



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2012

Mr. David C. Schulze
Interim General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2012-15279

Dear Mr. Schulze:

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# 466000 (DART ORR Nos. 9138 and 9156).

Dallas Area Rapid Transit ("DART") received a request for information regarding a specified DART bus accident, including the dash-cam video, officer radio transmissions, the driver's personnel file, and the driver's drug test results. DART received a second request from a different requestor for the personnel file and drug test results of the bus driver. You state DART has released the requested dash-cam video to the first requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. You also state the requested information may implicate the proprietary interests of Veolia Transportation Services, Inc. ("Veolia"). Accordingly, you inform us, and provide documentation showing, you notified Veolia of the request and of the company's right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Veolia. We have considered the submitted arguments and reviewed the submitted information.

Both DART and Veolia state the information submitted by Veolia is held by Veolia, a private entity. Veolia argues that because DART's contract with Veolia does not permit an

unlimited right of access to the requested personnel information, the information at issue is not “public information” subject to the Act. Section 552.002 of the Act defines public information as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” Gov’t Code § 552.002(a). Whether information prepared by a private party on behalf of a governmental body is in the physical custody of a governmental body is not determinative of whether the information is subject to the Act. *See, e.g.*, Open Records Decision Nos. 558 (1990), 499 (1988), 462 (1987). The test for whether the Act applies to information held by outside parties is whether (1) the information relates to the governmental body’s official duties or business; (2) the consultant acts as agent of the governmental body in collecting the information; and (3) the governmental body has or is entitled to access to the information. ORDs 499 at 2, 462 at 4. In Open Records Decision No. 518 (1989), this office determined that “if a governmental entity employs an agent to carry out a task that otherwise would have been performed by the entity itself, information relating to that task that has been assembled or maintained by the agent is subject to [the Act].” ORD 518 at 2-3; *see* Open Records Decision Nos. 445 (1986), 437 (1986), 317 (1982). Pursuant to its contract with DART, Veolia provides paratransit services for individuals with disabilities that are enrolled in the DART Paratransit Program. We find the hiring, training, and supervision of bus drivers, and the transportation of individuals with disabilities to locations in the DART transportation service region, which are services Veolia provides pursuant to its contract with DART, are services related to public transportation that are traditionally carried out by governmental bodies. Thus, in performing these public transportation services, Veolia is providing services that would otherwise be undertaken by DART as part of its official duties as a public transportation agency. Accordingly, we conclude the responsive information submitted by Veolia is collected and maintained by Veolia as an agent for DART and in connection with DART’s official business.

We next consider whether DART owns or has a right of access to the responsive information submitted by Veolia. Pursuant to DART’s contract with Veolia, DART has “the right to review [Veolia’s] personnel files . . . assigned to this contract.” The submitted information contains personnel information of a DART bus driver held by Veolia. Upon review of your representations and the contract between DART and Veolia, we find DART has a right of access to this personnel information held by Veolia. Thus, we conclude the information submitted by Veolia is “public information” subject to the Act.

We now turn to your argument under section 552.103 of the Government Code. Section 552.103 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 at issue. 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, orig. proceeding); *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).*

To establish 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." *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See 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.¹ *See Open Records Decision No. 555 (1990); see also ORD 518 at 5 (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. *See Open Records Decision No. 331 (1982).* Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See Open Records Decision No. 361 (1983).*

¹In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; 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 threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

You state DART reasonably anticipates litigation concerning the bus accident at issue in the present requests. In support of this contention, you provide documentation showing that DART received two notice of claim letters, each from an attorney alleging injury to their client as a result of the bus accident at issue. Based on your arguments and our review of the submitted information, we agree that litigation against DART was reasonably anticipated on the date DART received the requests for information. You further state, and we agree, the information at issue relates to that litigation. Thus, we find the submitted information is generally excepted under section 552.103 of the Government Code.²

Generally, however, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

²As our ruling is dispositive, we do not address the remaining arguments against disclosure of the submitted information.

Ref: ID# 466000

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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