



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 26, 2011

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

OR2011-07486

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# 418787 (DART ORR 8061).

Dallas Area Rapid Transit ("DART") received a request for information relating to a hearing of the requestor's Management Appeal Committee ("MAC") appeal, including information pertaining to the MAC's recommendation. You claim the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the information you submitted.

We first note the information submitted as Attachment D is the MAC's recommendation to the President and Executive Director of DART. As the requestor specifically seeks information generated by the MAC in connection with its recommendation, we find Attachment D is responsive to the request. Therefore, as DART does not claim Attachment D is excepted from or privileged against disclosure, DART must release Attachment D to the requestor unless it has already done so. *See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).*

Next, we address your claim for Attachments B and C under section 552.103 of the Government Code. This exception 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 an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the 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 [1<sup>st</sup> 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).

You contend Attachments B and C are related to anticipated litigation. 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.* You inform us the requestor is a former DART police officer who was terminated. You explain the MAC heard the requestor's appeal and upheld his termination. You state Attachments B and C consist of notes prepared for the MAC hearing by an attorney for DART and notes taken at the hearing by an employee of DART. You contend DART anticipates litigation because the requestor has the right to appeal to a state court now that his MAC appeal has been denied. You do not inform us, however, that the requestor has taken any concrete steps toward commencing an appeal. Having considered your representations, we find the mere possibility of an appeal by the requestor to a state court does not establish that litigation was reasonably anticipated when DART received this request for information. *See* ORD 452 at 4; *see also* Open Records Decision No. 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor to Gov't Code § 552.103). We therefore conclude DART may not withhold Attachments B and C under section 552.103 of the Government Code.

You also claim the attorney work product privilege under section 552.111 of the Government Code for Attachment B. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the attorney work

product privilege, as found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You contend Attachment B constitutes attorney work product. You state Attachment B consists of notes prepared by an attorney for DART in anticipation of, and for use at, the requestor's MAC hearing. Based on your representations and our review of the information at issue, we find Attachment B consists of material prepared in anticipation of litigation by a party's representative. *See* TEX. R. CIV. P. 192.5; ORD 677 at 6-8; *cf.* Open Records Decision No. 588 (1991) (discussing factors attorney general considers in determining whether administrative proceeding not subject to Texas Administrative Procedure Act, Gov't Code ch. 2001, constitutes litigation). We therefore conclude Attachment B constitutes

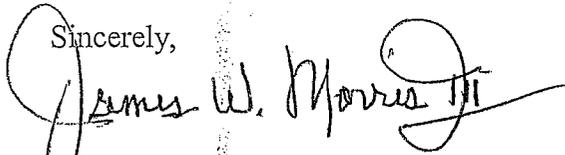
attorney work product protected by Texas Rule of Civil Procedure 192.5 and may be withheld on that basis under section 552.111 of the Government Code.<sup>1</sup>

In summary, DART may withhold Attachment B under section 552.111 of the Government Code and must release the rest of the submitted information.<sup>2</sup>

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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/em

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<sup>1</sup>As we are able to make this determination, we need not address your other arguments against disclosure of Attachment B.

<sup>2</sup>We note Attachment C contains information relating to the present requestor DART would ordinarily be required to withhold under section 552.117 of the Government Code. Because section 552.117 protects privacy, the requestor has a right to his own private information under section 552.023 of the Government Code. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). We also note Open Records Decision No. 670 (2001) includes a previous determination authorizing all governmental bodies to withhold personal information relating to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, under section 552.117(a)(2) of the Government Code without the necessity of requesting a decision under the Act. See ORD 670 at 5-6. Thus, if DART receives another request for Attachment C from a different requestor, and the present requestor is still a peace officer, DART may withhold the personal information relating to the requestor in Attachment C pursuant to section 552.117(a)(2) and Open Records Decision No. 670 without requesting another ruling. We further note section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. See Gov't Code § 552.024(c)(2). Thus, if DART receives another request for Attachment C from a different requestor, and the present requestor is no longer a peace officer, section 552.024(c) authorizes DART to withhold the present requestor's personal information in Attachment C if he has timely chosen not to allow access to the information.

Ref: ID# 418787

Enc: Submitted documents

c: Requestor  
(w/o enclosures)