



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2005

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

OR2005-06075

Dear Ms. Alexander:

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# 227822.

The Texas Department of Transportation ("TXDOT") received a request for information relating to the PR22 project. You inform us that you will release some of the requested information, and that some of the requested information is available on the internet.¹ However, you claim that other 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 reviewed the submitted information.²

¹A public information officer does not fulfill his or her duty under the Act by simply referring a requestor to a governmental body's website for requested public information. Section 552.221 of the Government Code requires the governmental body to either provide the information for inspection or duplication in its offices or to send copies of the information by first class United States mail. A requestor may, however, agree to accept information on a governmental body's website in fulfillment of the request and, in that situation, the governmental body must inform the requestor of the Internet address of the requested information. Open Records Decision No. 682.

²We 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.

Initially, we note that Exhibits B and C of the submitted information contains several completed reports made of, for, or by TXDOT. Section 552.022 of the Government Code provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” constitutes “public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. You assert instead that it may be withheld pursuant to sections 552.103 and 552.111 of the Government Code. These sections are discretionary exceptions to disclosure that protects a governmental body’s interests and therefore are not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 663 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, the documents we have marked in Exhibit B of the submitted information may not be withheld pursuant to section 552.103.

However, you also contend that Exhibit C 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. You explain that Exhibit C is used by TXDOT to evaluate and enhance traffic control safety on highways, loops, and roads that are eligible for federal funds. Based on your representations, we agree that section 409 of title 23 of the United States Code applies to Exhibit C and constitutes 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 the department must withhold Exhibit C under section 409 of title 23 of the United States Code.

We now turn to your claim pertaining to the remaining submitted information, which is not subject to section 552.022. Section 552.103 of the Government Code provides:

(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 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 on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In order 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

In this instance, you inform us that, prior to TXDOT's receipt of this request for information, TXDOT received a notice of claim concerning an accident that occurred on the roadway that is the subject of the request for information. You represent to this office that the notice of claim meets the requirements of the TTCA. Based on this representation, we agree that litigation was reasonably anticipated by TXDOT on the date that it received this request.

Furthermore, we find that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that the remaining information at issue may be withheld from disclosure at this time pursuant to 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, responsive information to which all of the parties in the anticipated litigation have had access 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 concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary TXDOT must withhold the submitted information in Exhibit C that is subject to section 552.022 under section 409 of title 23 of the United States Code. TXDOT must release the documents we have marked in Exhibit B that are subject to section 552.022 of the Government Code. The remaining information at issue may be withheld under section 552.103 of the Government Code unless all parties to the anticipated litigation have had access to this information.

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

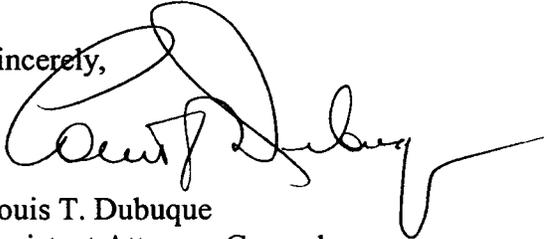
free, at(877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *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,



Louis T. Dubuque
Assistant Attorney General
Open Records Division

LTD/seg

Ref: ID# 227822

Enc. Submitted documents

c: Mr. Roger L. Turk
Law Offices of Thomas J. Henry
521 Starr Street
Corpus Christi, Texas 78401
(w/o enclosures)