



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2009

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

OR2009-14334

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# 357969.

Dallas Area Rapid Transit ("DART") received a request for all reports pertaining to a specified accident. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that most of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports that are subject to section 552.022(a)(1). Section 552.103 is not other law that makes information expressly confidential for the purpose of section 552.022(a)(1). *See 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) (statutory predecessor to section 552.103 may be waived). Accordingly, DART may not withhold the information subject to section 552.022(a)(1), which we have marked, under section 552.103. However, because information subject to section 552.022 may be withheld

under sections 552.117, 552.130, and 552.136 of the Government Code, we will address the applicability of these sections to this information.¹ We will also address your claim under section 552.103 of the Government Code for the information not subject to section 552.022(a)(1).

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state[.]" Gov't Code § 552.130. Accordingly, DART must withhold the Texas motor vehicle record information we have marked in the completed reports under section 552.130 of the Government Code.

Section 552.136 of the Government Code 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." *Id.* § 552.136; *see id.* § 552.136(a) (defining "access device"). This office has determined that insurance policy numbers constitute access device numbers for purposes of section 552.136. Therefore, DART must withhold the insurance policy numbers we have marked under section 552.136.

Next, we note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). DART may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have not informed us whether or not the named employee whose information is at issue chose to withhold his personal information prior to DART's receipt of the request for information. Therefore, if the employee timely elected to withhold his personal information, DART must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold his personal information, then DART may not withhold any of the marked personal information under section 552.117(a)(1) of the Government Code.

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We next address your argument under section 552.103 of the Government Code against the disclosure of the information not subject to section 552.022. Section 552.103 of the Government Code 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.

Id. § 552.103(a), (c). DART 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 is pending or reasonably anticipated on the date DART 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). DART must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *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. Open Records Decision No. 331 (1982).

You state that, prior to the date of DART's receipt of the present request for information, an attorney representing an individual involved in the accident at issue "filed a liability claim

against DART on behalf of his client[.]” Further, you have provided an affidavit from DART’s Manager of Liability Claims stating that litigation is anticipated regarding the accident at issue because of the liability claim. Based on your representations, we agree DART reasonably anticipated litigation on the date it received the present request for information. You also claim that the information at issue is related to the anticipated litigation because the requested records relate to the accident from which the liability claim arose. Upon review, we agree that the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, DART may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.²

We note that once information has been obtained by all parties to the 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 once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, DART must release the marked completed reports subject to section 552.022(a)(1) of the Government Code; however, in doing so, DART must withhold the information we marked under section 552.130 of the Government Code and section 552.136 of the Government Code. In addition, if the employee timely elected to withhold his personal information, DART must withhold the information we have marked in the completed reports pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold his personal information, then DART may not withhold any of the marked personal information under section 552.117(a)(1) of the Government Code. DART may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

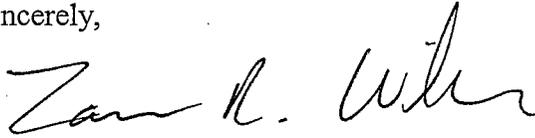
Finally, you ask this office to issue a previous determination permitting DART to withhold Texas driver’s license and Texas motor vehicle information under section 552.130 of the Government Code. We decline to issue such a previous determination at this time. Accordingly, this letter ruling is limited 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 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

²As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tamara R. Wilcox".

Tamara R. Wilcox
Assistant Attorney General
Open Records Division

TRW/dls

Ref: ID# 357969

Enc. Submitted documents

c: Requestor
(w/o enclosures)