



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2010

Mr. John B. Dahill
General Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2010-17567

Dear Mr. Dahill:

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# 400486.

The North Texas Tollway Authority (the "authority") received a request for information relating to a specified construction project. You state some of the requested information is the subject of pending litigation. You claim the rest of the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered your arguments and reviewed the information you submitted.

You inform us that some of the requested information is the subject of pending litigation styled *North Texas Tollway Authority v. The Honorable Greg Abbott*, Cause No. D-1-GN-10-002245, 353rd District Court, Travis County, Texas. You state that the authority will abide by the court's decision with respect to the information at issue in the litigation. Accordingly, we will allow the trial court to determine whether the information at issue in the litigation must be released to the public. We will consider your claims for the submitted information.

We note that the authority did not comply with section 552.301 of the Government Code in claiming the attorney work product privilege under section 552.111 of the Government Code. *See* Gov't Code § 552.301(a), (e). Although the authority generally contends that some of the requested information is protected by the work product privilege, the authority has provided no arguments explaining how or why any of the submitted information constitutes attorney work product. *See id.* § 552.301(e)(1)(A) (governmental body must submit written

comments stating why claimed exceptions apply to information at issue). The authority's assertion of the attorney work product privilege is not a compelling reason for non-disclosure under section 552.302 of the Government Code. *See id.* § 552.007; Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 and TEX. R. CIV. P. 192.5 may be waived); *see also* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). In failing to comply with section 552.301(e), the authority has waived the attorney work product privilege and may not withhold any of the submitted information on that basis. *See* Open Records Decision No. 663 at 5 (1999) (waiver of discretionary exceptions).

We also note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports made of, for, or by the authority, namely, the "Geotechnical Engineering Report" dated July 30, 2010, the "Tieback Test Programs" report dated July 8, 1999, and Volumes I, II, and III of the "Geotechnical Services" report dated October 15, 1997 (collectively "the completed reports"). Thus, the completed reports are subject to section 552.022(a)(1) and must be released unless they are expressly confidential under other law or excepted from disclosure under section 552.108. Although the authority seeks to withhold the completed reports under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a 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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the authority may not withhold the completed reports under section 552.103. As the authority claims no other exception to the disclosure of the completed reports, they must be released in their entirety pursuant to section 552.022(a)(1) of the Government Code.

Next, we address your claim for the remaining information at issue under section 552.103 of the Government Code. 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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.*

You explain that the authority entered into a contract involving, among other things, the construction of a retaining wall on the President George Bush Turnpike in Carrollton. You state that a portion of the retaining wall failed and that the authority believes the contractor was negligent in constructing the retaining wall. You inform us that prior to its receipt of the instant request for information, the authority issued a notice of claim to the contractor and others, notifying them of the retaining wall failure and requesting that the contractor put its insurance carrier on notice of the contractor's potential liability. You have provided a copy of the notice of claim. You state that the authority intends to pursue its claim against the contractor “by all means necessary, including litigation.” You also state that the remaining information at issue is related to the anticipated litigation. Based on your representations, the notice of claim, and our review of the information in question, we find that the information is related to litigation that the authority reasonably anticipated when it received the instant request for information. We therefore conclude that the authority may withhold the remaining information under section 552.103.

In reaching this conclusion, we assume the opposing party in the anticipated litigation has not seen or had access to any of the remaining information. The purpose of section 552.103

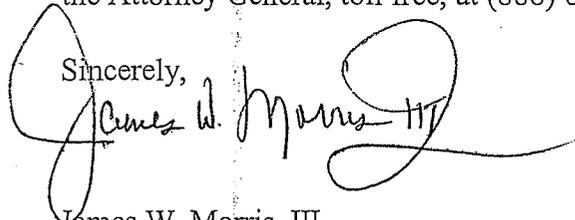
is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) we will allow the trial court to determine whether the information at issue in the pending litigation must be released to the public; (2) the authority must release the completed reports pursuant to section 552.022(a)(1) of the Government Code; and (3) the authority may withhold the rest of the submitted information under section 552.103 of the Government Code.

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_or1.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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 400486

Enc: Submitted documents

c: Requestor
(w/o enclosures)