



# Texas Department of Transportation

DEWITT C. GREER STATE HIGHWAY BLDG. • 125 E. 11TH STREET • AUSTIN, TEXAS 78701-2483 • (512) 463-8585

June 26, 2003

Ms. Katherine Minter Cary, Chief  
Open Records Division  
Office of the Attorney General  
Price Daniel Building  
209 W. 14th Street, 6th Floor  
Austin, Texas 78711-2548

**Hand Delivered**

RE: Public Information Act Request of Kathy Cusick, Dated June 12, 2003, and Received by the Texas Department of Transportation on June 13, 2003

Dear Ms. Cary:

The Department of Transportation (TxDOT) received a Public Information Act request from Kathy Cusick of Alamo City Rivermen Canoe Club on June 13, 2003. The request is enclosed as **Exhibit A**. In accordance with Section 552.301 of the Government Code, TxDOT is seeking a ruling on the request.

Kathy Cusick has requested all items providing criteria or generally advising or guiding TxDOT and its commissioners, staff, employees, and agents regarding permitting highway right of way to be fenced or otherwise blocked at navigable streams, thereby impeding public access to streams or requiring the public to cross a fence or enclosure to gain access to streams and regarding the public's right to cross such impediments. Ms. Cusick also requests all documents pertaining to a fence across the Highway 87 right of way at the Llano River south of Mason and across the Highway 80 right of way at the Guadalupe River south of Belmont.

The excepted information is covered by Section 552.107 of the Government Code, which excepts documents protected by the attorney-client privilege. The relevant portions of the attached documents are subject to the privilege because they concern confidential communications between a TxDOT lawyer and non-lawyers within the agency for the purpose of providing legal advice.

The excepted information is enclosed as **Exhibit B**.

**Documents subject to the attorney-client privilege are excepted from disclosure.**

In the past your office has applied both Sections 552.101 and 552.107 of the Government Code to documents subject to the attorney-client privilege.

Section 552.111, relating to pre-decisional intra-agency communications containing recommendations, advice, or opinion, can also apply. See ORD-574.

Section 552.107 protects "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." In ORD-574 (1990), your office concluded that Section 552.107 excepts from public disclosure only information subject to the attorney-client privilege.

The attorney-client privilege embraces communications by a client to an attorney when made confidentially and for the purpose of obtaining legal advice. See ORD-574 (1990); ORD-462 (1987). Communications by the attorney to the client are also privileged when they are made in the attorney's capacity as a legal advisor. ORD-574 (1990); ORD-462 (1987). Communications between attorneys within TxDOT's Office of General Counsel and other TxDOT employees have frequently been found in letter opinions to be excepted from disclosure because of the attorney-client privilege. See, e.g., OR2002-5801; OR2002-3162; OR2002-2360; OR2001-5905; OR2001-5390; OR2001-4729; OR2000-2639; OR2000-0378; OR2000-0302; OR99-1092; OR99-1624; OR99-0152.

Because the excepted information involves confidential attorney-client communications, it is excepted from disclosure under Sections 552.101, 552.107, and 552.111. TxDOT has not waived its attorney-client privilege with regard to any of the excepted documents.

The excepted information is confidential attorney-client communications between TxDOT employees and TxDOT attorney Joanne Wright for the purpose of receiving legal advice.

**The excepted information does not fall within Section 552.022.**

Section 552.022 of the Government Code identifies certain limited categories of information that must be released, notwithstanding the existence of an applicable exception, unless the information is protected under other law. The categories include completed investigations, reports, evaluations, and audits; limited information about state employees; information contained in accounts, invoices, and contracts and relating to the expenditure of public money; names and voting records of agency officials; completed information used to estimate public expenditures; certain sales and use tax information; information giving the agency's organization and function; substantive and procedural rules; opinions in contested cases; formal policy statements; staff manuals; bills for attorney's fees; information in court records; and settlement agreements.

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Section 552.022(a) does not apply to attorney-client communications. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

**Conclusion.**

In accordance with Section 552.301(d)(1) of the Government Code, TxDOT has notified the requestor that it wishes to withhold the excepted information and is seeking an attorney general ruling. This correspondence is enclosed as **Exhibit C**. TxDOT has also sent a copy of this letter to the requestor in accordance with Section 552.301(d)(2).

Please feel free to contact me if you have any questions.

Sincerely,



Joanne Wright  
Associate General Counsel

Enclosures

cc: Kathy Cusick  
PO BOX 171194  
San Antonio TX 78217  
(w/o enclosures)