



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 16, 2012

Ms. Brandy N. Davis  
Abernathy Roeder Boyd & Joplin P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2012-02461

Dear Ms. Davis:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 445618.

The North Central Texas College (the "college"), which you represent, received a request for ten categories of information, including documents sent by the college or its attorneys to the Texas Ethics Commission and documents sent to or received from the Cooke County Attorney, the Cooke County District Attorney, and the Office of the Attorney General, during specified time periods. You state the college has released information responsive to some portions of the request. You claim the submitted 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.

Section 552.103 of the Government Code provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. 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(a). *See* ORD 551.

To establish 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.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). We note contested cases conducted under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered “litigation” for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

With respect to the information submitted as Exhibits B-1 and B-2, you state the requestor filed two sworn complaints with the Texas Ethics Commission (the “commission”) against the college’s president, alleging violations of the Election Code. You state proceedings relating to the complaints were ongoing with the commission on the date of the college’s receipt of the request for information. You argue a pending complaint filed with the commission constitutes “litigation” for purposes of section 552.103. Subchapter E of chapter 571 of the Government Code sets forth the procedures governing commission investigations and hearings. Pursuant to section 571.139(c), the commission abides by the Texas Administrative Procedure Act only when a sworn complaint reaches the final, formal hearing stages of review. Gov’t Code § 571.139(c). You do not inform this office the complaints at issue are pending in any formal hearings with the commission. You also do not explain how any other stage of the commission’s complaint processing procedure constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See* ORD 588; *see generally* Open Records Decision No. 301 (1982) (discussing meaning of “litigation” under predecessor to section 552.103). Thus, we find you failed to demonstrate the pending complaints against the college’s president constitute pending litigation for purposes of section 552.103. Therefore, we find you have not demonstrated the applicability of section 552.103 to the information submitted as Exhibits B-1 and B-2, and the college may not withhold the information at issue on that basis.

Next, with respect to the information filed as Exhibits B-3 and B-4, you state the college reasonably anticipates litigation by the Cooke County Attorney’s Office (the “county attorney”). You explain prior to the college’s receipt of the instant request for information, and after receiving a complaint, the county attorney initiated an investigation against the college’s president. However, you have not provided this office with evidence the county attorney had taken any objective steps toward filing a lawsuit prior to the date the college received the request for information. *See* Gov’t Code § 552.301(e); Open Records Decision No. 331. Upon review, therefore, we find you have not established litigation was reasonably anticipated on the date the college received the request for information. Therefore, the college may not withhold Exhibits B-3 and B-4 under section 552.103 of the Government Code. As you raise no further exceptions to disclosure, the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/agn

Ref: ID# 445618

Enc. Submitted documents

c: Requestor  
(w/o enclosures)