



March 22, 1999

Mr. Benjamin A. Martinez  
Assistant City Attorney  
City of Eagle Pass  
P.O. Box 4019  
Eagle Pass, Texas 78853-1111

OR99-0779

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122992.

The City of Eagle Pass (the "city") received a request for complaints, a schedule, the contract for construction, communications between the city and the contractor or the Texas Highway Department, photographs, and schematics, all concerning a construction project on the Del Rio Highway. You submit to this office responsive information, and you claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. 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.

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 University*

*of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.–Austin 1997, no pet.); Open Records Decision No. 551 at 4 (1990).

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 at 4 (1986). 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.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You argue that litigation is reasonably anticipated because a claim has been filed against the city. In this instance, you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103(a).

Although you have established that the city council’s resolutions are related to pending litigation as required by section 552.103(a) of the Government Code, the resolutions must be disclosed. This office held under the Texas Open Records Act, V.T.C.S. art. 6252 17a, the predecessor to Government Code Chapter 552, that city ordinances fall into that category of documents that must be made available to the public as a matter of due process.

Where compelling public policy based on constitutional considerations or law outside the Open Records Act requires public access to information, its relationship to litigation cannot justify withholding it. *See* Open Records Decision Nos. 221 (1979) (minutes of public meetings); 146 (1976) (election returns); 43 (1974) (information made public by statute).

Open Records Decision No. 551 ((1990). In an earlier decision, involving the minutes of a school board meeting, this office stated:

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<sup>1</sup>In 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).

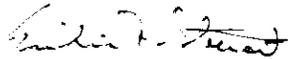
It is clear that official records of the public proceedings of a governmental body are among the most open of records. . . . Open Records Decision Nos. 91 (1975); 60 (1974). . . . We doubt that the section 3(a)(3) exception [the litigation exception] could ever be applied to except these records.

Open Record Decision No. 221 at 1 (1979). You must release the city's resolutions with attachments.

In reaching the conclusion that the litigation exception applies to most of the requested information, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; 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). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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.

Sincerely,



Emilie F. Stewart  
Assistant Attorney General  
Open Records Division

EFS\nc

Ref: ID# 122992

Enclosures: Submitted documents

cc: Mr. Roberto L. Rodriguez  
680 Quarry Street  
Eagle Pass, Texas 78852-4599  
(w/o enclosures)