



Office of the Attorney General
State of Texas

May 12, 1997

DAN MORALES
ATTORNEY GENERAL

Mr. Robert A. Schulman
Schulman, Walheim & Heidelberg, Inc.
112 East Pecan, Suite 3000
San Antonio, Texas 78205

OR97-1089

Dear Mr. Schulman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105550.

The United Independent School District (the "district"), which you represent, received an open records request for two categories of information. The first category sought information relating to "the compensation package for Dr. Barber - salary, benefits, car allowance, annuities, etc."¹ The second category consisted of a variety of information concerning "the removal of asbestos by the school district from Nye Elementary." Initially, you asserted that the submitted information at issue is excepted from required public disclosure pursuant to sections 552.026, 552.101, 552.102, 552.103, 552.104, 552.105, 552.107, 552.108, 552.109, 552.111, 552.114, and 552.117 of the Government Code. However, in your submitted brief you only explained how sections 552.101, 552.103, 552.107, and 552.108 applied to the submitted information. Therefore, in this ruling, we only consider the applicable exceptions you claim for the submitted records at issue.²

¹As you do not argue that the "compensation package for Dr. Barber" is excepted from required public disclosure, we assume the district has made the requested information available to the requestor. *See* Gov't Code § 552.302. However, we urge you to exercise caution before releasing information responsive to the request, as information commonly found in personnel files may be protected by common-law privacy or a confidentiality statute. *See* Gov't Code § 552.352 (providing penalties for improper release of confidential information).

²Although you raised a veritable cornucopia of exceptions in your initial letter, you did not explain how most of the claimed exceptions apply to any of the submitted records. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Therefore, in this ruling we only consider the exceptions for which you have offered support.

Because section 552.103(a) of the Government Code is the most inclusive exception you raise, we will discuss it first. Section 552.103(a), known as the litigation exception, 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.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. 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.); Open Records Decision No. 551 (1990) at 4.

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 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. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

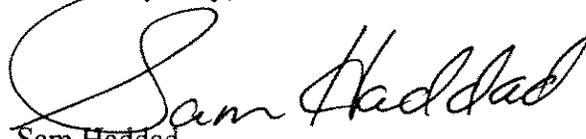
³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney 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).

You assert that "an employee of the District, . . . , who was terminated by the Board of Trustees . . . , has retained an attorney and filed a grievance, claiming that his termination was wrongful." The employee has alleged various violations of law including, claims for defamation, state and federal whistle blower laws, violations of the Occupational Safety and Health Act standards and the Fair Labor Standards Act. These claims involve the removal, storage and disposal of asbestos material from a district school. You further claim that if the matter is not resolved in the grievance process litigation is reasonably anticipated. In this instance, after reviewing the submitted materials and your arguments, we conclude that you have shown that litigation is reasonably anticipated. *See* Open Records Decision No. 588 (1991). We further find that the documents that have been submitted are related to reasonably anticipated litigation for the purposes of section 552.103(a).

The requested records may be withheld pursuant to section 552.103 only to the extent that the records have not been previously seen by the opposing parties in the anticipated litigation. Generally, absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We also note that the applicability of this section ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982) (concerning pesticide complaint investigation files); Open Records Decision No. 350 (1982) at 3.

As we resolve your request under section 552.103, we need not address your other claimed exceptions at this time. 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,



Sam Haddad

Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 105550

Enclosures: Submitted documents

cc: Ms. Maria Eugenia Guerra
LareDOS
1812 Houston
Laredo, Texas 78040
(w/o enclosures)