



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2004

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

OR2004-9626

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 212670.

The Texas Department of Transportation (the "department") received several requests from the same requestor for records pertaining to a specified accident. The department also received an additional request for information pertaining to a specified project related to that accident. You claim that the information at issue is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

We begin by noting that the information submitted as Exhibit B is made expressly public under section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." This section 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:

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 ruling 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.

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

Gov't Code § 552.022(a)(1). Exhibit B consists of completed reports, which are made public pursuant to section 552.022(a)(1). Therefore, the department may only withhold this information if it is confidential under other law. Although you argue that the submitted information is excepted under sections 552.103 and 552.111 of the Government Code, these are discretionary exceptions and therefore not "other law" for purposes of section 552.022.²

You also contend, however, that Exhibit B is excepted from disclosure under section 409 of title 23 of the United States Code. Section 409 provides as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [sic] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. Federal courts have determined that section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally-required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992). We agree that section 409 of title 23 of the United States Code is other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also Pierce County v. Guillen*,

²Discretionary 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 Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

123 S.Ct. 720 (2003) (upholding constitutionality of section 409, relied upon by county in denying request under state's Public Disclosure Act).

You state that Exhibit B relates to a project involving Interstate 37, which is a part of the National Highway System under section 130 of title 23 of the United States Code and therefore a federal-aid highway within the meaning of section 409 of title 23 of the United States Code. You assert that section 409 of title 23 would protect Exhibit B from discovery in civil litigation. Upon review, we determine that the department may withhold Exhibit B under section 409 of title 23 of the United States Code.

You assert that the information submitted as Exhibit C is excepted from disclosure under section 552.103 of the Government Code, which provides as follows:

(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). A governmental body has 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 was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter

is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance.

You state that the department reasonably anticipates litigation concerning the incident at issue in the first request. In support of this contention, you indicate that the first requestor submitted notice with the department in compliance with the TTCA prior to the date the department received the requests at issue. Based on your arguments and our review of the submitted information, we agree that the department reasonably anticipated litigation on the date the department received the present requests, and we find that the information at issue relates to the anticipated litigation. Thus, the department may withhold Exhibit C pursuant to section 552.103 of the Government Code.

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. 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 lawsuit is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must withhold Exhibit B under section 409 of title 23 of the United States Code. The department may withhold Exhibit C pursuant to section 552.103 of the Government Code. Based on this finding, we do not reach your remaining claimed exception to disclosure for this information.

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 Dep't of Pub. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/ADP/seg

Ref: ID# 212670

Enc. Submitted documents

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