



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 7, 1998

Ms. Monica L. Strickland
Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR98-1174

Dear Ms. Strickland:

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# 115384.

The City of Midland (the "city") received a request for documents relating to the city's Mockingbird and Midkiff Street Widening Project (Project). You assert an exception to public disclosure under chapter 552 of the Government Code , section 552.103. We have considered your arguments and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city 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 No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

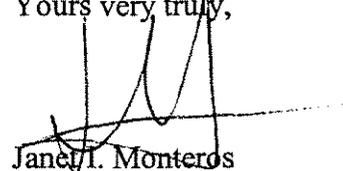
Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney, that a request for information was

made by an attorney or that an open records request was made for information does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

The city has made a "request" in its July 31, 1998, correspondence to the requestor that it be reimbursed for the amount of "damages and the barricade costs [which] are directly attributed to the Southwestern Bell Utility relocations." However, in the request for reimbursement, you do not indicate any response from the requestor which indicates that it threatens litigation, nor does the submitted documentation indicate that the city reasonably anticipates litigation, other than the observation that this "is the first and only response that the City has received from Southwestern Bell concerning the reimbursement of the sixty-seven thousand two hundred and no/100 dollars (\$67,200.00) that the City was charged due to Southwestern Bell's delay in relocating its utilities from the right-of-way." The city offers no evidence of any threat of litigation at this point in time. Therefore, we conclude that the city has not established that litigation is reasonably anticipated. Therefore, the city may not withhold the requested information under section 552.103.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/gle

Ref.: ID# 115384

Enclosures: Submitted documents

cc: Ms. Tracy N. Turner
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(w/o enclosures)