



May 6, 1999

Mr. Donald J. Walheim  
Escamilla & Poneck, Inc.  
1200 South Texas Building  
603 Navarro Street  
San Antonio, Texas 78205-1826

OR99-1231

Dear Mr. Walheim:

You have asked whether certain information is subject to required public disclosure under the Texas Public Information Act (the “act”), chapter 552 of the Government Code. Your request was assigned ID# 123941.

The South San Antonio Independent School District (the “school district”), which your office represents, received a request from an attorney for “copies of any reprimands or suspensions,” for Gary Durbon, a coach with the school district. In response to the request, you submit to this office for review the information which you assert is responsive. You contend that the submitted records are excepted from required public disclosure by section 552.103 of the Government Code. We have considered the exception and arguments you raise, and have reviewed the information submitted.<sup>1</sup>

Section 552.103(a) excepts from 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

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<sup>1</sup>You have also submitted to this office information that apparently was sent for informational purposes only. In this ruling, we do not address the public disclosure of that information.

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The school 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 school district must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the school district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (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). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you have supplied to this office the request letter, a "Special Power of Attorney" document, and an affidavit from a school district employee to support your claim under section 552.103. You state that "[a]s attorney for the school district . . . it is my determination that there is a real likelihood of litigation in this case." However, it does not appear at this time that an attorney has threatened the school district with a lawsuit, nor have you provided any concrete evidence to support a claim that litigation is reasonably anticipated. *See* Open Records Decision Nos. 361 (1983), 346 (1982). We conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated. Therefore, you may not rely on section 552.103 to withhold any of the submitted information from the requestor.

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

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/nc

Ref.: ID# 123941

Encl: Submitted documents

cc: Mr. Ray Leach  
3737 Broadway, Suite 310  
San Antonio, Texas 78209  
(w/o enclosures)