E must be released.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

²We note some of the information being released is confidential and not subject to release to the general public. However, the requestor in this instance has a special right of access to the information. See Gov't Code § 552.023(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles). Should DART receive another request for these same records from a person who would not have a special right of access to the private information, DART should resubmit this same information and request another ruling from this office. See *id.* §§ 552.301(a), .302.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine M. Kroll". The signature is written in a cursive, somewhat stylized font.

Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 332799

Enc. Submitted documents

c: Requestor
(w/o enclosures)