



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 10, 2008

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

OR2008-00575

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# 299311.

The Dallas Area Rapid Transit ("DART") received a request for information "relating to the proposed DART Royal Lane train station and surrounding parcels, including parcels 11031 and 10933." You state that some responsive information will be released to the requestor. You claim that the submitted 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.

You state that DART sought clarification of the portion of the request pertaining to "parcels 11031 and 10933" from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). Based on your representation and our review of all of the information that has been submitted to us, it does not appear that DART had received the requested clarification from the requestor as of the date that it requested a ruling from us. Accordingly, we conclude that DART need not respond to this portion of the request for information, until it receives the requestor's clarification. We note, however, that when DART does receive the clarification, it must seek a ruling from us before withholding from the requestor any information that may be responsive to that portion of the request. *See* Open Records Decision No. 663 (1999)

(providing for tolling of ten business day deadline for requesting attorney general decision while governmental body awaits clarification).

We next note that a portion of the submitted materials includes information made public by section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov’t Code § 552.022(a)(1), (3). The submitted materials include information contained in a contract and a completed report. The completed report is subject to required release under section 552.022(a)(1), while the contract modifications fall within the scope of subsection (3) of section 552.022(a).¹ *See id.* The submitted information which is within the ambit of section 552.022 is therefore subject to required public disclosure, except to the extent that any of this information is expressly confidential under other law. You contend that section 552.103 of the Government Code makes this information confidential. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body’s interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Thus, the information that is subject to section 552.022, which we have marked, may not be withheld from public disclosure under section 552.103.

We note that some of the information subject to section 552.022 appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See Attorney General Opinion*

¹We note that DART does not claim an exception to disclosure of the completed reports under section 552.108 of the Government Code.

JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990). Thus, the information subject to section 552.022 must be released; however, any information that is protected by copyright must be released in accordance with copyright law.

We now turn to the submitted information that is not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides in relevant 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). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103 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 that 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 of the Government Code.

In this instance, you state, and provide documentation showing, that prior to its receipt of the instant request, DART brought a condemnation action against several property owners, Cause No. CC06-11240-B in Dallas County Court at Law No. 2. You inform us that the information at issue relates to the pending litigation. Having considered your arguments and reviewed the information at issue, we find that you have demonstrated that DART was involved in pending litigation on the date of its receipt of this request for information. We

also agree that the information at issue is related to the litigation. Therefore, DART may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, DART must release the information subject to section 552.022 of the Government Code; however, any information that is protected by copyright must be released in accordance with copyright law. DART may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 299311

Enc. Submitted documents

c: Mr. Charles Ferrara
CAN FER Construction Company
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(w/o enclosures)