



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2012

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

OR2012-12608

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# 461856.

The Texas Department of Transportation (the "department") received a request for four categories of information related to a specified location and a specified accident. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and section 409 of title 23 of the United States Code. We have considered your submitted arguments and reviewed the submitted representative sample of information.¹

We note Exhibit B consists of Traffic Control Devices Inspection Checklists which fall 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 expressly confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. See Gov't Code § 552.022(a)(1). Although you raise

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

sections 552.103 and 552.111 of the Government Code, do 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 Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, the department may not withhold the information at issue under these sections. However, the department also contends this information is excepted from disclosure under section 409 of title 23 of the United States Code. We note section 409 is “other law” that makes information confidential for purposes of section 552.022(a). See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); see also *Pierce County v. Guillen*, 537 U.S. 129 (2003) (upholding constitutionality of section 409, relied on by county in denying request under state’s Public Disclosure Act). Accordingly, we will consider your argument under section 409 for the information subject to section 552.022, along with your arguments under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022.

You contend the Traffic Control Devices Inspection Checklists are excepted from disclosure under section 409 of title 23 of the United States Code. Section 409 provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. Federal courts have stated section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally required record-keeping from being used for purposes of private litigation. See *Harrison v. Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); see also *Pierce*, 537 U.S. at 129.

Exhibit B pertains to FM 1406. You inform us FM 1406 is part of the National Highway System under section 103 of title 23 of the United States Code and is therefore a federal-aid highway for the purposes of section 409 of title 23. You explain the information at issue was

generated for highway safety purposes. Based upon your representations and our review of the information subject to section 552.022, we conclude the department may withhold Exhibit B pursuant to section 409 of title 23 of the United States Code.

Next, we address your claim under section 552.103 of the Government Code for Exhibit C. 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 *Id.* This office has concluded a governmental body's receipt of a claim letter that it

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)*.

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 state Exhibit C is related to anticipated litigation. You state, and provide documentation confirming, the department received a notice of claim from an attorney regarding the incident to which the present request for information pertains. 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 Exhibit C is related to the incident to which the claim pertains. Based on your representations and our review of the information at issue, we find Exhibit C 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 Exhibit C 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 may withhold Exhibit B pursuant to section 409 of title 23 of the United States Code. The department may withhold Exhibit C under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/akg

Ref: ID# 461856

Enc. Submitted documents

c: Requestor
(w/o enclosures)