



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1997

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR97-1641

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107929.

The Texas Department of Transportation (the "department") received a request for two items of information. You state that the department informed the requestor that the department has no documents responsive to the second requested item. You assert that the first requested item, "[d]ates and numbers of driveway requests from the McLeods," is excepted from required public disclosure based on sections 552.103 and 552.105 of the Government Code. As responsive to this request, you have submitted to this office copies of two permits for the construction of access driveway facilities on a highway right of way, with several accompanying documents.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You inform us that the Office of the Attorney General is representing the Texas Transportation Commission in a pending condemnation case that concerns a parcel of land owned by the McLeods. You submitted to this office a copy of the petition in the case. You state that "[s]ince Ms. Kanmar asks for information concerning the parcel in the pending condemnation, the relation of the information to the litigation is obvious."

In Open Records Decision No. 638 (1996), this office addressed the second prong of the litigation exception:

To meet the second prong of the section 552.103(a) exception, a governmental body must explain how the requested information relates to the subject of the litigation. . . . The submission of the petition in a pending case may assist this office in the assessment of the relatedness of the requested information to the subject of the pending litigation. However, we do not believe that a governmental body has necessarily established that requested information relates to pending litigation by just submitting a petition. A governmental body should in every case explain or describe how the requested information relates to the pending litigation.

Notwithstanding the fact that the requested information concerns the land that is being condemned in the pending litigation, we do not believe you have explained the relatedness of the requested information to the pending condemnation proceeding. Nor do we believe that the relatedness of the information is "obvious." Furthermore, it appears that Mr. McLeod has had access to the requested information. When the opposing party in the litigation has seen or had access to requested information, 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). Consequently, the department may not withhold the requested information from the requestor based on section 552.103.

Section 552.105 of the Government Code exempts from public disclosure:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

We assume you are asserting subsection (2) of section 552.105. This provision applies to information which, if released, would impair a governmental body's negotiating position in a particular land transaction. *See* Open Records Decision No. 357 (1982). You have not explained how the release of the two permits, which are signed by Mr. McLeod, would impair the department's position in the condemnation proceeding. Accordingly, the department may not withhold the requested information from the requestor based on section 552.105 of the Government Code.

We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 107929

Enclosures: Submitted documents

cc: Ms. Birgitta Kanmar
3201 Fishtrap Road
Aubrey, Texas 76227
(w/o enclosures)

