



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 6, 1997

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

OR97-1306

Dear Mr. Castañeda:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106168.

The Dallas Area Rapid Transit ("DART") received a request for "all documents pertaining to inspection, complaints, repair orders, accidents and investigation reports" for train car number 121 for the year of 1995 thru 1996. In response to the request, you submitted to this office for review a representative sample of the information you assert is responsive.¹ You claim that 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.

Section 552.103(a), known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

¹We 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.

- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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 (1990) at 4.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. 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.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) 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). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

In this instance, you state that litigation is reasonably anticipated because of the June 27, 1996 bus incident involving the requestor's client. You have supplied to this office correspondence, such as the requestor's claim and demand letters alleging damages against DART, which indicate litigation is reasonably anticipated. In this instance, after reviewing the submitted materials and your arguments, we conclude that you have shown that litigation is reasonably anticipated. *See* Open Records Decision No. 588 (1991). We further find that the documents that have been submitted are related to reasonably anticipated litigation for the purposes of section 552.103(a).

²In addition, this office has concluded that 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).

The requested records may be withheld pursuant to section 552.103 only to the extent that the records have not been previously seen by the opposing parties in the anticipated litigation. Generally, absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We also note that the applicability of this section ends once the litigation has been concluded.³ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref: ID# 106168

Enclosures: Submitted documents

cc: Mr. David I. Wilk
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(w/o enclosures)

³However, information deemed confidential by law may not be waived and should continue to be withheld once the litigation has concluded. Open Records Decision Nos. 490 (1988), 463 (1987). We caution that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352 (providing penalties for improper release of confidential information).

