



Office of the Attorney General  
State of Texas

April 14, 1998

DAN MORALES  
ATTORNEY GENERAL

Ms. Jennifer D. Soldano  
Associate General Counsel  
Texas Department of Transportation  
125 E. 11th Street  
Austin, Texas 78701-2483

OR98-0960

Dear Ms. Soldano:

You ask 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# 114409.

The Texas Department of Transportation (the "department") received two open records requests from the same individual. The first request is for certain records pertaining to a named department employee. You explain that the named employee is the construction inspector in the department's office in Stephenville, Texas, where an automobile accident occurred. You contend that the requested employee records are excepted from required public disclosure under section 552.103 of the Government Code because the records "relate" to reasonably anticipated litigation to which the department may become a party.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You have submitted to this office for our review a notice of claim letter that the department received from an attorney in connection with the accident. Under Open Records Decision No. 638 (1996), this office determined how a governmental body must establish reasonably anticipated litigation when relying solely on a claim letter. We stated that the governmental body must 1) show that it has received a claim letter from an allegedly injured

party or his attorney and 2) state that the letter complies with the notice of claim provisions of the Texas Tort Claims Act or applicable municipal statute or ordinance.

In this instance you have made the representation that the notice letter complies with the requirements of the Texas Tort Claims Act. We therefore conclude that you have met your burden of showing that litigation is reasonably anticipated and that the employee records "relate" to the anticipated litigation. The department therefore may withhold this information, to the extent it exists,<sup>1</sup> pursuant to section 552.103(a).<sup>2</sup>

We assume, however, that none of the employee records at issue has previously been made available to the opposing party in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The same requestor has sought in his second request nine categories of information pertaining to "Project CPM 80-8-22 ETC." You contend that these requested documents also come within the protection of section 552.103 for the same reasons discussed above. You did not, however, submit copies of these documents to this office for review as required by section 552.301(b)(3) of the Government Code.<sup>3</sup>

Pursuant to section 552.303(c) of the Government Code, our office notified you by letter sent via facsimile on February 17, 1998, that you had failed to submit information required by section 552.301(b)(3). We requested that you provide this information to our office within seven days from the date of receiving the notice. The notice further stated that under section 552.303(e), failure to comply would result in the legal presumption that the requested information is public information.

---

<sup>1</sup>You explain that the department does not possess records responsive to items 4 and 5 in the request.

<sup>2</sup>In reaching our conclusion here, we assume that the "representative sample" of the employee records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 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.

<sup>3</sup>Although you submitted to this office a "representative sample" of the employee records requested in the first open records request, those records cannot be properly characterized as representative of the records sought in the second request.

You did not provide our office with the information that was requested in our February 17, 1998 notice to you. Therefore, as provided by section 552.303(e), the information requested in the open records request dated February 9, 1998, is presumed to be public absent a demonstration that a compelling interest exists for withholding the information. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Government Code section 552.302); Open Records Decision No. 319 (1982).

Because you have not presented this office with compelling reasons for withholding the requested information pursuant to section 552.103, we deem this exception to disclosure as being waived with regard to the second open records request.<sup>4</sup> Consequently, the records requested in the February 9, 1998 request must be released in their entirety.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

  
Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/RWP/ch

Ref.: ID# 114409

Enclosures: Submitted documents

cc: Mr. Harold L. Clemmons  
P.O. Box 1559  
Glen Rose, Texas 76043  
(w/o enclosures)

---

<sup>4</sup>Generally, section 552.103 does not provide a compelling reason to overcome the presumption of openness. *See Hancock, supra*.