



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 24, 2009

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

OR2009-16709

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# 362647.

Dallas Area Rapid Transit ("DART") received a request for seven categories of information pertaining to a specified arbitration proceeding between DART and GLF Construction Corporation ("GLF").<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup>We note that DART asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

<sup>2</sup>Although you also argue that Attachment D is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note that, in this instance, sections 552.107 and 552.111 are the proper exceptions for this type of information. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

<sup>3</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that portions of Attachment E contain opinions and orders issued by the arbitrator that are subject to section 552.022 of the Government Code. Section 552.022(a)(12) of the Government Code provides for required public disclosure of "final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(12). Although you claim Attachment E is excepted from disclosure under section 552.103 of the Government Code, that exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022. 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. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, DART may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. As you raise no other exceptions against the disclosure of this information, it must be released.

We next address your arguments for the remaining 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 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 has the burden of providing relevant facts and documents to show that the section 552.103 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.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

You explain that DART's procurement regulations provide for an administrative dispute process. You state, and provide documentation showing, that DART is currently involved in an appeal proceeding pertaining to a contract dispute with GLF. You state that the appeal includes a claim for actual damages pursuant to DART's procurement regulations on administrative appeals. We understand the administrative process for the appeal provides for full discovery and for the opportunity to be heard and to offer evidence. Based on your representations and the documentation you have submitted, we conclude you have demonstrated DART's administrative proceeding for contract disputes is conducted in a quasi-judicial forum, and thus, constitutes litigation for purposes of section 552.103. We also determine that DART was involved in the pending litigation at the time it received the instant request for information, and that the submitted information relates to the pending litigation. Accordingly, we find that section 552.103 of the Government Code is generally applicable to the remaining information.

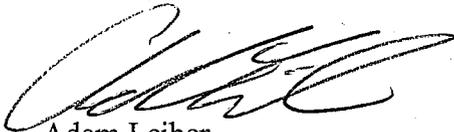
We note, however, that some of the documents you seek to withhold in Attachment E have been seen by the opposing party. If an opposing party has seen or had access to information that is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We have marked the information that the opposing party has seen or had access to. As you raise no additional exceptions for the marked information, it must be released. To the extent that the remaining information at issue has not been seen or obtained by the opposing party, it may be withheld under section 552.103 of the Government Code. However, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, DART must release the information we have marked pursuant to section 552.022(a)(12) of the Government Code. With the exception of information that the opposing party has seen or had access to, DART may withhold the remaining information under section 552.103 of the Government Code.

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](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, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/rl

Ref: ID# 362647

Enc. Submitted documents

c: Requestor  
(w/o enclosures)