

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 11, 2003

Ms. Marcelle Sattiewhite Jones
General Counsel
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2003-0929

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176294.

The North Texas Tollway Authority (the "NTTA") received a request for eighteen categories of information related to a particular tract of land. You advise that you have released or will release much of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information, some of which consists of representative samples.²

First, we note that a portion of the submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

¹ Although you also claim in your brief postmarked December 10, 2002 that the submitted information is excepted under section 552.107, this claim was not raised within the ten business day time period prescribed by section 552.301. Therefore, you have waived any claim of exception from disclosure under this section of the Government Code. *See* Gov't Code §§ 552.301, .302.

² We assume that the "sample" of records submitted to this office is truly representative of those requested records as a whole. *See* Open Records Decision 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. Further, we note that while you make reference to an Exhibit H, no such information was submitted.

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

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The information submitted as Exhibit F2 constitutes a completed report, which is expressly public under section 552.022(a). Therefore, you may only withhold this information if it is confidential under other law or is excepted from disclosure under section 552.108. You do not claim that the information is excepted under section 552.108. Sections 552.103, 552.105, and 552.111 are discretionary exceptions under the Public Information Act and are, therefore, not "other law" that make the completed report confidential. *See* Open Records Decision Nos. 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), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111). Therefore, you may not withhold Exhibit F2 from disclosure under these exceptions, and it must be released.

We now address your claim under section 552.103 of the Government Code in relation to the remaining information. 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.

Gov't Code § 552.103(a), (c). 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(a) applies is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body received the request for

information, 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 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the NTTA must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). A governmental body may also establish that litigation is reasonably anticipated by the 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).

You advise and provide documentation showing that Charis Interests, the predecessor in interest to the current property owner of Tract 36C, retained an attorney who made a demand for damages in relation to the NTTA's construction of a retaining wall along the road abutting Tract 36C. The attorney indicated that if the matter were not settled, litigation might become necessary. Charis Interests rejected the NTTA's settlement offer in 2001. The NTTA subsequently terminated negotiations with Charis, and declined to restart negotiations in a letter dated August 2002. You indicate that the property owner continues to assert claims against the NTTA as of the date of the NTTA's receipt of the instant request for information. Upon review of your arguments and the submitted documents, we find based on the totality of the circumstances that the NTTA has demonstrated that Exhibits F1, F3 and G relate to litigation that it reasonably anticipated on the date of its receipt of the request for information.

However, we note that if the opposing party in the anticipated litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982).³ Otherwise, the NTTA may withhold Exhibits F1, F3, and G under section 552.103. *See* Gov't Code § 552.103(c). The remaining requested information must be released. As we are able to make these determinations, we do not address your remaining claims.

³ In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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).

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,

A handwritten signature in cursive script that reads "Kristen Bates". The signature is written in black ink and is positioned above the typed name.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 176294

Enc. Submitted documents

c: Ms. Susan Barilich
Goodwin Gruber, P.C.
1201 Elm Street, Suite 1700
Dallas, Texas 75270
(w/o enclosures)

Filed in The District Court
of Travis County, Texas

MAR 09 2006

At Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GN300804

NORTH TEXAS TOLLWAY AUTHORITY,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	
OF TEXAS,	§	TRAVIS COUNTY, TEXAS
Defendant,	§	
	§	
and	§	
	§	
ALLODIAL LIMITED PARTNERSHIP,	§	
F/K/A CHARIS INTERESTS,	§	
Intervenor.	§	126 th JUDICIAL DISTRICT

FINAL DECLARATORY JUDGMENT

On this the ____ day of _____, 2006, the Court considered the North Texas Tollway Authority's (the "NTTA") Motion for Summary Judgment and action for declaratory relief. Having considered the Motion, the evidence, the law and the arguments of counsel, the Court is of the opinion that the Motion should be granted. No replies were filed by either Defendant or Intervenor in opposition to Plaintiff's motion.

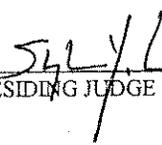
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the NTTA's Motion for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the information at issue, Exhibit F-2 (the "report") to the NTTA's December 9, 2002 submission to the Attorney General, is confidential under other law, Texas Rule of Evidence 503(b)(1) and Texas Rule of Civil Procedure 192.3(e) and, therefore, the NTTA is not required to disclose the report under Texas Government Code §552.022(a)(1).

IT IS FURTHER ORDERED THAT all costs of court are taxed against the parties incurring the same, and this judgment finally disposes of all claims between Plaintiff, Defendant and Intervenor and is a final judgment.

All other relief not expressly granted herein is denied.

Signed on this 9th day of March, 2006.



PRESIDING JUDGE

AGREED:



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