



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2012

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2012-06003

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# 452252.

The Texas Department of Transportation (the “department”) received a 15-part request for information related to a specified project and a specific incident involving a named individual. You state some of the requested information either has been or will be released. 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 representative sample of information you submitted.¹

We 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 made confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). We have marked a completed report that is subject to disclosure under section 552.022(a)(1). The department does not claim the marked information is excepted under section 552.108. Although you do claim 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 id.* § 552.007; *Dallas Area Rapid Transit v. Dallas*

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department 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).

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 does not make information confidential for purposes of section 552.022(a)(1). Therefore, the completed report we have marked may not be withheld under section 552.103 of the Government Code but instead must be released pursuant to section 552.022(a)(1) of the Government Code.

Next, we address your claim under section 552.103 of the Government Code for the rest of the submitted information. 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 seeks to withhold information under section 552.103 has the burden of providing relevant facts and documents 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).*

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).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.”²

²Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

Id. This office has concluded a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You contend the rest of the submitted information is related to anticipated litigation. You state the department received a notice of claim from the requestor regarding the incident to which the present request for information pertains.³ You inform us the claim meets the requirements of the TTCA and was received prior to the department's receipt of the request. You indicate the remaining information is related to the incident to which the claim pertains. Based on your representations and our review of the information at issue, we find the remaining information is related to litigation the department reasonably anticipated on the date of its receipt of the present request for information. We therefore conclude the department may withhold the remaining information under section 552.103 of the Government Code.

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 that relates to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure 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 department (1) must release the completed report we have marked pursuant to section 552.022(a)(1) of the Government Code and (2) may withhold the rest of the submitted information under section 552.103 of the Government Code.

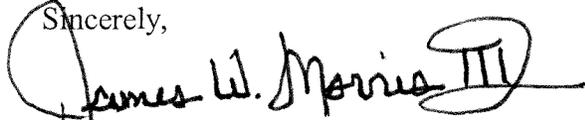
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.

³Although your request for this decision states the department is providing a copy of the claim to this office as Exhibit C, your correspondence does not contain such a document. The information at issue reflects, however, that the department received the claim prior to its receipt of the present request for information.

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 black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looped initial "J" and a distinct "III" at the end.

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

JWM/em

Ref: ID# 452252

Enc: Submitted documents

c: Requestor
(w/o enclosures)