



August 15, 2000

Mr. Kenneth Stewart
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2000-3116

Dear Mr. Stewart:

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# 138028.

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

1. A copy of the abbreviated list of Appraisal Guidelines for department appraisals.
2. A copy of department form ROW A-5.
3. A record of any contracts between the department and Martha Gayle-Reid since 1998.
4. A copy of any documents evidencing payments made to Martha Gayle-Reid since 1998.
5. A copy of any requests for proposal from Ms. Gayle-Reid since 1998.

In its brief to this office, the department indicates that it will release some of the responsive information to the requestor. You assert that the remaining information, submitted as Exhibit B, is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.110, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the documents submitted constitute public information that is not excepted from required disclosure under the Act. We specifically refer you to section 552.022 of the Government Code, which provides in pertinent 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;

...
(14) administrative staff manuals and instructions to staff that affect a member of the public[.]

Gov't Code § 552.022 (emphasis added). In the instant case, the three pages with the heading "Payee Payment Information" fall within the scope of section 552.022(a)(3) as information in a department account relating to the expenditure of public funds; thus, these pages must be released. Further, the documents titled "Appraisal Guidelines" and form ROW A-5 consist of instructions to staff that affect a member of the public. As such, these documents must also be released pursuant to section 552.022(a)(14). We have marked the pages that must be released.

Although the department claims exception under sections 552.101, 552.110, and 552.114, it offers no argument or evidence to support exception from required public disclosure under any of those sections. Furthermore, after reviewing the submitted documents, we conclude that the information at issue is not, on its face, excepted from disclosure under sections 552.101, 552.110, and 552.114. Thus, the department may not withhold the submitted documents under sections 552.101, 552.110, or 552.114 of the Government Code. We also note that sections 552.103 and 552.104 of the Government Code are discretionary exceptions under the Act and thereby do not constitute "other law" that makes information confidential. *See also* Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 522 at 4 (1989) (discretionary exceptions in general). *See also* Gov't Code § 552.007(a); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.—Dallas 1999, *no pet.*) (governmental body may waive litigation exception, section 552.103).¹

We next address the section 552.103 assertion with respect to the only remaining submitted document titled "Record of Fee Appraiser Contracts." Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a

¹The department also seems to be asserting various discovery privileges under sections 552.101 and 552.103. However, discovery privileges such as the consulting expert privilege and the work product privilege do not constitute "other law" that would make information confidential under the Act. *See* Open Records Decision No. 575 at 2 (1990).

governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You supplied this office with a copy an original petition for a pending lawsuit in which the department is a defendant and the subject of this request is serving as a consulting expert. Additionally, we conclude that the document titled "Record of Fee Appraiser Contracts" relates to the pending litigation. We find, therefore, that the "Record of Fee Appraiser Contracts" may be withheld from disclosure under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, you may withhold the document titled "Record of Fee Appraiser Contracts" under section 552.103. The remaining information must be released.

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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/er

Ref: ID# 138028

Encl. Submitted documents

cc: Mr. Richard Bischoff
Law Office of Richard L. Bischoff
P.O. Box 5325
El Paso, Texas 79954
(w/o enclosures)