



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2011

Mr. Robert Schell
Assistant Director Legal Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2011-04545

Dear Mr. Schell:

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# 414606.

The North Texas Tollway Authority (the "authority") received a request for information pertaining to the President George Bush Turnpike, including contracts, drawings, specifications, addenda, change orders, geotechnical reports, soil construction material testing reports, and consultant field observation reports. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

First, we note the submitted documents include information that is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹We assume 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.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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

...

(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)(1), (3). The submitted information contains a completed report that is subject to section 552.022(a)(1). The submitted information also includes information in completed contracts that pertain to the receipt or expenditure of funds by the authority, and are therefore subject to section 552.022(a)(3). The authority may only withhold these documents if they are made confidential under "other law." Although you argue the documents at issue are excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception and, as such, is not "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, the information we have marked under section 552.022 may not be withheld under section 552.103 and must be released to the requestor.

We now address your argument under section 552.103 of the Government Code for the remaining information that is not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides, in part:

(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 that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.*

You claim the submitted information is excepted under section 552.103 because it relates to reasonably anticipated litigation. You explain the authority entered into several contracts for the construction of the President George Bush Turnpike. You state a portion of a retaining wall on the President George Bush Turnpike failed and the authority undertook emergency measures to stabilize and secure the retaining wall and surrounding areas. You also state the authority has begun a forensic investigation of the retaining wall to determine the cause of the failure. You inform us that, prior to its receipt of the instant request for information, the authority issued notices of claim to the parties involved in construction services. You explain the notices of claim notified the parties of the retaining wall failure and other walls identified as deficient, and sought to recover costs. You have provided a copy of the notices of claim. You state the authority believes “these matters will not be resolved without litigation.” Based on your representations and our review, we conclude the authority reasonably anticipated litigation when it received the request for information. You state the submitted information is related to the anticipated litigation because it pertains to the subject matter of the anticipated litigation. Accordingly, the authority may generally withhold the information that is not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code.

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 must be disclosed. In this instance, some of the information at issue has been obtained from the opposing party to the anticipated litigation. Therefore, this information and the section 552.022 information we have marked may not be withheld under section 552.103. However, the remaining information may be withheld under section 552.103 of the Government Code. We 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, the authority must release the information we have marked under section 552.022(a)(1) and section 552.022(a)(3) of the Government Code. With the exception of the information that has been seen by the opposing party to the anticipated litigation, the authority may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tf

Ref: ID# 414606

Enc. Submitted documents

c: Requestor
(w/o enclosures)