



November 15, 1999

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR99-3235

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act (the "PIA"), chapter 552 of the Government Code. Your request was assigned ID# 129375.

The Department of Transportation (the "department") received a request for various information about a construction projection on FM 1387 in Midlothain during the month of February, 1999. You assert that the requested information is excepted from required public disclosure based on section 552.103 of the Government Code.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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 at 4 (1990).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental

body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). The fact that a governmental body has received a claim letter that it represents to this office to be in compliance with notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practices & Remedies Code, or applicable municipal ordinance shows that litigation is reasonably anticipated. *See* Open Records Decision No. 638 (1996).

You claim that the department reasonably anticipates litigation because the department has received a notice of claim filed against the city that meets the requirement of the Texas Tort Claims Act. We therefore conclude that you have established that litigation is reasonably anticipated. In addition, you have shown that the requested information relates to the anticipated litigation. Thus, the department may withhold the information from required public disclosure based on section 552.103, with certain exceptions explained below.

Section 552.103 does not apply to the highway improvement contract or to the specifications, provisions and plans referenced in that contract. *See* Gov't Code 552.022(a)(3). This is so, because of a recent change to the PIA that generally makes discretionary exceptions to disclosure, such as section 552.103, inapplicable to certain information, including information in a contract relating to the expenditure of public funds. The 76th Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to non-mandatory exceptions to disclosure. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 5, 1999 Tex. Sess. Law. Serv. 4500 (Vernon)(to be codified as an amendment to Gov't Code § 552.022). Section 552.022 now states in relevant part:

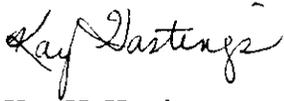
Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law .

We have marked the information made public by section 552.022. In addition, if the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Finally, we 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).

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.

Sincerely,

A handwritten signature in cursive script that reads "Kay Hastings".

Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/ch

Ref.: ID# 129375

encl. Submitted documents

cc: Mr. Jack Wilburn
Forensic Investigations, Inc.
3232 McKinney Avenue, Suite 1160
Dallas, Texas 752004-2407
(w/o enclosures)