



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 29, 2011

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

OR2011-05874

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# 415983.

The Texas Department of Transportation (the "department") received a request for information concerning any diesel spills that occurred prior to a specified diesel spill, whereby material was disposed of at a landfill by Protect Environmental Services ("Protect") and the department; and a copy of the pictures taken by Protect to document damages and work performed by them at the scene of the specified diesel spill. 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.<sup>1</sup>

Initially, we note a portion of the submitted information is not responsive to the request because while it is information pertaining to the specified diesel spill, it is not the requested pictures. This decision does not address the public availability of the non-responsive information, which we marked, and that information need not be released in response to the present request.

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<sup>1</sup>We 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 those records contain substantially different types of information than that submitted to this office.

Section 552.103 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.

...

(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 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 of the governmental body's receipt of the request, 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, 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that "litigation involving a specific matter is realistically contemplated." Open Records Decision No. 518 at 5 (1989).

You argue that litigation is reasonably anticipated in this instance because, as a result of the work performed by Protect to clean up the specified diesel spill, the department submitted damage claim 02D006501 to SAIA Motor Freight Line, L.L.C. ("SAIA"). Although the letter states the department will consider its claim delinquent if it does not receive payment from SAIA by a specified date, the letter does not contain any language stating or threatening that the department will pursue litigation against SAIA. Cf. Open Records Decision Nos. 638 at 3 (mere fact that individual alleged damages does not serve to establish that litigation is reasonably anticipated), 551 at 1 (litigation reasonably anticipated when attorney's letter demanded damages and stated that attorney was authorized to file suit if damages were not paid), 452 at 5 (litigation reasonably anticipated when attorney made written demand for disputed payments and stated further legal action would be necessary unless payments were forthcoming). Furthermore, you make no representations that the department has taken any concrete steps toward litigation or that it will pursue litigation in

this matter. Additionally, the request for information does not contain any language stating or threatening litigation against the department. *See* Open Records Decision Nos. 555 (1991) (concrete evidence to support claim that litigation is reasonably anticipated may include, for example, governmental body's receipt of letter containing specific threat to sue governmental body from attorney for potential opposing party), 361 (1983) (fact that potential opposing party has hired attorney who makes request for information does not establish that litigation is reasonably anticipated). Thus, we conclude the department has failed to demonstrate that litigation was reasonably anticipated on the date it received the request for information. Accordingly, the department may not withhold the submitted information under section 552.103 of the Government Code. As you raise no other exceptions to disclosure, the submitted information must be released.

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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/bs

Ref: ID# 415983

Enc. Submitted documents

c: Requestor  
(w/o enclosures)