



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 1, 2011

Mr. John B. Dahill  
General Counsel  
Mr. Robert Schell  
Assistant Director of General Counsel  
North Texas Tollway Authority  
5900 West Plano Parkway, Suite 100  
Plano, Texas 75093

OR2011-04517

Dear Mr. Dahill and Mr. Schell:

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# 413281.

The North Texas Tollway Authority (the "authority") received requests from two requestors for information relating to a specified construction project. You claim the requested information is exempted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.<sup>1</sup>

We first note the submitted information includes resolutions adopted by the authority. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolutions are analogous to an ordinance. Moreover, the resolutions appear to have been adopted at public meetings of the authority and thus are official records of a governmental

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<sup>1</sup>This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the authority to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

body's public proceedings. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"). Therefore, the authority must release the submitted resolutions, which we have marked.

We also note 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 excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). We have marked completed reports and contracts relating to the expenditure of public funds that are subject to section 552.022(a)(1) and (3). You seek to withhold the marked reports and contracts under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d at 475-76; 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 purposes of section 552.022(a)(1) or (3). Therefore, the authority may not withhold the marked reports and contracts under section 552.103 of the Government Code and must release those documents pursuant to section 552.022(a)(1) and (3) 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 [1<sup>st</sup> 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 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 it should be withheld pursuant to Gov't Code § 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 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 inform us a portion of the retaining wall failed, and the authority made a demand on several parties, including two entities that provided engineering services for the wall that failed. You state the authority subsequently made demands on the two entities that provided engineering services and other parties for deficiencies in other walls in the vicinity of the wall that failed. You also state the authority issued notices of claim to the two entities that provided engineering services. You inform us the authority intends to pursue its claims against those two entities and other parties “by all means necessary, including litigation.” You also inform us that you believe these matters will not be resolved without litigation. You state the remaining information at issue is related to the anticipated litigation. Based on your representations and our review of the information at issue, we find the remaining information is related to litigation the authority reasonably anticipated when it received these requests for information. We therefore conclude the authority may withhold the remaining information under 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing parties in the anticipated litigation have 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 parties have seen or had access to

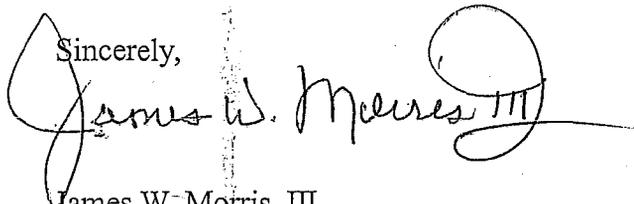
information relating to anticipated litigation, through discovery or otherwise, there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the authority (1) must release the marked resolutions; (2) must release the marked reports and contracts pursuant to section 552.022(a)(1) and (3) of the Government Code; and (3) 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\\_orl.php](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,



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

JWM/em

Ref: ID# 413281

Enc: Submitted documents

c: Requestors  
(w/o enclosures)