ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2007

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

OR2007-01216

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# 270261.

The Texas Department of Transportation (the "department") received a request for ten categories of information pertaining to the South Llano Bridge, Project RMC 613388001. You claim that the submitted 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 representative sample of information.[1]

Initially, you inform us that a portion of the requested information is subject to two previous rulings issued by this office. On August 1, 2006, this office issued Open Records Letter No. 2006-08460 (2006), which involved a request for photographs of the South Llano Bridge repair work since April 1, 2006. We concluded in that instance that the department may withhold the submitted photographs under section 552.111 of the Government Code. On October 19, 2006, this office issued Open Records Letter No. 2006-12333 (2006), which regarded two requests for specified records pertaining to the same project at issue in this

[1]We 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.

instance. There, we held that the department may withhold the information at issue under section 409 of title 23 of the United States Code. We presume that the pertinent facts and circumstances have not changed since the issuance of these two prior rulings. Thus, we determine that the department may continue to rely on our rulings in Open Records Letter Nos. 2006-08460 and 2006-12333 with respect to any information requested in those cases that is also at issue here. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the requested information was not addressed in Open Records Letter Nos. 2006-08460 or 2006-12333, we will address your claims for exception from disclosure.

Next, we note that the information at issue includes completed reports made of, for, or by the department. 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 argue that this information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary exceptions and, therefore, are not other law for purposes of section 552.022. *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Thus, the completed reports may not be withheld pursuant to these exceptions.

You also contend, however, that this information 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, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 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. We agree that section 409 of title 23 of the United States Code 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). You inform us that "[b]ridges, including bridges not located on the National Highway System or the state highway system, are always eligible for federal aid under 23 U.S.C. §144 and therefore are federal-aid highways within the meaning of 23 U.S.C. §409." Furthermore, you assert that section 409 of title 23 of the United States Code would protect the reports at issue from discovery in civil litigation. Therefore, we conclude that section 409 of title 23 of the United States Code requires the department to withhold the documents that are subject to section 552.022.

We now address your section 552.103 claim for the remaining information not subject to section 552.022. Section 552.103 of the Government Code provides in part 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.
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> . . .
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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). 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 on the date the governmental body received the request for information 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).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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). When the governmental body is the prospective plaintiff in the anticipated litigation, the concrete evidence must at least reflect that litigation involving a specific matter is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to predecessor to section 552.103 and that litigation is "reasonably likely to result").

The department states that prior to receiving the current request for information it sent the requestor's client a notice-of-default letter concerning the requestor's work on the bridge project at issue. You have submitted a copy of this notice of default letter, as well as additional correspondence with the requestor's client pertaining to the alleged default. Upon review of your arguments and the submitted information, we find that the department reasonably anticipated litigation when it received the request for information. Our review of the remaining information shows that it is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the department may withhold the remaining information under section 552.103.[2]

We note, however, that once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, to the extent the documents at issue here are precisely the same records that we addressed in Open Records Letter Nos. 2006-08460 and 2006-12333, we conclude that the department may continue to rely on those letter rulings as previous determinations. The department must withhold the information subject to section 552.022 of the Government Code under section 409 of title 23 of the United States Code. The department may withhold the remaining 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

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[2]Because we are able to resolve this under section 552.103, we do not address your other argument for exception of the remaining information.

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 Office of the Attorney General 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. 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,

Lauren Kleine
Assistant Attorney General
Open Records Division

LEK/GNS/sdk

Ref: ID# 270261

Enc. Submitted documents

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(w/o enclosures)