



May 1, 2001

Mr. Brett Bray  
Division Director  
Texas Department of Transportation  
P.O. Box 2293  
Austin, Texas 78768

OR2001-1780

Dear Mr. Bray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146664.

The Texas Department of Transportation (the "department") received a request for six categories of information regarding case number 00-0423. You state that the enforcement action at issue here was instituted by the department as a result of a complaint filed by the requestor and that much of the documentation relative to that complaint has already been provided to the requestor. You claim, however, that the information responsive to the first five categories of information sought by the requestor is excepted from disclosure under section 552.103 of the Government Code and under the attorney-client and/or work-product privileges. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that it appears that you did not submit for our review the information responsive to the sixth category of information sought by the requestor. Nor do you indicate that you seek to withhold this information. Therefore, we assume that you have released any information responsive to the sixth category of information. If you have not released this information, you must release it to the requestor at this time. See Gov't Code §§ 552.301(a), .302.

Next, we address a letter received by this office from Connie Range. In her letter, Ms. Range contends that the department failed to reply to her request for information dated February 13, 2001, apparently referring to the request made by Sam Range on the same date. Although Ms. Range's name is included in the letterhead, the request letter is signed only by Mr. Range. Thus, we conclude that the request dated February 13, 2001, is a request from Sam Range, not Connie Range, and that the department did not fail to respond to said request within the ten-business-day period as required by section 552.301(d).

We now turn to your claimed exceptions regarding the submitted information. You contend that the submitted information is protected by the work-product privilege. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996); *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories.

We have reviewed your arguments and the submitted information and find that some of the submitted information, which we have marked, was created for trial or in anticipation of civil litigation and tends to reveal an attorney's mental processes, conclusions and legal theories. This marked information may be withheld under section 552.111 of the Government Code.

You also contend that the submitted information is protected by the attorney-client privilege. Section 552.107(1) of the Government Code excepts 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[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis.

Upon review of your arguments and the submitted information, we conclude that some of the submitted information, which we have marked, may be withheld under section 552.107 of the Government Code.

Finally, you assert that the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a 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). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You explain that the department's Motor Vehicle Board (the "Board") is required to conduct an investigation whenever it has reason to believe that a violation of the Texas Motor Vehicle Commission Code (the "Code") has occurred, and that the Board may institute proceedings to enforce the Code when it deems such action appropriate. Tex. Rev. Civ. Stat. Ann. art. 4413(36), § 3.05(a) (Vernon 201). You also state that under section 3.01 of the Code, the Board "has authority to enforce and administer Chapter 503 of the Transportation Code, under which the case in question is brought." You indicate that the submitted information relates to the Board's investigation into possible violations of the Code, which were brought to your attention by a complaint filed by the requestor, and that the Board has instituted administrative litigation with respect to the suspected violations. The question is whether this administrative litigation amounts to "litigation" for purposes of section 552.103.

This office has held that "litigation" within section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, are "litigation" for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). This office has focused on the following factors in determining whether an administrative proceeding is conducted in a quasi-judicial forum: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, and d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

You have not provided this office with the Board's rules regarding its enforcement actions, nor have you explained how such actions amount to "litigation" for purposes of section 552.103. Therefore, we cannot determine whether such a proceeding is conducted in a quasi-judicial forum. Consequently, we have no basis on which to determine whether litigation was anticipated or pending at the time of the request. Therefore, you may not withhold the requested information under section 552.103 of the Government Code.

To summarize, we conclude that (1) the department may withhold certain information, which we have marked, under section 552.111; (2) the department may withhold certain

information, which we have marked, under section 552.107; and (3) the department may not withhold the requested information under section 552.103. The unmarked information must be released to the requestor.

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).

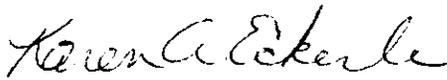
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/rr

Ref: ID#146664

Encl: Submitted documents

cc: Sam and Connie Range  
P.O. Box 345  
Williamsport, TN 38487  
(w/o enclosures)