



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2005

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

OR2005-04663

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 225142.

The Department of Transportation (the "department") received a request for all information "relating to proposals submitted in response to [the department's] 'Request for Competing Proposals and Qualifications to Develop, Design and Construct, and, Potentially, Finance, Maintain and Operate the SH-45 Southeast Turnpike Through a Comprehensive Development Agreement,'" a copy of the Comprehensive Development Agreement, and a copy of the unsolicited proposal from Zachry Construction Corporation ("Zachry"). You state that the department has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.110, and 552.111 of the Government Code. Although you take no position with respect to proprietary nature of the submitted information, you claim that some of the submitted information may contain proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, the department notified the interested third parties, Zachry, Hill Country Constructors, Lone Star Infrastructure, J.V., and Archer Western Contractors, Ltd., of the department's receipt of the request and of their right to submit arguments to us as to why any portion of the submitted information should not be released. *See* Gov't Code §552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under

the Act in certain circumstances). We have considered all received arguments and have reviewed the submitted information.¹

Section 552.103 of the Government Code 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). The department 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. *Univ. of Tex. Law Sch. v. Tex. 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). The department must meet both prongs of this test for information to be excepted under 552.103(a).

The department represents, and has provided documentation showing, that litigation concerning the construction of SH-45 is currently pending in federal court against the department. Further, the litigation was pending as of the date the instant public information request was received by the department. After reviewing your arguments, the submitted complaint, and the submitted information, we find that the submitted information relates to the pending litigation. Accordingly, the department may withhold the submitted information under section 552.103 of the Government Code.

¹We assume that the "representative 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.

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). Because our ruling on this issue is dispositive, we need not address the remaining arguments.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

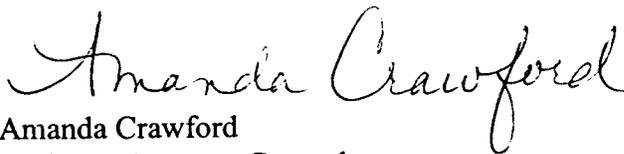
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 225142

Enc. Submitted documents

c: Mr. Patrick Wielinski
Cokinos, Bosien & Young
2221 East Lamar, Suite 120
Arlington, Texas 78006
(w/o enclosures)

Mr. William A. Zeis
Counsel to Zachry Construction
Fulbright & Jaworski
600 Congress Avenue, Suite 2400
Austin, Texas 78701-3271
(w/o enclosures)

Mr. Douglas A. Fuller
Lone Star Infrastructure
1421 Wells Branch Parkway, Building 2, Suite 200
Pflugerville, Texas 78660
(w/o enclosures)

Mr. John Abrams
Hill Country Constructors
111 Congress Avenue, Suite 2400
Austin, Texas 78701-4083
(w/o enclosures)

Mr. Joe Lee
Texas Tollway Team
Archer Western Contractors
2121 Avenue J, Suite 103
Arlington, Texas 76006
(w/o enclosures)