



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 9, 2017

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

OR2017-05023

Dear Ms. Parker:

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# 648762.

The Texas Department of Transportation (the "department") received a request for ten categories of information related to a specified location in the I-35W Corridor Project, including the contracts or subcontracts with North Tarrant Infrastructure, L.L.C. ("NTI"), several related contracts, and inspector logs, photographs, and traffic control plans. You claim some of the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of NTI. Accordingly, you state, and provide documentation showing, you notified NTI of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from a representative for NTI. We have reviewed the submitted arguments and the submitted information, a portion of which consists of a representative sample.¹

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 those records contain substantially different types of information than that submitted to this office.

Initially, we address NTI's assertion the information submitted in Exhibit C is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002 of the Government Code defines "public information" as:

(a) [I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

(a-1) Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a), (a-1). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns, has a right of access to, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1).

NTI argues the contracts in Exhibit C are not “public information” subject to the Act because NTI is not a governmental body subject to the Act, NTI does not hold the responsive contracts on behalf of the department, and the department is not a party to the contracts at issue. *See id.* § 552.003(1)(A) (defining “governmental body”). NTI asserts, pursuant to the facility agreement the department entered into with the company that hired NTI, the department should not have possession of the responsive contracts. We note, however, the information at issue relates to a program overseen by the department. We further note the information at issue is in the possession of the department, and the department has submitted this information as being subject to the Act. Thus, we find the department collected, assembled, or maintains this information in connection with the transaction of official business. Therefore, the information in Exhibit C constitutes public information subject to the Act and may only be withheld if an exception to disclosure under the Act applies.

NTI raises section 552.104(a) of the Government Code for the information in Exhibit C. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. NTI states it has competitors. In addition, NTI states release of the information submitted as Exhibit C would cause harm to its and its affiliated companies’ competitors. NTI argues the information would provide free insight into its methodology for calculating price and risk without incurring the costs incurred to develop the methodology, which would have a negative effect on NTI’s ability to compete for future contracts. After review of the information at issue and consideration of the arguments, we find NTI has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold Exhibit C under section 552.104(a) of the Government Code.²

Next, we address the department’s arguments against disclosure of the remaining information. Section 552.103 of the Government Code provides in relevant 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

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of the submitted information.

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 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, orig. proceeding); *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 from disclosure 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). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

The department argues the information submitted as Exhibit B is protected by section 552.103 of the Government Code. You state the department “is routinely sued on motor vehicle accidents” that occur on department roadways. You contend the department reasonably anticipates litigation to which this information relates because the requestor is an attorney who has stated there was an accident in the specified location, and she is doing her due diligence in deciding whether to file suit. However, we note the requestor has not indicated the department would be a defendant in the litigation at issue. Thus, upon review, we find the department has not demonstrated any party had taken concrete steps toward filing litigation to which the department would be a party when the department received the request for information. Therefore, we conclude the department has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the department may not withhold Exhibit B under section 552.103(a) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Section 552.111 encompasses information that is protected by civil

discovery privileges. *See* Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). You argue the information you have marked within Exhibit B is excepted from disclosure under section 552.111 because it would be privileged from discovery 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. Federal courts have stated that section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *see also Pierce County v. Guillen*, 537 U.S. 129 (2003) (upholding constitutionality of 23 U.S.C. § 409, relied on by county in denying request under state's Public Disclosure Act).

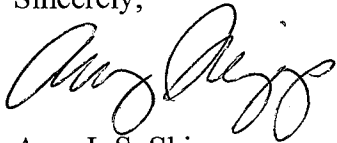
You state the information at issue pertains to a roadway that is part of the National Highway System under section 103 of title 23 of the United States Code and is, therefore, a federal-aid highway for the purposes of section 409 of title 23. You state the information was created for the purpose of identifying and evaluating hazards on public roads and thus is used for highway safety purposes. You argue the information at issue would be privileged from discovery in civil litigation under section 409 and is therefore excepted from disclosure under section 552.111 of the Government Code. Based on your representations, we conclude the department may withhold the information you marked within Exhibit B under section 552.111 of the Government Code.

In summary, the department may withhold Exhibit C under section 552.104(a) of the Government Code. The department may withhold the information you marked within Exhibit B under section 552.111 of the Government Code. The department must release the remaining information in Exhibit B.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/eb

Ref: ID# 648762

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)