OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 26, 2003

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

OR2003-4393

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 183485.

The Texas Department of Transportation ("TxDOT") received a request for all information relating to a specified incident. You assert the requested information is excepted from disclosure under section 552.103 of the Government Code. We reviewed the information you submitted and considered the exception you claim.

Initially, we note the submitted information contains a contract governed by section 552.022 of the Government Code. This provision provides, in pertinent part, as follows:

> (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:
>
> > (3) information in an account, voucher or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted documents include an executed contract relating to the expenditure of public or other funds by a governmental body subject to section 552.022(a)(3). TxDOT must release the executed contract unless it is confidential under other law. *See* Gov't Code § 552.022(a)(3).

You assert section 552.103 of the Government Code, a discretionary exception under the Act, which does not constitute other law for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive Gov't Code § 552.103), 551 (1990) (statutory predecessor to Gov't Code § 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, TxDOT may not withhold the executed contract we have marked under section 552.103 of the Government Code.

With respect to the remaining submitted information, we address your claim under section 552.103 of the Government Code. In relevant part, section 552.103 states the following:

> (a) Information is excepted from the requirements of Section 552.021 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.
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> . . . .
>
> (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). To secure the protection of section 552.103(a), TxDOT must demonstrate the requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991). TxDOT has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing the applicability of section 552.103(a) requires a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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.).

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"). This office has held that a governmental body reasonably anticipates litigation when it receives a claim letter and affirmatively represents to this office that the claim letter complies with the notice requirements of the Texas Tort Claims Act ("TTCA"), Civil Practices and Remedies Code chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996).

You inform us that TxDOT received a Notice of Claim on March 12, 2003 from the requestor, an attorney who represents the estate of an individual involved in the incident at issue. Further, you explain the Notice of Claim meets the requirements of the TTCA. Based on your affirmative representations and supporting documentation, we find you have adequately established that TxDOT reasonably anticipated litigation on April 21, 2003, the date it received the request for information. Additionally, we agree the submitted information relates to the anticipated litigation. Accordingly, we conclude TxDOT may withhold the remainder of Exhibit B under section 552.103 of the Government Code.

In summary, TxDOT must release the executed contract, which we have marked, as section 552.022(a)(3) makes this information expressly public. TxDOT may withhold the remainder of the submitted information under section 552.103 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).

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 Dep't of Pub. 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,

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 183485

Enc: Submitted documents

c: Mr. Raul Steven Pastrana
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(w/o enclosures)