



July 1, 2002

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

OR2002-3555

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# 165185.

The Texas Department of Transportation (the “department”) received a written request for a variety of documents concerning an automobile accident that occurred at the 5100 block of Westbound IH 10 and the road construction that occurred in that vicinity. You state that some responsive information has been released to the requestor. You contend, however, that the remaining information coming within the scope of the request, a representative sample of which you submitted to this office, is excepted from required public disclosure pursuant to section 552.103 of the Government Code.¹

Before we address the applicability of section 552.103, we must address a procedural matter. Section 552.301(a) of the Government Code requires a governmental body to request a decision from the attorney general within ten business days after receiving a request for information that the governmental body wishes to withhold, unless there has been a previous determination that the requested information is excepted from required public disclosure. You state that the department first received the records request on April 12, 2002, the date of that correspondence. You did not request a decision from this office until April 30, 2002, more than ten business days following the department’s receipt of the request.

¹In reaching our conclusion here, 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 No. 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.

However, you note that this request was submitted to the department via facsimile transmission. Section 552.301(c) of the Government Code provides that written requests submitted via facsimile transmission must be addressed to "the officer for public information, or the person designated by that officer." *See also* Gov't Code § 552.202 ("department head" agent of officer for public information for purposes of chapter 552). You state that the person to whom the request was addressed is neither the department's officer for public information nor a department head. We therefore conclude that the initial faxed request received by the department was not valid for purposes of section 552.301(c). On the other hand, because you state that the department received a second copy of the request by mail on April 17, 2002, we conclude that you timely sought a decision from this office. Accordingly, we will consider your arguments for withholding the requested information.

To secure the protection of section 552.103 of the Government Code, 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 the automobile accident 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 and that the department received the notice of claim prior to the current records request. We therefore conclude that you have demonstrated that the department reasonably anticipated litigation regarding the accident on the day it received the mailed records request. We further conclude that the records at issue "relate" to that litigation for purposes of section 552.103. We therefore conclude that the department may withhold the requested information at this time pursuant to section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing parties to the 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "Dr. R. Saldivar", with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/sdk

Ref: ID# 165185

Enc: Submitted documents

c: Mr. Michael C. Howard
402 East 11th Street
Houston, Texas 77008
(w/o enclosures)