



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 21, 1998

Ms. Merri Schneider-Vogel
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR98-1998

Dear Ms. Schneider-Vogel:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117556.

The Wharton County Junior College (the "College") received a request for information concerning the College's employment of Mr. Carl Carter. You assert that some of the requested information is excepted from required public disclosure based on sections 552.101, 552.103 and 552.107(1) of the Government Code.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is 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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the

burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You contend that the requested information relates to reasonably anticipated litigation. You assert that the College expects to be made a party to litigation based on the following circumstances: the College did not extend Mr. Carter's employment contract, Mr. Carter has retained a lawyer, Mr. Carter's attorney's communications with the College and with the College's attorney, and Mr. Carter's request for a formal hearing before the Board of Trustees.

Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). There must be some objective indication that the potential party intends to follow through with the threat. *See* Open Records Decision No. 452 (1986) at 5. On the other hand, several threats to sue and the hiring of an attorney for the purpose of carrying out the threat is evidence that litigation is reasonably anticipated against a governmental body. *See* Open Records Decision No. 288. Moreover, when an attorney for the potential opposing party makes a demand for disputed payments and threatens to sue if suitable payments are not made promptly, the exception applies. *See* Open Records Decision No. 346 (1982).

We have considered your arguments and reviewed the submitted information. We conclude that the College has not established that litigation is reasonably anticipated in this instance. Consequently, the College may not withhold the information from the requestor based on section 552.103.

The College asserts that documents 1 through 6 of exhibit B are excepted from disclosure by section 552.101 of the Government Code in conjunction with Rule 166b of the Texas Rules of Civil Procedure. This office has determined that section 552.101 does not encompass discovery privileges. Open Records Decision No. 575 (1990) at 2. Accordingly, the College may not withhold the documents based on section 552.101.

The College asserts that exhibit C, which consists of two documents, is excepted from disclosure under the attorney-client privilege. Section 552.107(1) of the Government Code essentially embodies the attorney-client privilege and states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal

Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 at 5; 462 (1987) at 13-14. Thus, the exception applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990).

We have reviewed exhibit C and considered your arguments. We conclude that the College may withhold the documents in exhibit C from the requestor based on section 552.107(1) of the Government Code.

We are resolving this matter with this 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 may 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/mjc

Ref.: ID# 117556

Enclosures: Submitted documents

cc: Ms. Beatrice Mladenka-Fowler
Law Offices of Mladenka-Fowler & Associates
1529 Heights Boulevard
Houston, Texas 77008
(w/o enclosures)