

January 21, 1999



OFFICE OF THE
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STATE OF TEXAS

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Mr. Daniel Vaughn
McLeod, Alexander, Powel
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P.O. Box 629
Galveston, Texas 77553

OR99-0163

Dear Mr. Vaughn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 121630.

The Park Board (the "board") received a request for any correspondence or meeting minutes relating to a 1996 oil spill, copies of documents relating to attorney's fees received for representing the park, copies of attorney's fees for other related matters, copies of attorney's fees paid to other attorneys, and monies paid to the Sheriff's Department for services. You state that some of the documents and information requested have been or will be made available to the requestor. We have considered the exceptions you claim and reviewed the representative samples of the information at issue.

You argue that the information is made confidential under a settlement agreement. A governmental body cannot close information simply by entering into a contract provision that prohibits disclosure. Attorney General Opinion JM-672 (1987); Open Records Decision No. 232 (1979); *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We conclude that the board may not withhold the information based on the submitted settlement agreement.

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You claim that section 552.103 protects the settlement agreement at issue from disclosure. Section 552.103(a) excepts 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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986). 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.*

You state that "there is currently no litigation pending," but assert that litigation is reasonably anticipated. Having carefully considered your arguments and the submitted documents, we agree that litigation in this matter is realistically contemplated and is more than mere conjecture. You may withhold the requested information under section 552.103(a) of the Government Code.

However, the requestor's attorney has already obtained copies of two Release and Settlement Agreements from the United States Clerk's file. Documents that have been filed with a court cannot be withheld from disclosure. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Once information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We conclude that you may only withhold the records at issue that the opposing party to the anticipated litigation has not seen or the records the opposing party has not had access.

Since we have resolved this request under section 103(a) of the Government Code, we need not address your claim under section 552.107 of the Government Code. 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,

David Van Brunt Price
David Van Brunt Price
Assistant Attorney General
Open Records Division

DVP\nc

Ref: ID# 121630

Enclosures: Submitted documents

cc: Mr. Marty Schladen
P.O. Box 628
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(w/o enclosures)