



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2010

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

OR2010-05387

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# 376020.

The Texas Department of Transportation (the "department") received two requests from the same requestor for (1) all complaints made by the public to the department concerning construction project CSJ # 0050-02-055 and prime contract 12053001, (2) all records maintained by the department pertaining to any accidents that occurred on the portion of State Highway 6 subject to the aforementioned construction project and prime contract, and (3) all traffic control device inspection checklists performed by and kept by department engineers and inspectors on construction project CSJ # 0050-02-055. You inform us that the department requested clarification of the second category of information. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and section 409 of title 23 of the United States Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

¹ We note that although you raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information.

² 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.

Initially, you inform us that, with regard to item 2 of the first request, the department sought clarification from the requestor concerning responsive accident reports that are maintained in the Crash Records Information System. *See* Transp. Code §§ 550.062 (officer's accident report), 201.806 (providing for the compilation of accident reports by the department); *see also* Gov't Code § 552.222 (b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). 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 the 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, the department or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* We understand that, pursuant to section 550.065(b), upon receipt of two of the three pieces of required information, the department will release to the requestor any accident reports maintained in the Crash Records Information System that are responsive to item 2 of the first request.³ However, you inform us that the requestor has not responded to the department's request for clarification. In this regard, we note that in the requestor's first request, the requestor has already provided at least two of the three required pieces of information relating to the accident involving the family member of the requestor's client. Accordingly, we understand that, if it has not already, the department will release a copy of the accident report contained in the Crash Records Information System pertaining to that specified accident to the requestor. The department has no further obligation under the Act to release accident reports pertaining to any other accidents until the requestor responds to the department's request for clarification.

Next, we note that Exhibit B consists of a completed report, Exhibit C consists of a completed traffic control devices inspection checklist, and Exhibit E contains completed traffic analysis reports and a daily activity report. These completed reports are subject to section 552.022 of the Government Code, which enumerates categories of information that are not excepted from required public disclosure unless they "are expressly confidential under other law." Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under

³We note that in a letter to this office seeking a ruling on an earlier public information request relating to a different accident, which resulted in Open Records Letter No. 2010-04639 (2010), you stated that "under [section 550.065(c)(4)], [the department] is required to release accident information collected under Transportation Code, Section 550.065 to a person who provides the agency with two or more pieces of information specified by the statute. The requestor has provided [the department] with two of the three pieces of information pursuant to § 550.065(c)(4); therefore, under §550.065(b), [the department] must release a copy of the Peace Officer's CR-3 accident report regarding the subject accident from the Crash Records Information System which is maintained by [the department]." *See* letter from Sharon Alexander, Associate General Counsel, Texas Department of Transportation to Amanda Crawford, Chief, Open Records Division, Office of the Attorney General (January 27, 2010) (on file with Open Records Division, Office of the Attorney General).

other law. Thus, the department may only withhold this information if it is confidential under other law or excepted from disclosure under section 552.108. Although you argue that this information is excepted under sections 552.103, 552.107, 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 *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), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 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). Thus, information subject to section 552.022 may not be withheld under any of these exceptions. However, the department contends that Exhibits B and C are excepted from disclosure under section 409 of title 23 of the United State Code. We note that section 409 is “other law” for purposes of section 552.022(a). 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 on by county in denying request under state’s Public Disclosure Act). Further, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022 of the Government Code. See *In re City of Georgetown* at 336. The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence and the attorney work product privilege is also found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your argument under federal law for Exhibits B and C and your assertion of the attorney-client and attorney-work product privileges under rule 503 and rule 192.5 for the information subject to section 552.022.

Section 409 of title 23 of the United States Code 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 determined that section 409 excludes from evidence data compiled for purposes of highway 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).

You inform us that Exhibits B and C were created for the purpose of identifying and evaluating hazards on public roads. You also assert that State Highway 6 is part of the National Highway System under section 409 of title 23 of the United State Code and therefore is a federal-aid highway. Finally, you state that this section would protect Exhibits B and C from discovery in civil litigation. Therefore, we conclude that section 409 of title 23 of the United States Code requires the department to withhold Exhibits B and C.

We next address your arguments under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure for the remaining information that is subject to section 552.022. Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged

and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the information subject to section 552.022 in Exhibit E consists of a communication “prepared for transmission to an attorney for purposes of litigation and has been forwarded to [the department’s] attorney for the purposes of obtaining legal advice.” Based on your representation and our review of the information at issue, we determine that the department may withhold the information we have marked in Exhibit E on the basis of the attorney-client privilege under Texas Rule of Evidence 503.⁴

We next turn to the information in Exhibit E that is not subject to section 552.022. You raise section 552.107 of the Government Code for the remaining information in Exhibit E. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire

⁴As our ruling is dispositive, we need not address your remaining argument for this information.

communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the remaining information in Exhibit E consists of a privileged attorney-client communication made for the purpose of obtaining legal advice. You have identified the parties to the communications. You state the communication was intended to be confidential, and you indicate that the communication has maintained its confidentiality. Based on your representations and our review of the information at issue, we find that the department has established that the remaining information in Ex. E consists of an attorney-client privileged communication. Therefore, we conclude that the department may withhold the remaining information in Exhibit E under section 552.107(1) of the Government Code.⁵

Next, we address your claim under section 552.103 of the Government Code for the remaining information, which consists of Exhibit D. This exception provides in 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 governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

⁵As our ruling for this information is dispositive, we do not address your remaining argument against disclosure.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."⁶ *Id.* This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated.

You inform us, and provide documentation showing, the department received a notice of claim concerning an incident that occurred on the roadway at issue, alleging negligence by the department with regard to highway construction at the accident site. You represent that the notice of claim is in compliance with the notice requirements of the TTCA. Based on your representations and our review of the information at issue, we find that you have demonstrated that the department reasonably anticipated litigation on the date of its receipt of this request for information. Furthermore, we find that the remaining information is related to the anticipated litigation for purposes of section 552.103(a).

We note, however, that the opposing party in the anticipated litigation has seen or had access to the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public discovery under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the anticipated litigation has seen or had access to may not be withheld under section 552.103. Accordingly, as the opposing party has seen the remaining information, the department may not withhold any of the remaining information under section 552.103 of the Government Code.

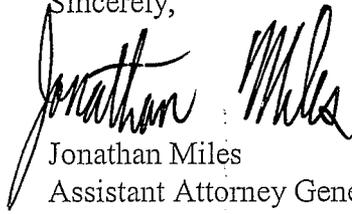
In summary, the department must withhold Exhibits B and C under section 409 of title 23 of the United States Code. The department may withhold the information we have marked in Exhibit E under Texas Rule of Evidence 503. The department may withhold the remaining information in Exhibit E under section 552.107 of the Government Code. The remaining information must be released.

⁶Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Miles". The signature is written in a cursive style with a large initial "J" and "M".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 376020

Enc. Submitted documents

c: Requestor
(w/o enclosures)