



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 6, 1996

Ms. Leala Mann
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Mr. Mark E. Dempsey
Assistant City Attorney
City of Garland
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Open Records Decision No. 638

Re: A governmental body's burden under section 552.103 of the Government Code to establish that litigation is reasonably anticipated and that requested information relates to either anticipated or pending litigation; and whether a "notice of claim" by itself is sufficient to show that litigation is reasonably anticipated (RQ-804)

Dear Ms. Mann, Ms. Armstrong, and Mr. Dempsey:

The Texas Department of Transportation, the County of Travis, and the City of Garland each received notices of claims that you represent to have been sent in compliance with the notice provisions of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code.¹ Each governmental body then

¹Notice to the city may also have been provided in accordance with a municipal ordinance requiring notice of claims. See Civ. Prac. & Rem. Code § 101.101(b) (approving city charter and ordinance provisions requiring notice "within a charter period permitted by law"); *City of Houston v. Torres*, 621 S.W.2d 588, 590 (Tex. 1981) (compliance with city charter provisions requiring timely notice of claim is "condition precedent" to lawsuit against city). But see *Borne v. City of Garland*, 718 S.W.2d 22 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (municipal ordinance requiring written notice of claim within 30

received an open records request for information related to the incidents that gave rise to the claims. You contend that the information at issue may be excepted from disclosure pursuant to section 552.103(a), the litigation exception, because you assert that the requested information relates to reasonably anticipated litigation.

The purpose of section 552.103(a) is to protect the litigation interests of the governmental body claiming the exception. This exception allows the discovery rules to control the release of information that relates to pending or potential litigation. Open Records Decision No. 551 (1990).

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.² *See id.* at 4. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Prong 1: Litigation Is Pending or Reasonably Anticipated

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 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the

(footnote continued)

days of incident without exception for good cause violated open courts provision of Tex. Const. art. I, § 13).

²Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated").

On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Of course, the fact that someone has actually filed suit against the governmental party clearly shows that litigation is pending.

Changes in the Litigation

It is important to note that the status of the litigation can determine the applicability of section 552.103(a). There are several reasons for this. First, the exception does not apply when the opposing party to the litigation has already obtained access to the information, through discovery or otherwise. *See* Open Records Decision Nos. 349 (1982) at 2, 320 (1982) at 1. Second, the exception does not apply when litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. Finally, unless litigation is pending, the exception does not apply until the controversy giving rise to the litigation has reached the stage at which the potential opposing party begins to take objective steps toward *actually filing* a lawsuit.

With the section 552.103(a) exception, there may be instances in which the governmental body asserts that litigation is reasonably anticipated, but while this office is deciding the applicability of that exception, circumstances change. In light of the temporal nature of the applicability of section 552.103(a) and the governmental body's duty to establish the applicability of the exceptions it claims, we believe the act requires a governmental body raising section 552.103(a) to provide this office with information about new and significant developments concerning the anticipated litigation.

Further, we believe that a governmental body must provide to this office these updates concerning the litigation in a timely manner. The legislature, recognizing the value of the timely production of public information and the timely rendition of open records rulings, intended that the open records decision-making process move rapidly.

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

See Gov't Code §§ 552.221, .306. Moreover, recent amendments to the act, which became effective September 1, 1995, indicate a strong legislative intent to accelerate the open records decision process. See Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 18, 1995 Tex. Sess. Law Serv. 5127, 5139 (codified at Gov't Code § 552.301). Thus, we believe a governmental body must submit to this office information about a change in the circumstances of the anticipated litigation as soon as possible after the governmental body receives notice of that change. For example, if a suit is filed against a governmental body asserting section 552.103(a) on the basis of reasonably anticipated litigation while a request for an open records decision is pending in this office, the governmental body must inform this office of that suit as soon as possible.

