



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2010

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

OR2010-05807

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# 377835.

The Texas Department of Transportation (the "department") received a request for a certified copy of the highway plan profile for Ray Yards Bridge on U.S. Highway 75, as the highway existed before January 25, 2008; records related to opening of the "Watch for Ice" sign and application of deicer or sand on the named bridge during a specified time; and records related to the response and investigation of a multiple vehicle accident that occurred on January 25, 2008. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also argue the attorney-client privilege under section 552.101 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 arguments only under section 552.107.

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.

Initially, we note Exhibit C contains daily activity reports subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) 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). A completed report must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim that the daily activity reports in Exhibit C are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. *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). 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. As the department raises no other exceptions for the daily activity reports in Exhibit C, they must be released to the requestor.

You assert the remaining information is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant 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). 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 is

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). The department must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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 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 stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the “TTCA”), Civil Practice & Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You assert the department reasonably anticipated litigation pertaining to the requested information because the department received a notice of claim letter prior to receiving the request for information. You further assert the claim letter meets the requirements of the TTCA and alleges negligence on the part of the department. Based on your representations and our review, we conclude the department reasonably anticipated litigation when it received the request for information. You assert the documents at issue relate to the litigation because they pertain to the same incident that is the basis of the anticipated litigation against the department. Thus, we agree the information at issue relates to the anticipated litigation. Accordingly, the department may withhold the remaining information under section 552.103 of the Government Code.³

We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 377835

Enc. Submitted documents

c: Requestor
(w/o enclosures)