



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 30, 1994

Ms. Leala Mann
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

OR94-636

Dear Ms. Mann:

The Texas Department of Transportation (the "department") received a request for records relating to the Richmond Road Project. The department has asked if this information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. That request was assigned ID# 25543.

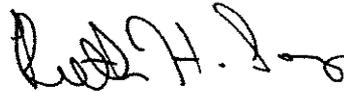
The department contends that the information is excepted from disclosure under section 552.103. To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard 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 (1990) at 4. The department has submitted a letter from J-W Payne Construction Company, Inc. (the "company"), which served as the contractor for the Richmond Road Project, stating that it plans to file a claim against the department. This office also received a letter from an attorney for the company, stating that the company is seeking the records as part of the department's claims process and that this process is designed to avoid litigation.

Under the department's contract claims procedure, a claim for additional compensation arising out of a contract between the department and a contractor may be informally resolved by committee. 43 T.A.C. § 1.68. This committee is to "gather information, study, and meet informally with contractors" to resolve disputes. *Id.* § 1.68(b)(1). These proceedings "*are in nature an attempt to mutually resolve a contract claim without litigation* and are not admissible for any purpose" in an administrative hearing. *Id.* § 1.68(b)(6). (Emphasis added.)

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. Section 552.103(a) requires "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* The letter you submitted indicates that the company intends to utilize the department's informal resolution process. This process is not litigation for the purposes of section 552.103(a). *Compare* Open Records Decision No. 588 (1991) (A contested case in a formal proceeding under the Administrative Procedure Act was determined to be litigation for the purposes of section 552.103). You have presented no evidence showing that this issue will proceed to litigation, nor has litigation been threatened. Therefore, the requested information may not be withheld from disclosure under section 552.103(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

Ref.: ID# 25543

Enclosures: Submitted documents

cc: Mr. David J. Potter
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(w/o enclosures)

Mr. Jeff Payne
J-W Payne Construction Company, Inc.
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New Boston, Texas 75570
(w/o enclosures)