



April 5, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-1692

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160802.

The Department of Transportation ("TxDOT") received a request for information relating to a specific automobile accident that occurred on December 12, 1999, including all documentation relating to certain construction on I.H. 35. You inform us that you will release some responsive information to the requestor. However, you advise us that release of the information submitted as Exhibit C may raise the proprietary interests of three third parties, Javelina Construction South, Inc.; Laredo Paving, Inc.; and Redland Stone Products Company (collectively, "third parties"). You inform us, and the submitted documents reflect, that you have notified the third parties of the request for information so they could respond directly to this office with their arguments regarding the confidentiality of the requested information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You also claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.136 of the Government Code. We have considered the exceptions claimed and reviewed the information submitted.

We first note that portions of the submitted information in Exhibit F and all of the information in Exhibit E are subject to section 552.022 of the Government Code. Section 552.022 of the Government Code makes certain information expressly public. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by

[s]ection 552.108[.]” Gov’t Code § 552.022(a)(1). Thus, a governmental body must release a completed investigation unless the information is excepted under section 552.108 or is confidential by law. You claim that the information in Exhibit F is excepted from public disclosure under section 552.103. Our office has previously concluded that section 552.103 is a discretionary exception. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body’s position in litigation, and does not itself make information confidential). This exception does not “expressly [make] information confidential under other law.” Gov’t Code § 552.022. Therefore, you may not withhold the section 552.022(a)(1) information we have marked under section 552.103. Because you do not raise another exception to public disclosure of this information, you must release the information in Exhibit F that we have marked under section 552.022(a)(1).

With respect to Exhibit E, you first claim that the information it contains is excepted from public disclosure under section 552.111. That provision, however, is also a discretionary exception and does not serve as other law for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). You also contend, however, that Exhibit E is confidential under section 409 of title 23 of the United States Code. Section 409 provides as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [sic] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. We agree that section 409 of title 23 of the United States Code consists of other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we conclude that TxDOT must withhold the information in Exhibit E under section 409 of title 23 of the United States Code.

We next address the remaining submitted information that is not subject to section 552.022. We note that as of the date of this letter, the third parties have not submitted comments to this office explaining why any portion of the submitted information must be withheld. Because the third parties have not provided us with any comments and you have not raised any exceptions under section 552.110 on behalf of TxDOT, we have no basis to conclude

that the information in Exhibit C is excepted from disclosure under section 552.110. See Gov't Code § 552.110(a), (b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, you may not withhold any of the submitted information under section 552.110.

However, you claim that the information not subject to section 552.022(a)(1) is excepted from public disclosure under section 552.103. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

TxDOT 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. See Gov't Code § 552.103(c). The city must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, you assert that the requested documents are the subject of a pending lawsuit to which TxDOT is a party. In support of your assertion, you have provided this office a copy of the requisite petition showing TxDOT was sued prior to TxDOT receiving the instant request for information. After reviewing your representations and the submitted information, we find that you have demonstrated that the submitted information is related to litigation that was pending at the time TxDOT received the request for information. Therefore, TxDOT may withhold the submitted information that is not subject to section 552.022(a)(1) under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).¹

In summary, we conclude that TxDOT may withhold the submitted information that is not subject to section 552.022(a)(1) under section 552.103 of the Government Code and TxDOT must withhold the information in Exhibit E under section 409 of title 23 of the United States Code. TxDOT must release the information in Exhibit F that we have marked under section 552.022(a)(1) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

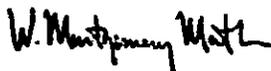
¹As section 552.103 is dispositive of this information, we do not address your section 552.136 claim.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 160802

Enc. Submitted documents

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