



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2011

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

OR2011-00134

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# 405041 (DART ORR 7775).

Dallas Area Rapid Transit ("DART") received a request for seven categories of information relating to a specified incident. 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 information you submitted.

We first note some 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 made for DART. We have marked that information. You do not claim section 552.108 for the marked information. Although you seek to withhold the marked information under section 552.103 of the Government Code, that section 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); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that

makes information confidential for purposes of section 552.022(a)(1). Therefore, DART may not withhold any of the information subject to section 552.022(a)(1) under section 552.103. We note sections 552.117, 552.1175, and 552.130 of the Government Code either are or may be applicable to some of the information subject to section 552.022(a)(1).¹ As those sections are confidentiality provisions for the purpose of section 552.022(a)(1), we will address sections 552.117, 552.1175, and 552.130. We also will address DART's claim under section 552.103 for the submitted information that is not subject to section 552.022(a)(1).

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.

Gov't Code § 552.103(a), (c). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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

¹This office will raise sections 552.117, 552.1175, and 552.130 on behalf of a governmental body, as these exceptions are mandatory and may not be waived. *See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).*

evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.*² You contend DART reasonably anticipates litigation. You state the law firm that made this request for information has asserted a personal injury claim against DART on behalf of two named individuals. You also state the submitted information that is not subject to section 552.022(a)(1) is related to the claim. Based on your representations and our review of the information at issue, we find DART reasonably anticipated litigation when it received this request for information. We also find the information at issue is related to the anticipated litigation. We therefore conclude section 552.103 of the Government Code is generally applicable to the submitted information that is not subject to section 552.022(a)(1).

In this instance, however, the opposing parties to the anticipated litigation have already seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties to litigation have already seen or had access to information relating to litigation, through discovery or otherwise, 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 the opposing parties to the anticipated litigation have already seen or to which they have already had access. The marked information may not be withheld under section 552.103 of the Government Code and must be released. Except for that information, DART may withhold the information that is not subject to section 552.022(a)(1) under section 552.103. We note the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address sections 552.117, 552.1175, and 552.130 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests confidentiality for those types of information under section 552.024 of the Government Code. *See* Gov’t Code §§ 552.024, .117. We note section 552.117(a)(1) is applicable to an employee’s personal cellular telephone number if the employee pays for the cellular telephone service with his or her personal funds. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under

²Among other examples, this office has concluded litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

section 552.117(a)(1) on behalf of an employee who requested confidentiality for the information under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of an employee who did not timely request confidentiality under section 552.024. Provided the DART employee concerned pays for his cellular telephone service with his personal funds, DART must withhold the home address and cellular telephone number we have marked under section 552.117(a)(1) to the extent the employee timely requested confidentiality for the marked information under section 552.024.

Section 552.1175 of the Government Code protects information relating to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See Gov't Code § 552.1175(a)*. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(a)-(b). Section 552.1175 encompasses a peace officer's personal cellular telephone number if the peace officer pays for the cellular telephone service with the officer's personal funds. DART must withhold the Dallas police officer's cellular telephone number we have marked under section 552.1175 if the officer pays for the cellular telephone service with his personal funds and elects to restrict access to his cellular telephone number in accordance with section 552.1175(b).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state. *See id.* § 552.130(a)(2). DART must withhold the Texas motor vehicle information we have marked under section 552.130.

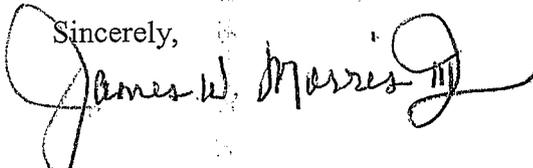
In summary: (1) the submitted information that is not subject to section 552.022(a)(1) of the Government Code may generally be withheld under section 552.103 of the Government Code, but DART must release the marked information the opposing parties have already seen or to which they have already had access; (2) provided the DART employee concerned pays for his cellular telephone service with his personal funds, the home address and cellular telephone number we have marked must be withheld under section 552.117(a)(1) of the

Government Code to the extent the employee timely requested confidentiality for the marked information under section 552.024 of the Government Code; (3) the Dallas police officer's cellular telephone number we have marked must be withheld under section 552.1175 of the Government Code if the officer pays for the cellular telephone service with his personal funds and elects to restrict access to his cellular telephone number in accordance with section 552.1175(b); and (4) the Texas motor vehicle information we have marked must be withheld under section 552.130 of the Government Code.³ The rest of the submitted information 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 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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/vb

Ref: ID# 405041

Enc: Submitted information

c: Requestor
(w/o enclosures)

³We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas license plate number under section 552.130.