



August 9, 2000

Ms. Janice Marie Wilson
Associate General Counsel
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR2000-3040

Dear Ms. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138415.

The Department of Transportation (the "department") received a request for the following items:

- (1) A true and correct copy of the letter to Gene Adams dated 4-26-1999 which was delegated to Mr. Plemmons for action.
- (2) A true and correct copy of the video tape showing the alleged violations of TNRCC regulations at the Bowie plant.
- (3) A true and correct copy of any and all licenses issued to Donald Vaughn which were valid during the period of October 1998 pertaining to operations of a wastewater treatment facility.
- (4) A true and correct copy of the letter delegating authority to Donald Vaughn to participate in the daily supervision of the operation of the Bowie County plant.

You state that the requestor will be provided with the letter in item 1 which is a letter written by the requestor. In a separate letter, the requestor also asked for a copy of the file generated

as a result of an inquiry into the possible breach of contract between the Atlanta district office and the requestor's company. Other than item 1 of the first request, you claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) provides 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.

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 establishing that section 552.103(a) applies is a two-prong 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 (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.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You explain that the department is involved in an administrative proceeding with the requestor concerning a breach of contract claim for services provided by the requestor's company. You have provided a letter in which you request the State Office of Administrative Hearings to assign an administrative law judge to hear the contested case under Chapters 2001 and 2260 of the Government Code. You have also provided a copy of a letter from the State Office of Administrative Hearings which provides a docket number for the administrative case. Contested cases conducted under the Administrative Procedures Act, Chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 at 7 (1991). Therefore, you have demonstrated that litigation was pending on the date that the department received the request. Because we agree that the submitted information relates to the pending litigation, we conclude that you may withhold the submitted information under section 552.103.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor.¹ Open Records Decision Nos. 349 (1982), 320 (1982).

¹We have marked one document with a yellow flag that appears to have been signed by the opposing party. If the opposing party has seen or had access to this document, it must be released to the requestor.

Also, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352.

In conclusion, you may withhold the submitted information under section 552.103. Because you may withhold the submitted information under section 552.103, we need not address the applicability of section 552.107.

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).

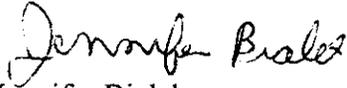
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 138415

Encl: Submitted documents

cc: Mr. Dan Birge
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(w/o enclosures)