



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2010

Ms. Shirley Thomas
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2010-19400

Dear Ms. Thomas:

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# 405092 (ORR 7779).

The Dallas Area Rapid Transit ("DART") received a request for information pertaining to a specified accident. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Some of the information you have submitted to us for review is not responsive to the request for information because it was created after DART received the request. This ruling does not address the public availability of any information that is not responsive to the request, and DART is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dism'd).

The submitted responsive information also includes completed reports that are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception

under the Act and 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, DART may not withhold this information, which we have marked, under section 552.103. However, the completed reports contain information that is subject to section 552.130 of the Government Code, which constitutes other law for purposes of section 552.022.¹

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, DART must withhold the Texas motor vehicle record information we have marked under section 552.130, but it must release the remaining information subject to section 552.022(a)(1).²

You assert the responsive information not subject to section 552.022 is excepted under section 552.103 of the Government Code, which provides in 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.

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

²We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number and a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general opinion.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show 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 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). The 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 concluded that a governmental body's receipt of a claim that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. See Open Records Decision No. 638 at 4 (1996).

You state the requestor, who is an attorney, made a personal injury claim on behalf of his clients against DART relating to the accident at issue. Thus, you assert DART reasonably anticipated litigation when it received the request for information. You do not affirmatively represent to this office the requestor has made a claim against DART that is in compliance with the TTCA. However, after reviewing the submitted documentation and your arguments, we conclude, based on the totality of the circumstances, DART reasonably anticipated litigation when it received the request for information. Furthermore, we find the remaining information is related to the anticipated litigation for purposes of section 552.103(a).

We note, however, DART seeks to withhold information that an attorney at the same law firm as the attorney representing the opposing parties to the pending litigation has already seen or had access to. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the remaining submitted information that the opposing parties or their representatives have already seen or had access to is not excepted under section 552.103, and DART must release it to the requestor. However, we conclude

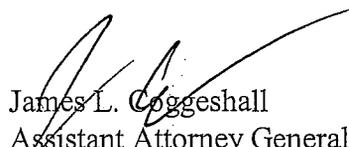
that DART may withhold the remaining responsive information pursuant to section 552.103 of the Government Code.

To conclude, DART must release the information marked under section 552.022(a)(1) of the Government Code, with the exception of the marked Texas motor vehicle record information that DART must withhold pursuant to section 552.130 of the Government Code. DART may withhold the remaining responsive information under section 552.103 of the Government Code, with the exception of any information that the opposing parties to the anticipated litigation or their representatives have already seen or had access to.

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

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/vb

Ref: ID# 405092

Enc. Submitted documents

c: Requestor
(w/o enclosures)