ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2009

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

OR2009-12202

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# 354851.

The Dallas Area Rapid Transit ("DART") received a request for (1) results related to certification testing of three named individuals in 2007 and 2008, and (2) interview notes and ratings of the same individuals from 2008 related to the position of chief dispatcher. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code 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 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 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. *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).

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.* This office has found that a pending complaint with the Equal Employment Opportunity Commission ("EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

In this instance, you state that a current DART employee filed a charge of discrimination with the EEOC against DART. The EEOC issued a Notice of Right to Sue letter on June 17, 2009. The letter indicates that the complainant has the right to sue on the claim for ninety days following the receipt of the notice. The current request was received on June 24, 2009. Upon review, we determine that DART has established that it reasonably anticipated litigation on the date that it received the request. Further, you state that the submitted information pertains to the allegations contained in the EEOC complaint filed by the employee. As such, we determine that the submitted information relates to the anticipated litigation. Accordingly, DART may generally withhold the submitted information pursuant to section 552.103.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has obtained or otherwise been given access to the information then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that some of the information DART seeks to withhold in Attachment C was obtained from the opposing party in litigation. Thus, this information may not be withheld under section 552.103. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Thus, except for the information in

Attachment C that was obtained from the opposing party to the litigation, DART may withhold the submitted information under section 552.103 of the Government Code.

With respect to the information that may not be withheld under section 552.103, we will address your argument under section 552.122 of the Government Code. Section 552.122 excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold the remaining information in Attachment C, which consists of interview questions and answers, under section 552.122. You state that these questions are designed to assess the performance of applicants in the position and their knowledge of the position. Further, you argue that release of the information at issue would provide an unfair advantage to future interviewees thereby reducing the effectiveness of the interview process. Having considered your arguments and reviewed the information at issue, we find that the interview questions at issue qualify as test items for the purposes of section 552.122(b). We also determine that the release of the actual answers to those questions would tend to reveal the questions themselves. Accordingly, we conclude that DART may withhold the remaining submitted information in Attachment C, consisting of interview questions and the actual answers to those questions, under section 552.122 of the Government Code.

In summary, except for the information in Attachment C that was obtained from the opposing party to the litigation, DART may withhold the submitted information under section 552.103 of the Government Code. DART may withhold the remaining submitted information in Attachment C, consisting of interview questions and the actual answers to those questions, under section 552.122 of the Government Code. As our ruling is dispositive, we do not address your remaining claims.

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

Sincerely,

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/sdk

Ref: ID# 354851

Enc. Submitted documents

c: Requestor
(w/o enclosures)