



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2007

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

OR2007-05052

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 277209.

The Texas Department of Transportation (the "department") received a request for any and all roadway or construction contractors involved in the "repaving" project of FM 1387 in Midlothian, Ellis County, Texas, between July 25, 2006 and July 29, 2006, documents and tangible things that identify general and/or subcontractors working on the project, the work performed on the project, the contractors' insurance policies and/or bond information, the contractors' registered agent for service of process, all documents submitted by or sent to the contractors relating to accidents or events occurring on the construction site between July 25 and July 29, 2006, and any documents and tangible things which relate to the requestor's client. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.¹

¹We 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.

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides that:

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.

Gov't Code § 552.022(a)(1). In this instance, Exhibit B constitutes completed daily activity reports made for or by the department. The department must release the completed reports under section 552.022(a)(1) of the Government Code unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly confidential under other law. You claim that Exhibit B is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. 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 of the Government Code); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 of the Government Code is not other law that makes information confidential for the purposes of section 552.022 of the Government Code. Therefore, the department may not withhold Exhibit B under section 552.103 of the Government Code. As you raise no further exceptions against the disclosure of Exhibit B, this information must be released.

We next address your claim under section 552.103 of the Government Code for the remaining information that is not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides in relevant part 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). The department 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 is pending or reasonably anticipated, 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). The department 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”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state that the department received a Notice of Claim in compliance with the TTCA, which alleges that the negligence of the department caused the accident at issue. You inform us, and provide documentation showing, that the department received the Notice of Claim before it received the present request for information. Therefore, we conclude that the department reasonably anticipated litigation on the date it received the present request for information. We further find that the information in Exhibit C relates to the anticipated litigation. Accordingly, the department may withhold Exhibit C pursuant to section 552.103 of the Government Code.²

The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had access to the information at issue, such information is not excepted from disclosure under section 552.103

²As our ruling is dispositive, we need not address your remaining arguments against disclosure.

and must be released. We note that the applicability of section 552.103 ends once the related litigation has been concluded. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department may withhold Exhibit C pursuant to section 552.103 of the Government Code. The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

A handwritten signature in black ink that reads "Jordan Johnson". The signature is written in a cursive, flowing style.

Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/eb

Ref: ID# 277209

Enc. Submitted documents

c: Mr. Charles D. Shackelford
329 West Centre Street
Dallas, Texas 75208
(w/o enclosures)