



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2003

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

OR2003-6999

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188804.

The Texas Department of Transportation (the "department") received a request for certain information pertaining to a particular construction project. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample of information.¹

We first note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides that

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 We assume that the "sample" of records submitted to this office is truly representative of the 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.

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

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

Gov't Code § 552.022(a)(1), (5). The submitted documents include information that must be released under section 552.022(a)(1), except as provided by section 552.108, unless it is expressly confidential under other law. The department does not claim section 552.108. The submitted information also includes information that is subject to section 552.022(a)(5) which must be released on completion of the estimates, unless it is expressly confidential under other law. We note that sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure under the Public Information Act that protect the governmental body's interests and may be waived.² As such, sections 552.103 and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022(a). Accordingly, we conclude that the department may not withhold the submitted information that is subject to section 552.022 under section 552.103 or 552.111 of the Government Code.

We now address your claim under section 552.103 with respect 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.

....

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g., 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 section 552.103), Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(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). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

To demonstrate that litigation is reasonably anticipated, a governmental body 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). A governmental body may establish that litigation is reasonably anticipated by showing that 1) it has received a claim letter from an allegedly injured party or his attorney and 2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA"), Chapter 101 of the Texas Civil Practice and Remedies Code, or an applicable municipal statute or ordinance. Open Records Decision No. 638 (1996).

You have submitted a formal notice of claim from an individual with the same firm as the requestor, dated March 14, 2003, which you state complies with the notice requirements of the TTCA. The notice of claim makes reference to the construction site that is the subject of this request for information. Based on our review of your arguments and the submitted information, we conclude that litigation was reasonably anticipated on the date the department received the request for information, and that the information at issue relates to the anticipated litigation for purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483.

We note, however, that once information has been obtained by all parties to the anticipated 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 must be disclosed.³ Otherwise, the department may withhold the information that is not subject to section 552.022 under section 552.103. As section 552.103 is dispositive for this information, we do not address your claim under section 552.111.

In summary, the department must release the information we have marked pursuant to sections 552.022(a)(1) and (a)(5). The remaining submitted information may be withheld under section 552.103.

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).

³ Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 188804

Enc. Submitted documents

c: Mr. Christopher M. Clark
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(w/o enclosures)