



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 27, 1994

Mr. Michael D. Manno
Walsh, Anderson, Underwood, Schulze
& Aldridge, P.C.
6300 La Calma, Suite 200
Austin, Texas 78752

OR94-590

Dear Mr. Manno:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26421.

The Slidell Independent School District (the "school district"), which you represent, has received a request for certain attorney billing records relating to a Texas Education Agency due process hearing involving alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C. ch. 33. Specifically, the requestor seeks "copies of all attorney fees paid, pending and not paid, statements and expenses incurred since the beginning of the TEA Due Process hearing." You seek to withhold the requested information under sections 552.103(a) and 552.107(1) of the Government Code.

Section 552.103(a) of the Government Code exempts 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.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990). On the other hand, the mere fact that a requestor, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452 (1986); *see also* Open Records Decision No. 588 (1991) at 7 (holding that contested case under statutory predecessor to Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, constitutes "litigation" for purposes of section 552.103(a)).

You advise us that on February 19, 1994, the requestors filed a request for a hearing before the Texas Education Agency alleging violations of the Individuals with Disabilities Education Act. You also advise us that the requestors sought a continuance but were unable to establish good cause therefore and that the complaint was consequently nonsuited without prejudice. You contend that litigation in this instance may be reasonably anticipated because the requestors' complaint was dismissed without prejudice, therefore leaving open the possibility that the complaint may be refiled.

You have submitted to us for review a letter from the hearing officer in the dismissed suit to the requestors' attorney (Exhibit "B"), in which she states: "My understanding . . . is that the dispute has not been resolved, and Mr. McCall plans to re-file this request for hearing." A letter from the requestors' attorney to the hearing officer (Exhibit "C") indicates that the hearing officer confirmed "that the hearing scheduled in this matter would be dismissed 'non suited' without prejudice to refile the hearing request and complaint." We believe that you have demonstrated that litigation may be reasonably anticipated and that much of the requested information relates to the anticipated litigation. You have not demonstrated, however, that the issue of attorney's fees and costs are relevant to the anticipated litigation. Accordingly, we conclude that the school district may withhold the descriptions of the services provided, but not the information that reveals attorney's fees and costs. We have marked the documents accordingly.

Next, we address whether section 552.107(1) of the Government Code excepts information revealing attorney's fees and costs from required public disclosure. Section 552.107(1) excepts information if:

- (1) it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. See Open Records Decision No. 574 (1990). The application of section 552.107(1) to attorney fee bills must be determined on a case-by-case basis. Open Records Decision No. 589 (1991) at 1.

We have examined the information submitted to us for review. We conclude that the submitted information revealing attorney's fees and costs does not reveal client confidences to an attorney or the attorney's legal advice. Accordingly, this information may not be withheld under section 552.107(1) of the Government Code and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

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Enclosures: Marked documents

Ref.: ID# 26421