



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 30, 1994

Mr. Richard D. Monroe
Deputy General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

OR94-788

Dear Mr. Monroe:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27119.

The Texas Department of Transportation (the "department") received the following letter:

We would like to request Mr. Bickley [a traffic engineer with the department] to provide a "light sequence scenario" based on the attached light sequence chart (done by Mr. Glen McKey, with the Department of Transportation, dated 7-26-93) and the possibility of someone at Phase #1 with a red light.

You state that the department is "treating" this letter as a request for records made pursuant to chapter 552 of the Government Code.¹ You submitted to this office a report

¹We note that section 552.227 of the Government Code expressly provides that "[a]n officer for public records or the officer's agent is not required to perform general research." See Open Records Decision Nos. 563 (1990) at 8; 379 (1983) at 4.

that you state is “arguably responsive” to the request.² We note that the report does not appear to provide information about a “light sequence scenario.” However, we assume that the submitted report is, as you indicate, responsive to the request.

The department contends that the report is excepted from disclosure under section 552.103(a). To show the applicability of section 552.103(a), 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 provided information showing that an accident resulting in fatalities occurred at a traffic light, and that two lawsuits are pending in Harris County over the accident. According to a petition filed in one of the lawsuits and that was submitted to this office, the plaintiffs allege that the accident was caused by another driver. The department is not named in either suit. However, the attorney representing the defendants contends that the department is responsible for the accident and has notified the department of his clients’ intent to bring the department into the lawsuit. Our review of the report shows that it is related to the subject matter of the litigation.³ Since the department has met its burden of showing the applicability of section 552.103(a), the report may be withheld.

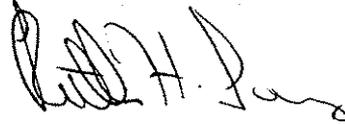
In reaching this conclusion, we assume that the opposing parties to the litigation have not previously had access to the report at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. If the opposing parties in the anticipated litigation have seen or had access to the report, there would be no justification for now withholding it from the requestor pursuant to section 552.103(a). The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. We note that since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the department’s discretion to release the report to the requestor. Gov’t Code § 552.007; Open Records Decision No. 542 (1990) at 4.

²We assume that the accident report and the plaintiffs’ petition were sent to us for informational purposes only.

³Some records that do not appear to be responsive to the request or related to the litigation apparently were inadvertently sent to this office. A previous open records request, the department’s response to that requestor, and documents concerning the previous request were sent to this office. We did not review these documents.

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,

A handwritten signature in black ink, appearing to read "Ruth H. Soucy". The signature is fluid and cursive, with the first name "Ruth" being the most prominent.

Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MRC/rho

Ref.: ID# 27119

Enclosures: Submitted documents

cc: Ms. Lynne E. Mistrot
Legal Assistant
Stern and Gordon
5821 Southwest Freeway, Suite 501
Houston, Texas 77057
(w/o enclosures)