



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2008

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

OR2008-04029

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# 305727.

The Texas Department of Transportation (the "department") received two requests from different requestors for information pertaining to the repair or construction of a specified section of SH 71 over two specified periods of time. 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.¹ You also assert that a portion of the requested records, Exhibit E, may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you notified PavTex Engineering and Testing, Inc. ("PavTex") of the department's receipt of the request for information and of its right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of

¹Although you also argue the attorney-client privilege under sections 552.101 and 552.111 of the Government Code, this office has concluded that section 552.107 is the appropriate exception. *See* Open Records Decision No. 676 (2002). Thus, we consider your attorney-client privilege arguments under this exception.

exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that a portion of the submitted information is not responsive to the instant requests for information. The requestors ask for any and all information for two particular time periods. Thus, any information created outside of these particular time periods is not responsive. We have marked the non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.

Next, you inform us that a portion of the requested information is subject to two previous rulings issued by this office. On July 26, 2007, this office issued Open Records Letter No. 2007-09494 (2007), which involved a request for information pertaining to a specified incident. We concluded in that instance that the department may withhold a portion of the submitted information under section 409 of title 23 of the United States Code and the remaining submitted information under section 552.103 of the Government Code. On January 2, 2008, this office issued Open Records Letter No. 2008-00026 (2008), which regarded a request for information pertaining to SH 71 near Bee Creek Road and Bee Caves, Texas. There, we held that the department may withhold a portion of the information at issue under section 409 of title 23 of the United States Code and the remaining submitted information under section 552.103 of the Government Code. We presume that the pertinent facts and circumstances have not changed since the issuance of these two prior rulings. Thus, we determine that the department may continue to rely on our rulings in Open Records Letter Nos. 2007-09494 and 2008-00026 with respect to any information requested in those cases that is also at issue here. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the requested information was not addressed in Open Records Letter Nos. 2007-09494 and 2008-00026, we will address your claims for exception from disclosure.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't

²We 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.

Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from PavTex. Thus, there has been no demonstration that any of the information contained in Exhibit E is proprietary for the purposes of the Act. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990). Accordingly, Exhibit E may not be withheld based on the proprietary interests of PavTex.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. The submitted information includes CRB-3 accident report forms completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the governmental entity with two or more pieces of information specified by the statute. *Id.* In this instance, as you note, the requestors have not provided the department with two of the three requisite pieces of information. Therefore, the submitted CRB-3 reports you have marked in the submitted information must be withheld under section 550.065 of the Transportation Code in conjunction with section 552.101 of the Government Code.

We also note that some of the submitted information is subject to section 552.022 of the Government Code, which enumerates 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) 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, Exhibits B-2, D, and D-2 contain completed reports made for or by the department. Therefore, the department may only withhold this information, which we have marked, if it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you argue that this information is excepted under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions and, as such, are not other law for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions

generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived).

However, the department also contends that the information contained in Exhibits D and D-2 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, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 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.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 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*, 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 State Highway 71 is part of the National Highway System under section 103 of title 23 of the United States Code and is therefore a federal-aid highway within the meaning of section 409. Furthermore, you state that section 409 would protect the information at issue from discovery in civil litigation. Based on your representations and our review, we conclude that the department must withhold Exhibits D and D-2 pursuant to section 409 of title 23 of the United States Code.

We now address your argument under section 552.103 of the Government Code for the remaining submitted information contained in Exhibits B, B-2, C, and C-2. Section 552.103 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 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 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 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. ORD 452 at 4. 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 three Notices of Claim in compliance with the TTCA, alleging that the department's negligence caused two specified accidents. You inform us, and provide documentation demonstrating, that the department received these Notices of Claim before it received the present requests for information. Therefore, we conclude that the department reasonably anticipated litigation on the date it received the present requests for information. We further find that the information at issue relates to the anticipated litigation. Accordingly, the department generally may withhold the remaining submitted information contained in Exhibits B, B-2, C, and C-2 pursuant to section 552.103 of the Government Code.

We note, however, that the department seeks to withhold, in part, information that the opposing parties to the anticipated litigation provided to the department. 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 relates to the litigation through discovery

procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to anticipated litigation has already seen information that relates to the litigation, through discovery or otherwise, there is no interest in withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information we have marked in Exhibit B, which the opposing parties provided, is not excepted from disclosure under section 552.103, and the department may not withhold this information on that basis. The remaining submitted information contained in Exhibits B, B-2, C, and C-2 may be withheld under section 552.103.

In summary, the department may continue to rely on our rulings in Open Records Letter Nos. 2007-09494 and 2008-00026 with respect to any information requested in those cases that is also at issue here. The submitted CRB-3 reports you have marked in the submitted information must be withheld under section 550.065 of the Transportation Code in conjunction with section 552.101 of the Government Code. The department must release the information we have marked in Exhibit B-2 that is subject to section 552.022(a)(1). The department must withhold Exhibits D and D-2 under section 409 of title 23 of the United States Code. With the exception of information that has either been obtained from or provided to the opposing party, the department may withhold the remaining submitted information contained in Exhibits B, B-2, C, and C-2 under section 552.103 of the Government Code.³ The remaining submitted information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

³As our ruling is dispositive, we do not address your remaining claims.

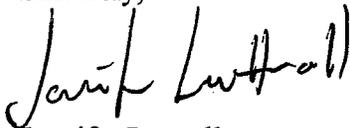
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 305727

Enc. Submitted documents

c: Ms. Shalimar S. Wallis
Watts Law Firm
Bank of America Plaza, Suite 100
300 Convent Street
San Antonio, Texas 78205
(w/o enclosures)