



January 30, 2001

Mr. Thomas W. Deaton
Flournoy & Deaton, L.L.P.
P.O. Box 1546
Lufkin, Texas 75902-1546

OR2001-0353

Dear Mr. Deaton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143696.

The Deep East Texas Workforce Development Board (the "board") received a written request for all correspondence between the board and the Texas Workforce Commission (the "commission") regarding the Deep East Texas Council of Governments and Economic Development District (the "district"). You contend that the requested information is excepted from required public disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code.

Because your claim under section 552.103 of the Government Code is the most inclusive, we will address it first. A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body is pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You contend that the requested information relates to reasonably anticipated civil litigation against the board. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). 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." *Id.* 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 at 5 (1989) (litigation must be "realistically contemplated").

You explain that the requested information relates to litigation that the board anticipates will be brought against it by the district and that

[t]he threatened litigation arises out of work and expenditures incurred that were allegedly performed by [the district], when they were a contractor for the [board]. This work has been unsupported and undocumented and [the district] has, on more than one occasion, threatened litigation.

Additionally, our review of the documents at issue reveal that the relationship between the board and the district has been strained for some time, that the board and the district have previously entered into "mediation" before the commission without success, and the amount of monies in dispute exceed \$500,000. Given the totality of the circumstances surrounding the disputes between the board and the district, we conclude that litigation against the board was reasonably anticipated at the time the board received the current records request and that the records at issue "relate" to that litigation for purposes of section 552.103.

This does not, however, end our discussion on the applicability of section 552.103. We note that the district has had prior access to many of 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 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, to the extent that the district has seen or had access to the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103. Consequently, the board must release all such records to the requestor at this time.

We additionally note that among the documents you submitted to this office is a report the board submitted to the legislature. Section 552.022(a) of the Government Code provides in relevant part:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public

information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

One such category of information expressly made public under section 552.022(a) is “a completed report, audit evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108” Gov’t Code § 552.022(a)(1). The documents submitted to this office as Exhibit AG falls under section 552.022(a)(1). Therefore, as prescribed by section 552.022(a), the records submitted as Exhibit AG, including all attachments, must be released to the requestor except to the extent they are made confidential under other law. Section 552.103 is a discretionary exception and not “other law” for purposes of section 552.022(a). *See* Open Records Decision No. 542 (1990) (“litigation exception” is waivable by governmental body). Consequently, Exhibit AG and its attachments may not be withheld pursuant to section 552.103. The board must release this report in its entirety. However, the board may withhold the remaining records at issue pursuant to section 552.103 of the Government Code, except as discussed above.¹

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839.

¹Because we resolve your request under section 552.103, we need not address the applicability of the other exceptions you raised.

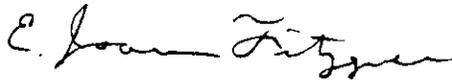
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/RWP/seg

Ref: ID# 143696

Encl. Submitted documents

cc: Mr. Gregory L. Longino
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(w/o enclosures)