



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2012

Mr. Carlyle H. Chapman, Jr.
For North Texas Tollway Authority
Locke Lord, L.L.P.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

OR2012-02295

Dear Mr. Chapman:

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# 445466.

The North Texas Tollway Authority (the “authority”) received a request for twenty-six categories of information relating to the failure of a retaining wall in connection with a specified construction project. You state you have no information responsive to some of the requested categories of information.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We assume the “representative sample” of information 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.

Initially, we note the submitted information contains a completed report that is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is made confidential under the Act or “other law” or is excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you assert this information is excepted from disclosure under section 552.103, this section is discretionary and does not make information confidential under the Act. *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the authority may not withhold the information subject to section 552.022, which we have marked, under section 552.103. However, we will consider your arguments under sections 552.103 and 552.107 of the Government Code for the information not subject to section 552.022 of the Government Code.

We next address your claim under section 552.103 of the Government Code. Section 552.103 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 claim the remaining information is excepted under section 552.103 because it relates to reasonably anticipated litigation. 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 also state the authority has begun a forensic investigation of the retaining wall to determine the cause of the failure. You inform us that, prior to its receipt of the instant request for information, the authority issued a notice of claim to the requestor’s client, which provided “quality assurance engineering services” in connection with the failed retaining wall. You explain the notice of claim notified the requestor’s client of the retaining wall failure and sought to recover costs incurred because of the failed wall and the resulting investigation and remediation measures undertaken by the authority. You have provided a copy of the notice of claim. You state the authority intends to pursue its claim against the requestor’s client “by all means necessary and available, including 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 our review confirms, the remaining information is related to the anticipated litigation because it pertains to the cause of the retaining wall’s failure. Accordingly, the authority may withhold the remaining information under section 552.103(a) of the Government Code.³

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

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

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,

A handwritten signature in cursive script that reads "Sean Opperman".

Sean Opperman
Assistant Attorney General
Open Records Division

SO/dls

Ref: ID# 445466

Enc. Submitted documents

c: Requestor
(w/o enclosures)