



September 6, 2001

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

OR2001-3971

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# 151594.

The Texas Department of Transportation (the "department") received a request for various documents pertaining to a specified construction project. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

Initially, we note that the submitted information includes documents pertaining to a warranty deed that appear to have been filed with the Galveston County Clerk. These documents, which we have marked, must be released to the requestor since they already exist in the public domain by virtue of their being filed with the county clerk.

Next, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate. *See* Gov't Code § 552.022(a)(5). Several of the submitted documents in Exhibit B, which we have marked, appear to be working papers used to

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

estimate the expenditure of public funds by a governmental body. If the estimate associated with these documents has been completed, the documents are public under section 552.022(a)(5). You claim that the submitted information in Exhibit B is excepted from disclosure pursuant to section 552.103 of the Government Code. However, we have previously concluded that section 552.103 is a discretionary exception that does not make information confidential.² See Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential). Accordingly, you may not withhold the marked documents in Exhibit B pursuant to section 552.022(a)(5) of the Government Code, if the estimates associated with these documents have been completed.

You claim that the remaining submitted information in Exhibit B is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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.

....

(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 department maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); see also *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

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See* Gov't Code § 552.103(c).

A governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). You state that a letter sent by an attorney who represents TE Products Pipeline Company, Limited Partnership ("TEPPCO") to the Transportation Division of the Office of the Attorney General threatens litigation against the department if the department does not take steps to complete work to repair TEPPCO's damaged pipeline. Based on our review of your arguments and the remaining submitted information in Exhibit B, we conclude that litigation is reasonably anticipated in this matter and that the remaining information in Exhibit B is related to the reasonably anticipated litigation for the purposes of section 552.103. Therefore, we conclude that you may withhold the remaining submitted information in Exhibit B from disclosure pursuant to section 552.103 of the Government Code. Furthermore, if the estimates associated with the marked documents in Exhibit B have not yet been completed, you may also withhold those documents from disclosure pursuant to section 552.103.

We note, however, that 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You claim that the submitted information in Exhibit C is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) excepts information from

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

disclosure that is encompassed by the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. *See* Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure, including factual recountings of events, documentation of calls made, meetings attended, or memos sent. *See id.* After careful review of the submitted information in Exhibit C, we agree that it constitutes either a client confidence or an attorney's legal advice or opinion. Therefore, we conclude that the department may withhold the submitted information in Exhibit C from disclosure pursuant to section 552.107(1) of the Government Code.

In summary, you must release the marked documents pertaining to the warranty deed, since they are already in the public domain by virtue of their having been filed with the Galveston County Clerk. You must release the marked documents in Exhibit B pursuant to section 552.022(a)(5), if the estimates associated with those documents have been completed. You may withhold the remaining information in Exhibit B pursuant to section 552.103 of the Government Code. You may also withhold that marked documents in Exhibit B from disclosure pursuant to section 552.103, if the estimates associated with those documents have not been completed. You may withhold from disclosure all of the submitted information in Exhibit C pursuant to section 552.107 of the Government Code.

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

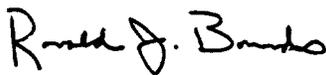
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 151594

Enc. Marked documents

cc: Mr. Ryan Lee Dennard
Locke, Liddell & Sapp
3400 Chase Tower
600 Travis Street
Houston, Texas 77002-3095
(w/o enclosures)