



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2011

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

OR2011-02923

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# 410407.

The Texas Department of Transportation (the "department") received a request for eighteen categories of information related to a specified accident. You state that some of the information has been provided to the requestor. You claim the remaining 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

Section 552.103 of the Government Code provides as follows:

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney client privilege under rule 503 of the Texas Rules of Evidence and the attorney work-product privilege under rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002). We note that, in this instance, the proper exceptions to raise when asserting the attorney-client privilege or work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See id.*, Open Records Decision No. 677 (2002).

²We assume 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 those records contain substantially different types of information than those submitted to this office.

(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 section 552.103(a) 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). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the "APA"), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

You state the requested information pertains to a worker's compensation claim pending before the Texas Department of Insurance Division of Workers' Compensation (the "TDIDWC") alleging work-related injuries sustained in the course and scope of employment with the department. You also state the information at issue relates to the worker's compensation claim and that contested cases before the TDIDWC are generally governed by the APA. Labor Code § 410.153. Based upon these representations and our review, we find the department has established that litigation was pending on the date that it received the request for information. We further find the requested information relates to the pending litigation. Accordingly, we conclude the department may withhold the requested information under section 552.103(a) of the Government Code.³

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information

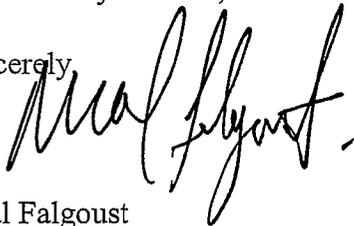
³As our ruling is dispositive, we do not address your remaining arguments against disclosure.

that has either been obtained from or provided to the opposing parties in the litigation is not excepted from disclosure under section 552.103(a) and must be released. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 410407

Enc. Submitted documents

c: Requestor
(w/o enclosures)