



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 16, 1996

Mr. Christopher P. Borreca  
Bracewell & Patterson, L.L.P.  
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711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR96-1146

Dear Mr. Borreca:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request ID# 40377.

The Houston Community College System (the "HCCS"), which you represent, received a request for information relating to the receipt, application or allocation of state and federal grants, as well as information relating to the expenditures of 5 individuals associated with HCCS. You assert that the requested information is excepted from disclosure by section 552.103 of the Government Code and have submitted the responsive documents to our office for review.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that 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, 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 Nos. 638 (1996) at 2, 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Open Records Decision No. 638 (1996) at 2.

You state that the HCCS is currently a party to a lawsuit brought by two former HCCS employees and have supplied this office with a copy of various pleadings from this lawsuit. Because you have shown that the HCCS is a party to pending litigation, you have satisfied the first prong of the test for section 552.103. You also argue that the requested information relates to the pending litigation. Specifically, you state that the HCCS is affirmatively defending against this litigation by asserting that the plaintiffs' employment ceased as a result of a loss of funding for their respective positions. Thus, you argue that requested information regarding the receipt, application or allocation of state and federal grants, including the 1993 and 1994 HCCS Annual Financial Reports, is related to this pending litigation. You further argue that the five specific individuals who are the subject of this request were named by the plaintiffs as "persons with knowledge of the facts surrounding the firing" of the plaintiffs. Thus, you argue that the requested information on expenditures by these five individuals is related to the pending litigation. Based on prior decisions of this office, *see, e.g.*, Open Records Decision No. 551 (1990), we conclude that the HCCS has established that the requested information relates to pending litigation and may be withheld under section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue. Section 552.103 is intended to protect the litigation interests of a governmental body by forcing parties that are or may be in litigation with a governmental body to obtain information relating to the litigation through the discovery process, if at all. Open Records Decision No. 551 (1990) at 3. The litigation exception was intended to prevent the use of the Open Records Act as a method to avoid discovery rules. *Id.* at 4. Once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and that information may not be withheld under this exception. *Id.*, *see also* Open Records Decision Nos. 454 (1986), 349 (1982), 320 (1982), 288 (1981). If the opposing parties in this litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

Finally, we note that section 552.103 is a discretionary exception that may be voluntarily or involuntarily waived by a governmental body. Open Records Decision No. 542 (1990) at 4. Section 552.007 of the Government Code, however, prohibits selective disclosure. If a governmental body releases to any person information that it may have withheld under section 552.103, the information is no longer protected under this exception and, unless the information is confidential by law, the governmental body must release the information to all who request it.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt  
Assistant Attorney General  
Open Records Division

RWS/rho

Ref.: ID# 40377

Enclosures: Submitted documents

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(w/o enclosures)