



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1995

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

OR95-1172

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your requests were assigned ID# 30268 and ID# 33195.

The Texas Department of Transportation (the "department") received three related requests for information. The first two requests were combined under ID# 30268. The first of these requests was for "a copy of all sign-in sheets for the Public Hearing" held on October 15, 1994. The second request was for the following:

1. A copy of the transcript of the [public] hearing.
2. A copy of all the sign-in cards.
3. A copy of all (ACT) cards or Petitions that they may have turned in.
4. A copy of any Video that might have been taken.
5. A copy of all ACT members.

The third request, received later by the department and assigned ID# 33195, sought "all publicly available information related to the State's plans for SH 161 through Grand Prairie." You claim that the requested information is excepted from disclosure under section 552.103(a) of the Government Code. You have submitted samples of the information requested.¹

¹In reaching our conclusion here, we 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

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing 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 must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that a lawsuit has been pending between the department and the Association Concerned about Tomorrow for Grand Prairie ("ACT"), of which two of the requestors are members, since 1983. The lawsuit is described as involving the construction of proposed SH 161. You state that, as part of the litigation, the court ordered the department to hold a public hearing on October 15, 1994.² The requested information is connected to that hearing. Therefore, the requested information appears to be related to the litigation. However, when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). From information provided to this office, it appears that the documents submitted in connection with the second request, ID# 33195, were disclosed to the public at the public hearing. Therefore, the department may not withhold these documents. See Gov't Code § 552.007 (prohibiting selective disclosure of public documents). The sign-up sheets requested in the first request, ID# 30268, were submitted to the department either prior to or at the hearing and became part of the official record of that hearing. Thus, they may not be withheld. See generally Open Records Decision Nos. 551 (1990) (city may not withhold ordinances from disclosure under section 552.103(a)), 221 (1979) (school district may not withhold official records of public proceedings). The written comment forms were solicited by the department and were presumably used by the department in connection with this public hearing. You acknowledge in your letter that this information relates to the hearing. Consequently, the department may not now withhold this information. Open Records Decision Nos. 551 (1990), 221 (1979). Similarly, the department may not withhold the videotape of the hearing. See Open Records Decision Nos. 461 (1987) (tape recording of open meeting of governmental body public information), 32 (1974) (same).³

(Footnote continued)

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.

²We note that an attorney for ACT disputes that the hearing was held in connection with the lawsuit. He states that "the hearing occurred pursuant to numerous federal and state highway development regulations that, completely independently of any litigation, require such hearings." As this matter does not affect the conclusion reached in this ruling, we need not discuss it.

³You state that the department does not have a list of the ACT members requested in ID# 30268. The Open Records Act does not require a governmental body to disclose information that did not exist

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 33195 and ID# 30268

Enclosures: Submitted documents

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(Footnote continued)

at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 (1986) at 3. However, the department may not withhold the transcript of the hearing on this basis. The information you submitted to this office indicates that the transcript was being prepared by a court reporter and had not yet been delivered to the department at the time the first requests were received. In similar circumstances, we have concluded that the information is in "active use" and may only be withheld while in use. Gov't Code § 552.221(b); Open Records Decision No. 225 (1979). Based on the reasons set out above, the department may not withhold the transcript under section 552.103(a).

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