



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 18, 1995

Mr. Stephen L. Braun
Law Offices of Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR95-185

Dear Mr. Braun:

You have asked for reconsideration of Open Records Letter No. 95-040 (1995). This office determined in that informal decision the provisions of section 552.103 of the Government Code did not except certain information from required public disclosure. We have assigned your request for reconsideration ID# 31734.

The Montgomery Independent School District (the "school district") received a request for an investigation report prepared in response to a parent's complaint. The parent alleged that a calendar had been stolen from his home and later was seen at a school campus. In response to allegations contained in the parent's complaint, the district hired your law firm to investigate. You sought to withhold that investigation report from public disclosure. This office determined in Open Records Letter No. 95-040 (1995) that the portions of the report revealing attorney advice and opinion or client confidences were excepted from disclosure pursuant to section 552.107. See Open Records Decision No. 574 (1990). We also determined that section 552.103(a) did not except from disclosure the remaining portions of the report. You seek a reconsideration as to the applicability of section 552.103(a) to the remaining portions of the report.

You contend that this office applied the wrong legal standard in determining that section 552.103(a) was inapplicable. You urge that this office should use as its test for withholding records under section 552.103(a) the *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) standard for the attorney work product privilege under the Texas Rules of Civil Procedure.¹ You state:

¹The Texas Supreme Court determined that:

The standard set forth in National Tank Co. is considerably less onerous for establishing the investigatory document privilege than the prior law which forms the basis for OR95-040. Likewise, the standard enunciated in National Tank Co. broadens the privilege.

Section 552.103(a) was designed to keep a party in litigation with a governmental entity from using chapter 552 as a method of avoiding the rules of discovery. Attorney General Opinion JM-1048 (1989) at 4; Open Records Decision No. 551 (1990) at 3. It is not, however, a discovery privilege. Nor do discovery privileges create exceptions from disclosure under chapter 552. Gov't Code §§ 552.006, .021 (all information maintained, collected, or assembled by or for governmental body is public unless otherwise excepted from disclosure under ch. 552); Open Records Decision No. 575 (1990) at 2. Section 552.005 of the Government Code specifically provides:

(a) This chapter does not affect the scope of civil discovery under the Texas Rules of Civil Procedure

(b) Exceptions from disclosure under this chapter do not create new privileges from discovery.

The burden of proving that section 552.103(a) is applicable rests with the governmental body asserting the exception. The governmental body must provide this office evidence showing that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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 (1990) at 4.² Based upon the information provided this office, we determine the applicability of section 552.103(a) on a case-by-case basis. Open Records Decision No. 628 (1994) at 3.

(Footnote continued)

investigative documents are prepared in "anticipation of litigation" for purposes of Tex. R.Civ. P. 166b(3) if a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

851 S.W.2d at 195.

²We note that the section 552.103(a) exception is not applicable only to documents that have been prepared in anticipation of litigation. Section 552.103(a) applies to documents *related* to the subject of the reasonably anticipated or pending litigation, which may encompass other types of documents.

You contended that both criminal and civil litigation were reasonably anticipated. You argued that criminal litigation was reasonably anticipated because a charge of theft concerning the calendar had been filed with the Montgomery Police Department. We note that there is no indication that the twelve year old, promotional calendar at issue had any significant monetary value. Information provided this office by the requestor indicated that criminal charges were not being pursued. In any event, as we explained in Open Records Letter No. 95-040 (1995), you provided this office no explanation of how the school would be a party to criminal litigation concerning a calendar owned by a private individual.

You also stated that during your firm's investigation "several threats of litigation" were made against the district, its employees, and officers and that, in addition, four attorneys had contacted your office. You provided no explanation as to who had threatened litigation or what basis there might be for anticipated litigation. You also did not state whether the attorneys who contacted your office represented individuals actually involved in the investigation and whether they had actually threatened to take the district to court or if they had made general inquiries about the investigation.

Isolated threats of litigation or threats of litigation by an individual without other steps being taken toward litigation do not trigger section 552.103(a). Open Records Decision Nos. 351 (1982), 331 (1982). Litigation is reasonably anticipated when an individual hires an attorney who demands damages and threatens a lawsuit if such damages are not paid. Open Records Decision No. 551 (1990) at 2. This office has also found that litigation is reasonably anticipated when threats have been combined with other evidence indicating the governmental body may soon be involved in litigation, such as possible violations of federal law:

The district has . . . received several telephone threats, including one from an attorney purporting to represent a parent. Although one threat would clearly not be sufficient to trigger section [552.103], several threats, including at least one from an attorney, suggest a stronger likelihood of litigation. Added to this is the factual setting of this case. We are dealing here with the possibility that some children in the district may have experienced lead poisoning [M]oreover, the use of leaded paint [by the district] violates federal law.

Open Records Decision No. 452 (1986) at 5.

This office applied the appropriate two-pronged test for determining the applicability of section 552.103(a). The district did not meet its burden of providing evidence sufficient to show that litigation was reasonably anticipated. Therefore, the remaining portions of the investigation report may not be withheld from disclosure pursuant to section 552.103(a).

If you have any questions, please contact this office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Ruth H. Soucy". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/LRD/rho

Ref.: ID# 31734

Enclosures: Submitted documents

cc: Ms. Linda Daye
12818 Devlin Down
Montgomery, Texas 77356
(w/o enclosures)