



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 2, 1997

Mr. James N. Rader
Senior Attorney
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR97-1268

Dear Mr. Rader:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106026.

The Lower Colorado River Authority ("LCRA") has received a request for several categories of information relating to the Chautauqua Foundation, Inc. (the "foundation"). You state that you will release some of the responsive documents. You contend that the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111. We address your arguments in turn.

Section 552.103 excepts from required public disclosure information relating to litigation "to which the state or political subdivision is or may be a party." To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). You explain that LCRA and the foundation entered into an agreement regarding the use of a tract of land owned by LCRA, and you are currently involved in a dispute regarding the agreement and other ancillary but related issues. You state that "LCRA has made a demand for performance under the Agreement and the Foundation has indicated that it does not wish to comply with certain aspects of the performance demanded." You further state that "litigation is anticipated if the Foundation continues its course of non-compliance and the LCRA declares a termination of the Agreement, as provided for in the Agreement." In this instance you have made the requisite showing that most of the requested information relates to reasonably anticipated litigation for purposes of section 552.103(a).

The opposing party to the anticipated litigation, however, has previously had access to many of the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982).¹ Therefore, you may not withhold under section 552.103 the information that the foundation created or has already seen. The remaining records that you have marked for withholding under section 552.103 may be withheld.

You also claim that section 552.111 excepts some of the information from required public disclosure. Section 552.111 excepts an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 (1993). Section 552.111 also excepts from required public disclosure a preliminary draft of a letter or document related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990).

We have reviewed the documents for which you claim the protection of this exception. We agree that the drafts of correspondence and most of the information you have marked for withholding under section 552.111 may be withheld. You may not, however, withhold under section 552.111 documents exchanged between the foundation and LCRA. The exception is meant to preserve the *internal* policymaking processes of a governmental body and only applies to memoranda created within an agency or among agencies. Open Records Decision No. 563 (1990). You have not explained, and it is not clear to this office, that the foundation is a governmental body or acts on behalf of a governmental body in order to invoke section 552.111. *See* Open Records Decision No. 429 (1985) (concluding that only information created by an entity authorized to act in an official capacity on behalf of a governmental body may be withheld by the governmental body under section 552.111). We have marked those documents that may not be withheld under section 552.111.

Next, we address your assertion that section 552.107 of the Government Code excepts some of the requested information from required public disclosure. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. Information may be withheld under section 552.107(1) only to the extent that it documents confidences of a governmental representative to its attorney or reveals the attorney's legal advice and opinions. Open Records Decision Nos. 589 (1991), 574 (1990). We have reviewed the information that you wish to withhold under section 552.107 that is not otherwise excepted from disclosure under section 552.103. With the exception of one document that we have marked, we conclude that you may withhold the information under section 552.107.

¹We also note that the applicability of section 552.103(a) ends once the litigation has 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.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 106026

Enclosures: Marked documents

cc: Mr. Douglass D. Hearne, Jr.
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(w/o enclosures)

