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ATTORNEY GENERAL OF TEXAS

September 22, 2015

Ms. Halfreda Anderson-Nelson
Public Information Officer
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2015-19835

Dear Ms. Anderson-Nelson:

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# 579983 (DART ORR Nos. 11697, 11689).

Dallas Area Rapid Transit (the "DART") received two requests from the same requestor for a specified presentation, information regarding a public hearing held on a specified date, and a specified Good Repair Capital Grant Application.¹ You claim 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 information you have submitted.

¹We note DART sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, we note portions of the submitted information have previously been released to the public. Further, some of the submitted information may have been presented in an open meeting of DART. *See* Gov't Code § 551.002 (requiring that every meeting of a governmental body shall be open to the public except as provided in the Open Meetings Act, Chapter 551 of the Government Code). Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, DART may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Section 552.103 of the Government Code is a discretionary exception to disclosure under the Act and does not constitute law that makes information confidential or expressly prohibits its release for purposes of section 552.007. *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); *see also* Open Records Decision Nos. 663 at 5 (1999) (waiver of discretionary exceptions), 665 at 2 n.5 (2000) (discretionary exceptions in general). Accordingly, to the extent the information we noted was previously released to the public or presented in an open meeting, DART may not withhold such information under section 552.103. To the extent the information at issue was not release previously released to the public or presented in an open meeting, we will address your argument against its disclosure, as well as the remaining information.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). The submitted information includes information used to estimate the need for or expenditure of public funds by a government body that is subject to section 552.022(a)(5). DART must release this information pursuant to section 552.022(a)(5), unless it is made confidential under the Act or other law. *See id.*

Although DART raises section 552.103 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORDs 665 at 2 n.5, 663 at 5. Therefore, DART may not withhold any of the information subject to section 552.022(a)(5), which we have marked, under section 552.103 of the Government Code. However, we will address DART's argument against disclosure of the remaining information.

Section 552.103 of the Government Code provides, in relevant part, as follows:

(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 the section 552.103(a) 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 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, orig. proceeding); *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 from disclosure under section 552.103(a).

For purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. Open Records Decision Nos. 588 at 2 (1991), 474 at 6 (1987) (disciplinary action before Texas State Board of Pharmacy), 368 at 2 (1983) (administrative hearing before Commissioner of Insurance), 301 at 1-2 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, ORDs 588 at 7 (State Board of Insurance proceeding), 301 at 2 (hearing before Public Utilities Commission). Factors this office considers in determining whether an administrative proceeding is

conducted in a quasi-judicial forum include whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588 at 3-4.

DART contends the submitted information relates to a complaint filed by North American Bus Industries (“NABI”) pursuant to DART’s Procurement Regulations. DART asserts litigation was pending with NABI when it received the request for information through DART’s administrative process. DART informs us the administrative process is overseen by an administrative law judge and allows for discovery, the opportunity to present witnesses, and the opportunity to offer evidence. Further, we understand the administrative process requires a transcript of testimony and argument at hearings be created unless the administrative law judge orders otherwise. We further understand the decision of the administrative law judge is final, subject only to a motion for reconsideration. Based on DART’s argument and our review, we find DART has demonstrated its administrative process is conducted in a quasi-judicial forum and, therefore, constitutes litigation for purposes of section 552.103 of the Government Code. Thus, we agree litigation was pending when DART received the instant request. We also find DART has established the remaining information is related to the pending litigation for purposes of section 552.103(a). Therefore, to the extent the remaining information was not previously released to the public or presented in a public meeting, DART may withhold it under section 552.103(a).

However, 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 the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, to the extent the information not subject to section 552.022(a)(5) was not previously released to the public or presented in a public meeting, DART may withhold the information we marked under section 552.103(a). The remaining 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.texasattorneygeneral.gov/open/>

[orl_ruling_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/bhf

Ref: ID# 579983

Enc. Submitted documents

c: Requestor
(w/o enclosures)