



July 25, 2001

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2001-3229

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149841.

The Texas Department of Transportation (the "department") received a written request for the following information:

the overlay and full depth pavement repair project documents for the Loop 12 road work between the Toll Road and Boedecker in Dallas, Texas. Specifically, I seek to review the barricade reports, records and plans as well as the as built plans for that particular project.

You contend that the requested information is excepted from disclosure under section 552.103 of the Government Code.

We note at the outset that some of the information at issue is subject to section 552.022(a) of the Government Code, which provides in pertinent part:

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:

....

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.

Among the documents you submitted for our review are "Traffic Control Device Inspection Reports" that are subject to required disclosure under section 552.022(a)(1) unless the information is expressly confidential under other law or excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). Section 552.103 is an exception under the Public Information Act and is not other law that makes the requested information confidential. Furthermore, you have not argued that section 552.108 applies to the inspection reports. Additionally, although you suggest that these inspection reports may be confidential under "other law," you have not directed this office to any such law, nor is this office aware of any such law. Accordingly, the inspection reports may not be withheld from disclosure pursuant to section 552.103 of the Government Code and therefore must be released to the requestor in their entirety.

We now address the applicability of section 552.103 of the Government Code to the remaining requested documents. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

In Open Records Decision No. 638 (1996), this office determined how a governmental body must establish reasonably anticipated litigation when relying solely on a claim letter. We stated that the governmental body must 1) show that it has received a claim letter from an allegedly injured party or his attorney and 2) state that the letter complies with the notice of claim provisions of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, or applicable municipal statute or ordinance.

You have submitted to this office for our review correspondence that you characterize as a notice of claim letter addressed to the department regarding a motorcycle accident that occurred at the road project that is the subject of the current records request. Furthermore, you have represented to this office that the notice of claim satisfies the notice provisions provided in the Texas Tort Claims Act. Because the department received the notice of claim prior to receiving the current records request, we conclude that you have demonstrated that the department reasonably anticipated litigation regarding this matter on the day it received

the records request. We further conclude that the records at issue "relate" to that litigation for purposes of section 552.103 of the Government Code. We therefore conclude that the department may withhold the submitted information at this time pursuant to section 552.103, except as discussed above.

In reaching this conclusion, however, we assume that the opposing parties to the anticipated litigation have not previously had access to the information at issue; absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation or likelihood thereof has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/RWP/seg

Ref: ID# 149841

Enc. Submitted documents

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(w/o enclosures)