



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 10, 1998

Ms. Kristi LaRoe
Assistant District Attorney
County of Tarrant
Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201

OR98-2155

Dear Ms. LaRoe:

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# 117990.

The Tarrant County Hospital District (the "district") received two requests for information relating to the JPS Southwest Clinic construction project. Although you state that some of the requested information has been released, you claim that the submitted documents are excepted from disclosure under sections 552.103, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You first claim that all of the submitted documents are excepted from disclosure by section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The district 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 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. To demonstrate that litigation is

reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You explain that several subcontractors have expressed an intent to sue the project's general contractor. You believe that in the event of such a lawsuit, the district will be named a defendant in the action. You state that the district may determine to file suit in this matter as well. Based on your arguments, we conclude that the prospect of litigation involving the district is too speculative for section 552.103(a) to apply. *See* Open Records Decision No. 557 (1990) (mere contemplation of bringing civil action when governmental body has not yet done so does not satisfy reasonably anticipated litigation prong of section 552.103). Consequently, the district may not withhold the submitted documents under section 552.103.

Secondly, you argue that some of the requested materials may be withheld under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We have marked those portions of the documents that may be withheld from required public disclosure under section 552.111.

You also claim that some of the documents may be withheld according to the "work product privilege" under section 552.111. We announced in Open Records Decision No. 647 (1996) that a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993) and (2) consists of or tends to reveal the thought processes of an attorney. Open Records Decision No. 647 at 5 (1996). The district has not met its burden under the *National Union* test. Accordingly, the district may not withhold the requested information from disclosure as work product.

You finally argue that the marked information may be withheld because of the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client

information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We have marked the information in Exhibit J that may be withheld based on section 552.107(1) of the Government Code. The remaining information must be released.

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



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 117990

Enclosures: Marked documents

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