



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2011

Mr. Robert Schnell
Assistant Director General Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2011-06246

Dear Mr. Schnell:

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# 416777.

The North Texas Tollway Authority (the "authority") received a request for six categories of information pertaining to specified retaining walls in Carrollton, Texas. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, 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:

¹We 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 that submitted to this office.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted information contains a letter with enclosures that is a completed investigation subject to section 552.022(a)(1). The submitted information also includes a "supplemental agreement for extra work" that is a contract relating to the expenditure of funds by the authority, and is therefore subject to section 552.022(a)(3). The authority may only withhold these documents if they are made confidential under "other law." Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest 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 section 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. Consequently, the letter, its enclosures, and the supplemental agreement for extra work may not be withheld under section 552.103 of the Government Code and we have marked them for release. However, we will address the applicability of section 552.103 to the remaining information.

Section 552.103 of the Government Code 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 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 of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 governmental body must meet both prongs of this test for information to be excepted 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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that "litigation involving a specific matter is realistically contemplated." Open Records Decision No. 518 at 5 (1989).

You explain the authority entered into contracts involving, among other things, the construction of a retaining wall on the President George Bush Turnpike. You state a portion of the retaining wall failed and the authority undertook emergency measures to stabilize and secure the retaining wall and surrounding areas. You inform us that, prior to its receipt of the instant request for information, the authority issued three demand letters to the requestor's client, which provided general engineering consulting services for the construction of the failed retaining wall. You explain these letters either sought to recover costs incurred because of the failed wall and the resulting investigation and remediation measures undertaken by the authority, or the authority's anticipated repair costs associated with other walls. You state the authority intends to pursue its claim for the failed wall against the requestor's client "by all means necessary, including litigation." You also state that, at the time the second and third demand letters were sent, there had been no movement by the parties toward resolution of the initial claim, and the authority believes that these matters will not be resolved without litigation. Based on your representations and our review, we conclude the authority reasonably anticipated litigation when it received the request for information. You state, and we agree, the remaining information relates to the anticipated litigation regarding the failed wall and other walls. Accordingly, the authority may withhold the remaining information, which we marked, under section 552.103(a) of the Government Code.

However, 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, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. 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).

In summary, the authority may withhold the records marked under section 552.103 of the Government Code. The remaining information must be released.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eeg

Ref: ID# 416777

Enc. Submitted documents

c: Requestor
(w/o enclosures)