



April 28, 2000

Ms. Janice Marie Wilson
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR2000-1671

Dear Ms. Wilson:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID# 134707.

The Texas Department of Transportation (the "department") received a request for information relating to contractor performance and defaults in connection with contracts for tree trimming, tree removal, and brush removal. You have submitted a representative sample of responsive information for our review.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 have reviewed the information you submitted.

As amended by the Seventy-sixth Legislature, section 552.103, the "litigation exception," 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.

...

¹In 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 letter ruling does not reach, and therefore does not authorize the department to withhold, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(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 documentation sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain its burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* A contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, constitutes litigation for the purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). In this instance, you inform this office that pursuant to the requestor's petition for an administrative hearing, a contested case styled *In the Matter of Archana, Inc.*, No. 601-99-1687, was docketed by the State Office of Administrative Hearings. You further inform us that both the petitioner's case and the requested information involve contracts for clearing vegetation from right-of-way. Based on your representations and our review of the submitted information, we conclude that you have demonstrated that the requested information relates to pending litigation for the purposes of section 552.103.

We note, however, that some of the requested information is subject to required public disclosure under section 552.022 of the Act. As amended by the Seventy-sixth Legislature, section 552.022 provides in relevant part:

(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:

...

(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)(3). Thus, any responsive information such as the submitted contract that is within the ambit of section 552.022(a)(3) cannot be withheld under section 552.103. *See* Open Records Decision No. 665 at 2 n.5 (2000) (explaining that

section 552.103 is not a confidentiality provision). The department may withhold, pursuant to section 552.103, responsive information that is not subject to disclosure under section 552.022.

In concluding that the department may withhold information relating to the pending litigation, we assume that the requestor has not seen or had access to any of the information that you seek to withhold. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to pending litigation previously has seen or had access to requested information relating to the litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The department must not release any confidential information, however, even at the conclusion of the related litigation. *See* Gov't Code §§ 552.101, .352.

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.

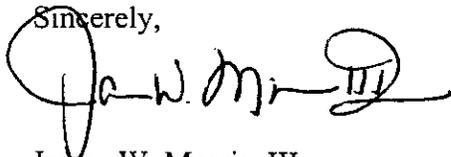
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 134707

Encl. Submitted documents

cc: Mr. Pratap Reddy
Archana, Inc.
1155 Larry Mahan Drive, Suite B
El Paso, Texas 79925
(w/o enclosures)