



June 21, 1999

Ms. Jennifer D. Soldano  
Associate General Counsel  
Texas Department of Transportation  
125 E. 115<sup>th</sup> Street  
Austin, Texas 78701-2423

OR99-1687

Dear Ms. Soldano:

You have asked 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# 125316.

The Texas Department of Transportation (the "department") received a request for "any information concerning Texas DOT's investigation" of a specified incident involving a buried electrical "Pull Box." Specifically, the request seeks information concerning "the date of the installation of this box, a description of the box, and any maintenance records you have on the box, in addition to your investigation of the incident." In response to the request, you submit to this office for review a copy of the records at issue.<sup>1</sup> You state that the submitted information is excepted from disclosure pursuant to sections 552.101<sup>2</sup> and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>You state that "[t]he requestor will be supplied with all the documents responsive to her request except for those protected by attorney/client privilege." Therefore, we assume that any other responsive information that is not at issue will be provided to the requestor.

<sup>2</sup>Although early open records decisions permitted governmental bodies to withhold from disclosure information within the attorney-client privilege pursuant to section 552.101, the privilege is specifically covered under section 552.107(1). Section 552.107 is the appropriate section to cite when seeking to withhold from disclosure communications between the governmental body and its legal counsel. *See* Open Records Decision No. 574 (1990). Furthermore, this office has stated that discovery privileges are not covered under the predecessor provision of section 552.101. *See* Open Records Decision No. 575 at 2 (1990).

As a preface to our discussion, we note that you did not initially assert the applicability of section 552.103(a) to the records at issue. Normally, a governmental body must raise an otherwise applicable exception to required public disclosure within ten business days following the governmental body's receipt of an open records request. *See Gov't Code* § 552.301(a). This office usually will not consider an exception raised after the initial ten business days unless there exists a compelling reason for doing so. *Open Records Decision No. 515 at 6 (1988)*.

On May 3, 1999, you supplemented your original letter requesting a ruling from this office with a copy of "Plaintiffs [sic] First Amended Original Petition." Based on the specific facts presented in this file, this office agrees to consider the applicability of section 552.103 to the information being requested.<sup>3</sup> In arriving at this decision, we assume good faith on the part of the department in taking a reasonable amount of time to raise the litigation exception. *See Gov't Code* § 552.228(a); *Open Records Decision No. 467 (1987)*.

Section 552.103(a) of the Government Code, the "litigation exception," reads as follows:

(a) Information is excepted from [required public disclosure] if it is 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

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

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. *Open Records Decision No. 588 (1991)*. A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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)*.

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<sup>3</sup>This office will consider changes in circumstances surrounding litigation when timely informed by governmental body of changes. *Open Records Decision No. 638 at 3 (1996)*.

In this instance, the department has supplied this office with information which shows that there is pending litigation. We additionally find that the documents submitted by the department are related to the litigation for the purposes of section 552.103(a). Therefore, the requested records may be withheld under section 552.103. However, if the opposing party in the litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

As we resolve your request under section 552.103, we need not address your other claimed exception at this time. 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,

A handwritten signature in cursive script that reads "Sam Haddad". The signature is written in black ink and is positioned above the typed name.

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/nc

Ref.: ID# 125316

Encl.: Submitted documents

cc: Ms. Dena Golden Orth  
The Summit Group  
523 Cactus Flower  
San Antonio, Texas 78260  
(w/o enclosures)