



June 10, 1999

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR99-1624

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125219.

The Texas Department of Transportation (the department) received a request for “all publicly available files in the *T. Brown Constructors, Inc. v. Texas Department of Transportation* case, SOAH Docket No. 601-92-124.” You indicate that you will release copies of the administrative record concerning the case. You claim, that the remaining responsive information is excepted from disclosure by sections 552.101 and 552.103 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the sample documents that you have submitted.²

Section 552.103(a) of the Government Code, the “litigation exception,” excepts from

¹You seek to except some of the information from disclosure asserting an attorney client privilege under section 552.101. This privilege is more properly claimed under section 552.107(1) Open Records Decision No. 574 at 2 (1990). We have considered the application of attorney-client privilege under 552.107 of the Government Code.

²In reaching our conclusion here, we 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.

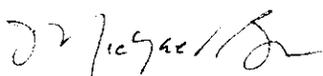
disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To show that this section is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). The requestor seeks information related to such a case, *T. Brown Constructors, Inc. v. Texas Department of Transportation* case, SOAH Docket No. 601-92-124. You have provided this office with a copy of an order entered in that case on March 24, 1999. Although the order denies petitioner's claim and all other relief, you assert that this order is not final. We note that where no motion for rehearing is timely filed, a decision in a contested case becomes final on the expiration of the period for filing such a motion. Gov't Code § 2001.144(a)(1). Motions for rehearing must be filed not later than the 20th day after the affected party is notified of the order, unless the agency extends this period by written order. Gov't Code § 2001.146. The department was required to post notice to the affected party "on issuance" of the order and the party is presumed to have been given notice on the date that it was posted. Gov't Code. 2001.142. More than 20 days have expired since the order was issued. As we have no indication that the department ordered an extension of the time for filing or that a motion for rehearing was filed in this period, we assume that the order is final. You also state that "[s]ection 2001.176 provides for another 30 day period" after the motion for rehearing deadline. Section 2001.176 designates time periods for initiating judicial review. Government Code section 2001.171 provides that judicial review is available only to "[a] person who has exhausted all administrative remedies available within a state agency." With exceptions that do not apply here, Government Code section 2001.145(a) makes a timely motion for rehearing a prerequisite to appeal of an order in a contested case. As previously noted, there has been no indication that a motion for rehearing was timely filed. Because you have not demonstrated that the affected party availed itself of the appeal process, we assume that it did not exhaust its administrative remedies, that judicial review is precluded in this case, that section 2001.176 does not apply, and that the litigation has concluded. The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We conclude that you have not demonstrated that the subject information may be withheld under section 552.103 of the Government Code.

You assert that several of the documents responsive to this request are protected by attorney client privilege. Section 552.107(1) protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." See Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications.

Id. We have marked the submitted information that reveals legal advice or confidential communications. This information may be withheld under section 552.107 of the Government Code.

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.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB\ch

Ref.: ID# 125219

Encl. Marked documents

cc: Mr. Peter T. Nelson
Fulbright & Jaworski L.L.P.
600 Congress Avenue, Suite 2400
Austin, Texas 78701
(w/o enclosures)