Prong 2: The Requested Information Relates to the Litigation

As we have indicated, chapter 552 of the Government Code places on a governmental body the burden of establishing why and how the section 552.103(a) exception applies to requested information. See Open Records Decision Nos. 542 (1990), 515 (1988) at 6. Once the governmental body has shown that litigation is pending or reasonably anticipated, the governmental body must then establish the second prong of the section 552.103(a) test. To meet the second prong of the section 552.103(a) exception, a governmental body must explain how the requested information relates to the subject of the litigation. Simply referring to the cause number of a pending case does not establish that the requested information relates to that case. The submission of the petition in a pending case may assist this office in the assessment of the relatedness of the requested information to the subject of the pending litigation. However, we do not believe that a governmental body has necessarily established that requested information relates to pending litigation by just submitting a petition. A governmental body should in every case explain or describe how the requested information relates to the pending litigation.

Turning to the specific situations presented, the question posed is whether a governmental body has met its burden of demonstrating that litigation is reasonably anticipated simply by showing that an allegedly injured party sent a letter that the governmental body purports to be a claim letter under the TTCA. We believe that a governmental body's claim that litigation is anticipated based on its receipt of a letter from an allegedly injured party is sufficient to demonstrate that litigation is reasonably anticipated if the governmental body's attorney represents to this office that the letter is in compliance with the notice requirements of the TTCA or applicable ordinance. See Open Records Decision No. 416 (1984) at 6.

Our review of the specific information submitted with the requests indicates that litigation is reasonably anticipated in each situation. The Texas Department of Transportation received what it purports to be a notice of claim from an attorney on behalf of his client, who allegedly tripped on a concrete slab. The County of Travis

received what it purports to be a claim letter from an attorney concerning injuries his client apparently sustained when a bus lift fell while loading the client, who was in a wheel chair, into the bus. The City of Garland received correspondence that it purports to be a claim letter from a woman seeking medical expenses and lost wages due to her accident at a city pool, who then retained an attorney to represent her in regard to the injury claim. See Open Records Decision No. 551 (1990).

In each instance, the governmental body has met its burden of showing that litigation is reasonably anticipated. You have represented to this office that each notice was sent in compliance with the requirements of the TTCA or applicable municipal ordinance. We also note that in each case you have shown that the allegedly injured parties have hired attorneys to represent them in these claims. Thus, affirmative, objective steps toward litigation have been taken sufficient to show that litigation is reasonably anticipated. See Open Records Decision No. 555 (1990) at 3. Our review of the documents at issue shows that in each case the requested information relates to the subject of the anticipated litigation. Therefore, the information at issue may be withheld from public disclosure pursuant to section 552.103(a), until the potential opposing party obtains the information through discovery or the litigation is concluded.⁴

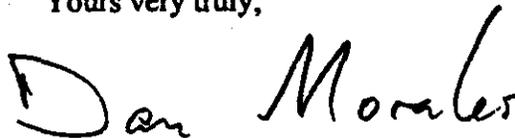
S U M M A R Y

A governmental body must establish how and why section 552.103(a) is applicable to particular records. Under the first prong of the section 552.103(a) test, in determining whether litigation is reasonably anticipated, a governmental body must provide this office evidence that the potential opposing party has taken concrete steps toward litigation. The fact that a governmental body received a claim letter that it represents to this office to be in compliance with the notice requirements of the Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance, shows that litigation is reasonably anticipated. Under the second prong of the section 552.103(a) test, the governmental body is encouraged to supply this office a petition in a pending lawsuit, but at a minimum must explain or describe how the information relates to the subject of reasonably anticipated or pending litigation to which the

⁴When litigation concludes, a governmental body may no longer withhold from required public disclosure pursuant to section 552.103(a) information that relates to that litigation. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. A governmental body need not inform this office of the conclusion of the litigation before it releases requested information. We note also that since the section 552.103(a) exception is discretionary with the governmental body asserting the exception, the governmental body may choose at any time to release the information at issue. Open Records Decision No. 542 (1990) at 4.

governmental body is a party. A governmental body must notify this office of a change in the circumstances of the litigation underlying a section 552.103(a) claim as soon as possible after receiving notice of that change. For example, when a governmental body contends that requested information relates to reasonably anticipated litigation and a lawsuit is later filed, the governmental body must then notify this office as soon as possible that litigation is now pending.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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